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THE SUPREME COURT'S LOVE–HATE RELATIONSHIP WITH *MIRANDA*

KIT KINPORTS*

*In recent years, the Supreme Court has enjoyed a love–hate relationship with its landmark decision in *Miranda v. Arizona*. While the Court has not hesitated to narrow *Miranda*'s reach, it has also been wary of deliberate efforts to circumvent it. This pragmatic approach to *Miranda* can be doctrinally unsatisfying and even incoherent at times, but it basically maintains the core structure of *Miranda* as the police have come to know and adapt to it.*

*Last Term provided the first glimpse of the Roberts Court's views on *Miranda*, as the Court considered three cases: *Maryland v. Shatzer*, *Florida v. Powell*, and *Berghuis v. Thompkins*. This Article examines each opinion through a pragmatic lens, with an eye towards ascertaining whether the Roberts Court remains committed to the pragmatic approach taken by its predecessors. While the Government prevailed on every issue raised by the three cases, the opinions vary in their fidelity to pragmatic norms.*

*The Article concludes that, even if *Shatzer* and *Powell* can be dismissed as effecting only incremental changes in the law—in the rules protecting those who invoke their *Miranda* rights, defining custody, and requiring that the warnings reasonably convey each of the rights *Miranda* guarantees—*Thompkins* cannot be defended on pragmatic grounds. In effect, the decision in *Thompkins* allows the police to begin interrogating a suspect immediately after reading the *Miranda* warnings, without first securing a waiver of *Miranda*, and then to use anything she says—even hours later—to demonstrate that she impliedly waived her rights. *Thompkins* thus essentially reduces *Miranda* to a mere formality, requiring that warnings be read and otherwise leaving criminal defendants protected only by the same voluntariness due process test that *Miranda* was designed to replace. To the extent *Thompkins* signals a change in the Court's attitude towards *Miranda*, it comes at a particularly critical time given*

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recent suggestions that Congress create an exception to Miranda for terrorism suspects.

I. INTRODUCTION

The Supreme Court's recent attitude towards its landmark ruling in *Miranda v. Arizona*¹ seems to be one of studied ambivalence. On the one hand, the Court has ruthlessly cut back on *Miranda*, construing it narrowly² and creating exceptions,³ thereby "[w]eakening" its protections and "softening [its] impact."⁴ On the other hand, the Court has resisted blatant attempts to subvert *Miranda*, whether on the part of Congress or individual police officers. In my view, the Court has adopted a pragmatic approach to *Miranda*. While it can be doctrinally unsatisfying and even incoherent at times, this pragmatic approach basically maintains the essential core structure of the *Miranda* rules and exceptions as the police have come to know them, while being wary of deliberate efforts to circumvent them.⁵

Chief Justice Warren's opinion in *Miranda* has always been surrounded by controversy. Even though the five-to-four decision was in

¹ 384 U.S. 436, 444 (1966) (requiring that certain "procedural safeguards" be accorded to suspects who are both in custody and subjected to interrogation).

² See, e.g., *Davis v. United States*, 512 U.S. 452 (1994) (requiring that invocations of the *Miranda* right to counsel must be unambiguous); *Berkemer v. McCarty*, 468 U.S. 420, 436–39 (1984) (holding that traffic and *Terry* stops do not satisfy the *Miranda* definition of "custody" even though they are Fourth Amendment "seizures"); *Rhode Island v. Innis*, 446 U.S. 291, 294–95, 300–03 (1980) (finding that police officers did not engage in interrogation when one commented to another within suspect's earshot, "God forbid one of [the handicapped children] might find [the murder weapon] . . . and hurt themselves").

³ See, e.g., *United States v. Patane*, 542 U.S. 630, 633 (2004) (creating an exception to the fruits of the poisonous tree doctrine for physical evidence discovered as the result of a *Miranda* violation); *Oregon v. Elstad*, 470 U.S. 298 (1985) (refusing to apply the fruits of the poisonous tree doctrine to consecutive-confession cases, where a *Miranda* violation is followed by warnings and a second statement); *New York v. Quarles*, 467 U.S. 649, 655–56 (1984) (recognizing a public safety exception to *Miranda*).

⁴ Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It—and What Happened to It*, 5 OHIO ST. J. CRIM. L. 163, 178, 184 (2007); see also Arthur J. Goldberg, *Escobedo and Miranda Revisited*, 18 AKRON L. REV. 177, 182 (1984) (arguing that *Miranda* has been left "twisting slowly in the wind").

⁵ Cf. Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1061 (2001) (observing that most of the Supreme Court opinions creating exceptions to *Miranda* "involved a good faith or unintentional violation of the prophylactic rule, coupled with particularly high costs for implementing the rule").

many respects a compromise⁶—the Court did not ban any particular interrogation technique⁷ or require the presence of counsel during police interrogations⁸—it immediately encountered resistance. Just two years after the Court issued the decision, Congress enacted the 1968 Crime Control Bill aimed at overturning it.⁹ During the 1968 presidential campaign, Richard Nixon urged Congress to pass the bill, calling *Miranda* a “legal technicalit[y]” that had “very nearly rule[d] out the ‘confession’ as an effective . . . tool in . . . law enforcement.”¹⁰ Twenty years later, the Reagan Justice Department, under Attorney General Edwin Meese, described the *Miranda* ruling as “a derelict on the waters of the law,” and proclaimed that “[o]verturning *Miranda* would . . . be among the most important achievements of this administration . . . in restoring the power of self-government to the people . . . in the suppression of crime.”¹¹

But when the 1968 legislation ultimately reached the Supreme Court in 2000 in *Dickerson v. United States*, Chief Justice Rehnquist, a longtime critic of *Miranda*, surprised many Court-watchers by writing the majority

⁶ See, e.g., Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 12 (1995) (noting that “the Court was barely able to go as far as it did,” and “at the time it was probably not possible to persuade a majority of the Court to go one inch further”); George C. Thomas III, “*Truth Machines*” and *Confessions Law in the Year 2046*, 5 OHIO ST. J. CRIM. L. 215, 218 (2007) (maintaining that “*Miranda* was not a revolution” but instead “a compromise, a quintessentially mid-60s compromise”).

⁷ See, e.g., FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATIONS AND CONFESSIONS 1 (2d ed. 1967) (commenting, one year after *Miranda*, that “all but a very few of the interrogation tactics and techniques presented in our earlier publication are still valid if used after the recently prescribed warnings have been given to the suspect . . . , and after he has waived his self-incrimination privilege and his right to counsel”).

⁸ *Miranda v. Arizona*, 384 U.S. 436, 474 (1966) (“This does not mean . . . that each police station must have a ‘station house lawyer’ present at all times to advise prisoners.”); cf. Brief for the American Civil Liberties Union as Amicus Curiae at 22–25, *Miranda*, 384 U.S. 436 (Nos. 759-761, 584) (urging the Court to ban interrogations absent the presence of counsel); Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1830 (1987) (proposing that police be prohibited from questioning suspects who have not consulted with a lawyer).

⁹ 18 U.S.C. § 3501 (2006) (providing that confessions are admissible in federal court so long as they are “voluntarily made,” taking into account “all the circumstances surrounding the giving of the confession”); see also *Dickerson v. United States*, 530 U.S. 428, 436, 442 (2000) (concluding that “Congress intended by its enactment to overrule *Miranda*” by “reinstat[ing]” the voluntariness due process test that *Miranda* sought to replace). See generally Yale Kamisar, *Can (Did) Congress “Overrule” Miranda?*, 85 CORNELL L. REV. 883 (2000).

¹⁰ RICHARD M. NIXON, TOWARD FREEDOM FROM FEAR, reprinted in 114 CONG. REC. 12,936–39 (1968).

¹¹ OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRETRIAL INTERROGATION (1986), reprinted in 22 U. MICH. J.L. REFORM 437, 565 (1989).

opinion striking the statute down.¹² Despite language in prior Supreme Court decisions referring to *Miranda* warnings as “prophylactic” rules, “procedural safeguards associated with” the Fifth Amendment privilege against self-incrimination, and “not themselves rights protected by the Constitution,”¹³ the seven Justices in the *Dickerson* majority concluded that *Miranda* was “a constitutional decision” that “may not be in effect overruled by an Act of Congress.”¹⁴ The Court did not go so far as to wholeheartedly embrace the Warren Court’s decision, cautioning that “[w]hether or not we would agree with *Miranda*’s reasoning and its resulting rule . . . in the first instance, . . . *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”¹⁵ Thus, *Dickerson* “froze in place the status quo,”¹⁶ even though in so doing it did not create a particularly tidy jurisprudential package.¹⁷

Three years later, in *Missouri v. Seibert*, a plurality of the Court likewise invalidated the “question-first” interrogation technique, a “practice

¹² *Dickerson*, 530 U.S. at 430. As an Associate Justice, Rehnquist was the author of the plurality opinion in *Michigan v. Tucker*, 417 U.S. 433, 439 (1974), which first described the *Miranda* rights as “prophylactic rules.” For theories attempting to explain Chief Justice Rehnquist’s vote in *Dickerson*, see Kamisar, *supra* note 4, at 199–201.

¹³ *Tucker*, 417 U.S. at 444; *see also Oregon v. Elstad*, 470 U.S. 298, 306 (1985) (“[T]he *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself [and] may be triggered even in the absence of a Fifth Amendment violation.”); *New York v. Quarles*, 467 U.S. 649, 654 (1984) (referring to *Miranda* warnings as “procedural safeguards associated with the privilege against compulsory self-incrimination” that “provide[] ‘practical reinforcement’ for the Fifth Amendment right”) (quoting *Tucker*, 417 U.S. at 444).

¹⁴ *Dickerson*, 530 U.S. at 432. The Court “concede[d],” however, that “language in some of our opinions . . . support[ed] the view taken by” the Fourth Circuit in upholding the federal statute. *Id.* at 438.

¹⁵ *Id.* at 443.

¹⁶ Klein, *supra* note 5, at 1077.

¹⁷ *See, e.g.,* Paul G. Cassell, *The Paths Not Taken: The Supreme Court’s Failures in Dickerson*, 99 MICH. L. REV. 898, 898, 900 (2001) (noting that his initial response to the Court’s decision was to wonder, “Where’s the rest of the opinion?” and concluding that “this result-oriented ‘success’ came at the great cost of any pretense of consistency in the Court’s doctrine”); R. Ted Cruz, *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 10, 15 (2005) (observing that the Court’s reasoning was not “the tightest of logical syllogisms,” and describing the decision as saying, “[f]irst, *Miranda* is NOT required by the Constitution” but is “merely prophylactic”; “[s]econd, 18 U.S.C. § 3501 is not good law”; and “[t]hird, do not ask why, and please, never, ever, ever cite this opinion for any reason”); Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-but-Shallow*, 43 WM. & MARY L. REV. 1, 3 (2001) (pointing out that *Dickerson* was a “compromise opinion, intentionally written to say less rather than more, for the sake of achieving a strong majority on the narrow question of *Miranda*’s continued vitality”). For further discussion of *Dickerson*, see *infra* notes 370–73 and accompanying text.

of some popularity” that had been “promoted” in certain police departments.¹⁸ Police using this tactic made a “conscious decision” to start interrogating a suspect without first reading *Miranda* warnings.¹⁹ Then later, after they elicited a statement that was concededly inadmissible (because of the *Miranda* violation), they would belatedly provide *Miranda* warnings, secure a waiver, and “cover the same ground a second time” “until [they got] the answer that [the suspect] already provided once.”²⁰ Calling question-first interrogation “a police strategy adapted to undermine the *Miranda* warnings,” the plurality refused to allow the prosecution to introduce the second statement Seibert made following the administration of *Miranda*.²¹

Despite cases like *Seibert*, the police have generally made their peace with *Miranda*, and so seemingly has the Court. In large measure, law enforcement has successfully “adapted” to the Warren Court’s decision. For example, police officers regularly “de-emphasize the significance” of the *Miranda* warnings in various ways: reading them in a “perfunctory” or “bureaucratic” tone of voice, suggesting they are “a mere formality . . . to dispense with prior to questioning”; “undermining the . . . warnings’ effect” by “focusing the suspect’s attention on the importance of telling his story”; or “treat[ing] the suspect’s waiver of the warnings as a *fait accompli*.”²² Whether because of these tactics, or because the warnings themselves are simply unable to dispel the inherent coerciveness of interrogation,²³ the overwhelming majority of suspects waive their rights and agree to talk to

¹⁸ *Missouri v. Seibert*, 542 U.S. 600, 609–10 (2004) (plurality opinion).

¹⁹ *Id.* at 605–06 (quoting police officer’s suppression hearing testimony).

²⁰ *Id.* at 604–06 (quoting police officer’s suppression hearing testimony).

²¹ *Id.* at 615–16. *Seibert* was initially questioned without warnings for about half an hour and then, after she made an incriminating statement and was given a break, the police “turned on a tape recorder, gave [her] the *Miranda* warnings, and obtained a signed waiver of rights from her.” *Id.* at 605. *But cf.* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 21 (2010) (arguing that “the fractured opinions [in *Seibert*] in effect instructed police on how to ignore *Miranda*”). For further discussion of *Seibert*, see *infra* notes 366–69 and accompanying text.

²² Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators’ Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397, 433–37 (1999). *But cf.* Kamisar, *supra* note 4, at 186 (arguing that “‘circumventing,’ ‘evading,’ or ‘disregarding’” are “more accurate” terms than “‘adapting’ or ‘adjusting’”).

²³ *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 536 (1966) (White, J., dissenting) (“But if the defendant may not answer without a warning . . . without having his answer be a compelled one, how can the Court ever accept his negative answer to the question of whether he wants to consult . . . counsel . . . ?”); Ogletree, *supra* note 8, at 1838 (criticizing the *Miranda* Court for “assum[ing] that the simple act of having the interrogator read the warnings to the suspect could offset the coercive atmosphere sufficiently” for a valid waiver).

the police without the assistance of counsel.²⁴ Thus, *Miranda* ultimately led to “an equilibrium that both police officers and courts, the regulated and the regulators, were willing to live with.”²⁵ The Court’s pragmatic approach to *Miranda* has maintained that equilibrium, such that Chief Justice Rehnquist was able to announce in *Dickerson* that “subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision’s core ruling that unwarned statements may not be used as evidence in the prosecution’s case in chief.”²⁶

Against this backdrop, the first clues as to the Roberts Court’s views on *Miranda* came last Term. The Court jumped right in, granting cert in three cases—*Maryland v. Shatzer*,²⁷ *Florida v. Powell*,²⁸ and *Berghuis v. Thompkins*²⁹—that together raised questions spanning the range of issues that arise under *Miranda*. On each occasion, the Government prevailed. In fact, the three cases involved eight separate *Miranda* issues, each of them resolved in favor of the prosecution. This Article uses these opinions as the vehicle to test the Roberts Court’s commitment to the pragmatic approach to *Miranda*. In examining the cases through a pragmatic lens, I evaluate them on several levels: whether they make only incremental changes in the law or tread new ground, both in terms of Supreme Court precedent and the trend among the lower courts; whether the Court can justify its ruling on pragmatic grounds or instead leaves the door open to law enforcement efforts to circumvent *Miranda*; and whether the opinions are one-sided or sensitive to the concerns of suspects facing custodial interrogation.

Part II of the Article begins with *Maryland v. Shatzer*, which cut back on *Miranda* in two respects: first, the Court created a break-in-custody exception to the *Edwards* rule that protects suspects who invoke their rights,³⁰ and second, it ruled that inmates serving prison sentences are not in

²⁴ See, e.g., Richard A. Leo, *Miranda’s Irrelevance: Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1009 (2001) (citing studies finding that about 80% of suspects waive their rights); George C. Thomas III, *Stories About Miranda*, 102 MICH. L. REV. 1959, 1976 (2004) (reporting similar figures, and noting that “[m]ore than 10 times as many suspects waived *Miranda* as invoked” their rights).

²⁵ William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975, 999 (2001); see also, e.g., CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 45 (1991) (observing that law enforcement officials “learned to live with *Miranda*, and even to love it, to the extent that it provided them with a safe harbor”); Leo, *supra* note 24, at 1021, 1027 (commenting that “police have transformed *Miranda* into a tool of law enforcement” such that “*Miranda* has now become a standard part of the machine”).

²⁶ *Dickerson v. United States*, 530 U.S. 428, 443–44 (2000).

²⁷ 130 S. Ct. 1213 (2010).

²⁸ 130 S. Ct. 1195 (2010).

²⁹ 130 S. Ct. 2250 (2010).

³⁰ *Shatzer*, 130 S. Ct. at 1219–24.

“custody” for purposes of *Miranda*.³¹ Despite ruling against *Shatzer* on both issues and extending Supreme Court precedent in defining custody, the majority opinion was consistent with a pragmatic approach to *Miranda* and somewhat sensitive to the policies underlying that decision. In fact, it contained language protective of suspects’ rights on other questions the Court had not clearly resolved on prior occasions.³²

In *Florida v. Powell*, which is the focus of Part III, the Court upheld a variation on the *Miranda* warnings given to the suspect there, rejecting his argument that the police did not adequately inform him of the right to have an attorney with him in the interrogation room.³³ Although the opinion was tied to the narrow facts of the case, it departed from both the Court’s own precedent and lower court case law and is harder to defend on pragmatic grounds.

In the final case, *Berghuis v. Thompkins*, which is analyzed in Part IV, the Court resolved four issues directly and a fifth implicitly, all in favor of the prosecution. Two of the rulings—that suspects must unequivocally invoke the right to silence and that this clear invocation requirement applies even where a suspect did not initially agree to waive her rights—endorsed the prevailing lower court view and therefore may have been expected, even though they are difficult to reconcile with a pragmatic approach.³⁴ But the more significant holdings—that *Thompkins* did not successfully invoke his right to silence by remaining silent, that he impliedly waived *Miranda* by giving a one-word answer to a question almost three hours into the interrogation,³⁵ and that the police do not have to secure a *Miranda* waiver prior to initiating interrogation³⁶—cannot be justified on pragmatic grounds.

Thus, I conclude that while *Shatzer* and *Powell* arguably effect only piecemeal changes in the law, poking holes in *Miranda* without giving the police substantial room to undermine it, *Thompkins* is a different story. The combined impact of the rulings in *Thompkins* enables the police to administer *Miranda* warnings in a very quick, dismissive, bureaucratic way and then launch immediately into the interrogation—unless and until the suspect has the wherewithal to unequivocally invoke her rights. In so holding, *Thompkins* deviates dramatically from Supreme Court precedent and goes a long way towards undoing *Miranda* and reinstating the voluntariness due process test *Miranda* sought to replace.

³¹ *Id.* at 1224–25.

³² *Id.*

³³ *Powell*, 130 S. Ct. at 1204–06.

³⁴ *Thompkins*, 130 S. Ct. at 2259–60.

³⁵ *Id.* at 2262–63.

³⁶ *Id.* at 2263–64.

To the extent *Thompkins* signals a change in the Court's attitude toward *Miranda*, it comes at a particularly critical time given recent suggestions that Congress create an exception to *Miranda* for terrorism suspects. While *Dickerson* may indicate that the Court would not look favorably on such legislation, *Thompkins* may change that calculus. Some preliminary thoughts on the implications of the Roberts Court's rulings for a terrorism exception to *Miranda* appear in the final piece of the Article.

II. MARYLAND V. SHATZER

In *Maryland v. Shatzer*, the Court created a break-in-custody exception to *Edwards v. Arizona*, holding that a defendant who is released from custody for a period of at least fourteen days loses the protection *Edwards* provides to suspects who invoke the right to counsel.³⁷ The *Shatzer* Court also decided that a prisoner "subject to a baseline set of restraints imposed pursuant to a prior conviction" is not in custody for *Miranda* purposes.³⁸ Although the Court's discussion of custody departed somewhat from Supreme Court precedent, neither ruling deviated from the trend in the lower court case law or a pragmatic approach to *Miranda*. Moreover, both portions of the Court's opinion showed some sensitivity to the interests of criminal defendants and the policy goals underlying *Miranda*.

A. THE BREAK-IN-CUSTODY EXCEPTION

When Shatzer was initially questioned in connection with suspicions that he had sexually abused his son, he invoked the *Miranda* right to counsel. Consistent with the Court's holding in *Edwards v. Arizona* that a suspect who asserts the right to counsel "is not subject to further interrogation . . . until counsel has been made available to him,"³⁹ the interview ended. At the time, Shatzer was serving a prison term for an unrelated sexual offense involving a different child. He was returned to the general prison population for more than two and a half years until the police uncovered further evidence implicating him in the abuse of his son. At that point, a different officer returned to the prison and questioned Shatzer in a

³⁷ *Shatzer*, 130 S. Ct. at 1213 (citing *Edwards v. Arizona*, 451 U.S. 47 (1981)).

³⁸ *Id.* at 1224.

³⁹ *Edwards*, 451 U.S. at 484–85. The *Edwards* rule was extended in *Arizona v. Roberson*, 486 U.S. 675 (1988), to apply even to good faith violations and also to prohibit the police from asking the suspect even about a different crime. It was then extended still further in *Minnick v. Mississippi*, 498 U.S. 146 (1990), to bar interrogation of a suspect who requested counsel unless the attorney was present in the room, even if the suspect had already been given an opportunity to consult with her.

prison maintenance room. Prior to this second interrogation, Shatzer received *Miranda* warnings and executed a written waiver.⁴⁰

In recognizing a break-in-custody exception to *Edwards* and therefore finding that Shatzer's *Miranda* rights had not been violated, Justice Scalia's opinion for the majority reasoned that a suspect who has "returned to his normal life" between interrogation sessions does not remain "isolated" in a police-dominated setting and "has likely been able to seek advice" from others.⁴¹ As a result, the Court believed there was "little reason to think" that Shatzer's "change of heart" was the result of police coercion, as opposed to a decision on his part that "cooperating with the investigation [was] in his interest."⁴² Turning next to the question when a break in custody is "of sufficient duration to dissipate its coercive effects," the Court concluded that law enforcement's need for "certainty" made it "impractical to leave the answer to . . . future case-by-case adjudication" and drew the line at fourteen days.⁴³ "It seems to us," the Court opined, that two weeks "provides plenty of time for the suspect to get reacquainted to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody."⁴⁴

Although *Shatzer* therefore cut back on the protections afforded criminal defendants by *Miranda* and *Edwards*, the Court spoke largely in one voice. None of the Justices would have suppressed Shatzer's confession, although Justice Stevens would have required a break in

⁴⁰ See *Shatzer*, 130 S. Ct. at 1217–18.

⁴¹ *Id.* at 1221.

⁴² *Id.*

⁴³ *Id.* at 1222–23.

⁴⁴ *Id.* at 1228. *But cf. id.* at 1231 (Stevens, J., concurring in the judgment) (pointing out that the majority provided "no reason for that speculation"); *id.* at 1228 (Thomas, J., concurring in part and concurring in the judgment) (calling the majority's line "arbitrary"). The record does not indicate precisely how the Court arrived at the fourteen-day limit. Although the State of Maryland's initial brief took the view that the *Edwards* protective shield should disappear as soon as a suspect is released from custody, *see* Brief for Petitioner at 21, *Shatzer*, 130 S. Ct. 1213 (No. 08-680) (defending this position because it "establishes a bright-line rule"), its reply brief suggested that the Court "properly may draw the line at the point where badgering is unlikely to have occurred, be it the three days that were at issue in *Roberson* and *Mimmick*, three weeks, or the thirty days suggested by Amicus Curiae, Criminal Justice Legal Foundation." Reply Brief for Petitioner at 10, *Shatzer*, 130 S. Ct. 1213 (No. 08-680). As the State noted, one amicus brief proposed a thirty-day limit on the grounds that "[a]n interrogation that took place 30 days ago is still fresh in the interrogator's and the defendant's minds, . . . it is less likely that a new officer will be assigned to the same investigation[, and] records are less likely to be misplaced." Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Petitioner at 19, *Shatzer*, 130 S. Ct. 1213 (No. 08-680). At oral argument, the State then suggested a seven-day limit. *See* Transcript of Oral Argument at 15, *Shatzer*, 130 S. Ct. 1213 (No. 08-680). Until the Court issued its opinion, then, there seems to have been no mention of a fourteen-day cutoff.

custody longer than fourteen days before “treating the second interrogation as no more coercive than the first.”⁴⁵ Justice Stevens was unwilling to specify a fixed line, but he thought “a significant period of time”⁴⁶ was needed to trigger a break-in-custody exception because a suspect who invokes the right to counsel and then never sees the attorney he requested is “likely to feel that the police lied to him or are ignoring his rights,”⁴⁷ and therefore that “further objection [is] futile and confession [is] the only way to end his interrogation.”⁴⁸

Not only was the *Shatzer* decision virtually unanimous, but it also effected only an incremental change in the law. The break-in-custody exception had been widely endorsed by the lower courts⁴⁹ and foreshadowed in some of the Supreme Court’s own precedents. Although the Court had never directly addressed the question⁵⁰ and some of its opinions “could be read to suggest that the *Edwards* presumption, once

⁴⁵ *Shatzer*, 130 S. Ct. at 1234 (Stevens, J., concurring in the judgment).

⁴⁶ *Id.*

⁴⁷ *Id.* at 1234 n.15.

⁴⁸ *Id.* at 1229 (quoting *Davis v. United States*, 512 U.S. 452, 473 (1994) (Souter, J., concurring in the judgment)); cf. Marcy Strauss, *Reinterrogation*, 22 HASTINGS CONST. L.Q. 359, 401–02 (1995) (suggesting six months because a suspect whose “rights [are] respected for six months . . . will likely not believe she is a victim of police badgering,” it is “highly unlikely that the police will release a suspect for the sole purpose of breaking *Edwards* if they must wait six months” before interrogating her, and half a year is “a significant enough interval that at least it can be argued that some individuals might feel differently about dealing with authority”).

⁴⁹ See *Shatzer*, 130 S. Ct. at 1220 (noting that “[l]ower courts have uniformly held that a break in custody ends the *Edwards* presumption”); Eugene L. Shapiro, *Thinking the Unthinkable: Recasting the Presumption of Edwards v. Arizona*, 53 OKLA. L. REV. 11, 23 & nn.90–91 (2000); Strauss, *supra* note 48, at 386.

⁵⁰ More than fifteen years ago, the Court agreed to consider whether a defendant was still entitled to the protection of *Edwards* even though five months had elapsed and he had already pleaded guilty to the charge for which he requested counsel. The Court heard oral argument in the case but then dismissed the cert petition when the prisoner died. See *United States v. Green*, 507 U.S. 545 (1993).

triggered, lasts forever,”⁵¹ language in other decisions implied that the *Edwards* protection applied only if the suspect was “still in custody.”⁵²

In addition to working only a piecemeal change in the law, the *Shatzer* decision was consistent with a pragmatic approach to *Miranda*. The Court reasoned that a break in custody was the “only logical endpoint” to *Edwards*; otherwise, the Court feared, the *Edwards* ban on police interrogation would essentially become “eternal.”⁵³ Given the Court’s holdings in *Arizona v. Roberson*—that *Edwards* applies even when the police wish to interrogate a suspect about a crime other than the one for which she requested counsel and even in cases of inadvertent violations (when the interrogating officer has no idea the suspect previously asserted the right to counsel)⁵⁴—the *Shatzer* Court thought that law enforcement officials would be severely hamstrung without a break-in-custody exception. “In a country that harbors a large number of repeat offenders,” the Court concluded, “this consequence is disastrous.”⁵⁵

At the same time, the Court was sensitive to *Shatzer*’s objection that the position taken in a separate opinion written by Justice Thomas—that suspects lose the protection of *Edwards* as soon as they are released from custody⁵⁶—was easily subject to police manipulation. Justice Thomas’s approach would allow law enforcement officials to engage in catch-and-release tactics, repeatedly arresting a suspect, releasing her if she invoked

⁵¹ Brief for the United States as Amicus Curiae Supporting Petitioner at 13, *Shatzer*, 130 S. Ct. 1213 (No. 08-680) (citing *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990); *Arizona v. Roberson*, 486 U.S. 675, 680–82 (1988); *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981)).

⁵² *Roberson*, 486 U.S. at 683 (“As a matter of law, the presumption raised by a suspect’s request for counsel . . . does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation.”); *see also* *McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991) (observing in dicta that a “suspect’s statements are presumed involuntary” under *Edwards* “assuming there has been no break in custody”); *Edwards*, 451 U.S. at 485 (“[I]t 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.”).

⁵³ *Shatzer*, 130 S. Ct. at 1222. The Court declined to address the State’s alternative suggestion that a “substantial lapse in time” in and of itself terminates a suspect’s protection under *Edwards*. *See id.* at 1222 n.4.

⁵⁴ *Roberson*, 486 U.S. at 682–85, 687 (“attach[ing] no significance” to the officer’s good faith because “*Edwards* focuses on the state of mind of the suspect and not of the police” and police “procedures . . . must enable an officer who proposes to initiate an interrogation to determine whether the suspect has previously requested counsel”).

⁵⁵ *Shatzer*, 130 S. Ct. at 1222.

⁵⁶ *See id.* at 1227–28 (Thomas, J., concurring in part and concurring in the judgment).

her *Miranda* rights, and then promptly re-arresting her.⁵⁷ The fourteen-day window was designed, the majority said, to avoid such “police abuse.”⁵⁸

Even though the Court’s decision to support a break-in-custody exception was consistent with a pragmatic approach to *Miranda*, there is much to be said for the contrary view. During the initial interrogation session, Shatzer was advised of his right to counsel and requested an attorney, but he never actually got what he wanted.⁵⁹ More important, once a suspect is released from custody, she is not entitled to state-provided counsel (assuming charges have not yet been filed).⁶⁰ For those unable to afford private lawyers, then, a fourteen-day break in custody does not provide a meaningful opportunity to obtain legal advice. As the Court noted in *Arizona v. Roberson*, “to a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling.”⁶¹

Although the Court obviously did not see it this way and its opinion contained rhetoric belittling some of its precedents, the *Shatzer* decision was not completely one-sided. Justice Scalia’s majority opinion did refer snidely to *Edwards* as a “super-prophylactic rule,”⁶² and also spoke of “genuinely coerced” confessions⁶³—as contrasted with the merely

⁵⁷ Cf. *State v. Alley*, 841 A.2d 803, 809–10 (Me. 2004) (finding that suspect had “a reasonable opportunity to contact an attorney” even though he was released at 2:35 p.m. and had only a six-hour break in custody).

⁵⁸ *Shatzer*, 130 S. Ct. at 1223.

⁵⁹ Cf. Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 797, 804 (2006) (arguing that the “*Miranda* right to counsel is in reality an empty promise” given that “[f]orty years of experience” has shown that in “the vast majority” of cases where a suspect asserts the right to counsel, “no attorney is provided”).

⁶⁰ *Miranda* and its right to counsel do not protect one who is no longer in custody, see *Miranda v. Arizona*, 384 U.S. 436, 445 (1966), and the Sixth Amendment right to counsel is not triggered until “adversary judicial proceedings” have begun. *Kirby v. Illinois*, 406 U.S. 682, 688–89 (1972) (requiring a “formal charge, preliminary hearing, indictment, information, or arraignment”).

⁶¹ *Arizona v. Roberson*, 486 U.S. 675, 686 (1988); see also Strauss, *supra* note 48, at 392 (arguing that a break in custody is “unrelated to the notion of voluntariness in the sense of implementing the suspect’s choice to deal with the authorities only through counsel”).

⁶² *Shatzer*, 130 S. Ct. at 1221 n.3; see also *id.* at 1219, 1220 (calling *Edwards* a “second layer of prophylaxis” as opposed to “a constitutional mandate”) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991)).

⁶³ *Id.* at 1221; see also *id.* at 1222 (referring to “in-fact voluntary confessions”).

presumptively coerced confessions violative of *Miranda*.⁶⁴ Additionally, the Court subjected *Edwards* to the seemingly omnipresent balancing test applied the previous Term in a Sixth Amendment confession case,⁶⁵ warning of the costs occasioned by *Edwards* in terms of “voluntary confessions it excludes from trial” and cautioning that “[t]he *Edwards* presumption of involuntariness is justified only in circumstances where . . . suspects’ waivers of *Miranda* rights are likely to be involuntary *most of the time*.”⁶⁶

On the other hand, the Court made the significant announcement that once a suspect asserts the right to counsel, *Edwards* prevents the police even from inquiring whether she has changed her mind and is now willing to talk to them without a lawyer. Language in prior Supreme Court

⁶⁴ See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 307 (1985) (“A *Miranda* violation does not constitute coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements.”); *New York v. Quarles*, 467 U.S. 649, 654–55 & n.5 (1984) (distinguishing confessions that are “actually compelled” from those that are “presumed compelled because of [the] failure to read . . . *Miranda* warnings”).

⁶⁵ See *Montejo v. Louisiana*, 129 S. Ct. 2079, 2089 (2009) (“When this Court creates a prophylactic rule in order to protect a constitutional right, the relevant ‘reasoning’ is the weighing of the rule’s benefits against its costs.”).

⁶⁶ *Shatzer*, 130 S. Ct. at 1222, 1226 (emphasis added); see also *id.* at 1220 (observing that “[a] judicially crafted rule is ‘justified only by reference to its prophylactic purpose,’ and applies only where its benefits outweigh its costs”) (quoting *Davis v. United States*, 512 U.S. 452, 458 (1994)); *id.* at 1221 (noting that “[t]he ‘justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time’”) (quoting *Coleman v. Thompson*, 501 U.S. 722, 737 (1991)). These cases thus import into the confessions arena the same “freewheeling” balancing approach prevalent in the Court’s Fourth Amendment jurisprudence. Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 855 (1994); see also, e.g., Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 393–94 (1974) (criticizing the “sliding scale approach” because it “converts” the law into “one immense Rorschach blot,” which can “only produce more slide than scale [and] means in practice . . . that appellate courts defer to trial courts and trial courts defer to the police”). For the view that the Fourth Amendment’s balancing test has no place in interpreting the Fifth Amendment’s absolute prohibition of compelled self-incrimination, see, for example, *Quarles*, 467 U.S. at 687–88 & n.10 (Marshall, J., dissenting); Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 S. CT. REV. 99, 110–11; Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 170–73 (1998).

opinions had fluctuated between that position⁶⁷ and the more prosecution-friendly view that *Edwards* only prohibits the police from engaging in conduct that rises to the level of “interrogation” for purposes of *Miranda*.⁶⁸ Resolving the divisions that these conflicting signals had generated in the lower courts, the *Shatzer* majority observed that *Edwards* bars even “subsequent requests for interrogation.”⁶⁹ Otherwise, the Court pointed out, police officers will be able to “take advantage of the mounting coercive pressures of ‘prolonged police custody’”⁷⁰ by making multiple attempts to question a suspect who invoked the right to counsel until she is “‘badgered into submission.’”⁷¹ Later in the opinion, the Court likewise described *Edwards* as “prevent[ing] any efforts to get [the suspect] to change his mind.”⁷² Lest there be any doubt, the Court then criticized Justice Stevens’s concurrence for speaking in terms of “‘reinterrogat[ing]’” a suspect: the “fallacy” of Justice Stevens’s argument, the majority noted, “is that we are not talking about ‘reinterrogating’ the suspect; we are talking

⁶⁷ See *Montejo*, 129 S. Ct. at 2090 (summarizing *Edwards* as providing that once a suspect asserts the right to counsel, “not only must the immediate contact end, but ‘badgering’ by later requests is prohibited”); *McNeil v. Wisconsin*, 501 U.S. 171, 176–77 (1991) (observing that a suspect who has invoked the right to counsel “may not be approached for further interrogation” and the police may not “subsequently initiate an encounter in the absence of counsel”); *Arizona v. Roberson*, 486 U.S. 675, 681 (1988) (noting that “any subsequent waiver that has come at the authorities’ behest, and not at the suspect’s own instigation, is itself the product of the ‘inherently compelling pressures’ and not the purely voluntary choice of the suspect”) (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)).

⁶⁸ See *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981) (holding that a suspect who invokes counsel “is not subject to further interrogation by the authorities until counsel has been made available to him”); see also *Roberson*, 486 U.S. at 686 (“[T]o a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling.”); *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (per curiam) (observing that “*Edwards* set forth a ‘bright-line rule’ that *all* questioning must cease after an accused requests counsel”) (quoting *Solem v. Stumes*, 465 U.S. 638, 646–47 (1984)); *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion) (discussing the steps police must take “before a suspect in custody can be subjected to further interrogation after he requests an attorney”).

⁶⁹ *Shatzer*, 130 S. Ct. at 1220. See generally 2 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *CRIMINAL PROCEDURE* § 6.9(f), at 845–47 (3d ed. 2007) (citing conflicting lower court rulings on this issue).

⁷⁰ *Shatzer*, 130 S. Ct. at 1220 (quoting *Roberson*, 486 U.S. at 686).

⁷¹ *Id.* (quoting *Roberson*, 486 U.S. at 690 (Kennedy, J., dissenting)).

⁷² *Id.* at 1225 n.8; see also *id.* at 1221 (noting that after a break in custody, “it is far fetched to think that a police officer’s asking the suspect whether he would like to waive his *Miranda* rights will any more ‘wear down the accused’ than did the first such request”) (quoting *Smith*, 469 U.S. at 98) (emphasis added).

about *asking his permission* to be interrogated.”⁷³ This is clearly a broader reading of the *Edwards* line of cases than the view that police do not violate the *Miranda* rights of a suspect who has asserted the right to counsel unless their conduct constitutes “interrogation” as defined in *Rhode Island v. Innis*.⁷⁴

Thus, the Court’s decision to endorse a break-in-custody exception to *Edwards* did not make a fundamental change in the law and was defensible on pragmatic grounds. Moreover, the opinion was somewhat balanced, even though it did seem to pull an unduly abbreviated fourteen-day cutoff out of thin air.

B. PRISONERS IN CUSTODY

After determining that *Edwards*’s protective umbrella closes after a break in custody of at least fourteen days, the Court went on to determine that Shatzer in fact enjoyed such a break from custody when, after the first interrogation session ended with his assertion of the right to counsel, he was “released back into the general prison population where he was serving an unrelated sentence.”⁷⁵ In so holding, the Court reasoned that inmates like Shatzer “live in prison” and “return to their accustomed surroundings and daily routine” rather than remaining “isolated with their accusers.”⁷⁶ Although Justice Scalia’s majority opinion stressed that it was not “minimizing the harsh realities of incarceration,” it pointed out that prisoners who rejoin the general prison population “regain the degree of control they had over their lives prior to the interrogation,” including, in Shatzer’s case, access to a prison library, mail, recreation, educational and training programs, and visitors.⁷⁷ Finally, the Court explained that, unlike a suspect in “interrogative custody,” the restrictions on Shatzer’s freedom did not “rest[] with those controlling the[] interrogation,” as his questioners had “no power to increase the duration of [his] incarceration.”⁷⁸

⁷³ *Id.* at 1225 (quoting *Shatzer*, 130 S. Ct. at 1229 (Stevens, J., concurring in the judgment)). Likewise, at oral argument, Justice Scalia asked the State’s attorney: “I thought that you couldn’t approach him. I thought that once he’s invoked his right to counsel, you can’t approach him and say, would you like to talk now? Right? Isn’t that . . . the rule?” Transcript of Oral Argument, *supra* note 44, at 26.

⁷⁴ *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980) (defining interrogation as “express questioning or its functional equivalent,” i.e., “any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response”).

⁷⁵ *Shatzer*, 130 S. Ct. at 1224.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 1225 & n.8.

Although the Supreme Court's conclusion coincided with that reached by numerous lower courts,⁷⁹ the Court was somewhat disingenuous in discussing its own precedents and claiming that it had "explicitly declined to address" this question on prior occasions.⁸⁰ In support of this proposition, the Court cited *Illinois v. Perkins*, which held that a suspect being questioned by an undercover informant is not entitled to *Miranda* warnings because the requisite "'interplay'" between custody and interrogation is missing.⁸¹ Specifically, the *Shatzer* Court relied on a parenthetical in *Perkins* that came at the end of a paragraph discussing the Court's prior decision in *Mathis v. United States*.⁸² In that parenthetical, the *Perkins* Court left open whether "the bare fact of custody" necessarily requires *Miranda* warnings "even when the suspect is aware that he is speaking to [a government] official."⁸³ But the Court did not deny that *Perkins*—who was imprisoned pending trial on another charge—was in custody for purposes of *Miranda*. In fact, the Court acknowledged that he was "in custody in a technical sense," but criticized the state court for "mistakenly assum[ing] that because [he] was in custody, no *undercover questioning* could take place."⁸⁴

Moreover, the *Shatzer* majority itself did not even cite *Mathis*, the Supreme Court precedent most on point.⁸⁵ In that case, the Court held that an inmate serving a state prison sentence was entitled to *Miranda* warnings during a jailhouse interview with an IRS agent conducting a tax fraud investigation.⁸⁶ Although the finding that *Mathis* should have been read his *Miranda* rights signifies that he must have been in custody, the Court's brief discussion focused on rejecting the Government's argument that *Mathis* was not in custody because he had been put in prison by other law enforcement officials for a different offense.⁸⁷ Admittedly, the Court's

⁷⁹ See Laurie Magid, *Questioning the Question-Proof Inmate: Defining Miranda Custody for Incarcerated Suspects*, 58 OHIO ST. L.J. 883, 935–39 (1997).

⁸⁰ *Shatzer*, 130 S. Ct. at 1224.

⁸¹ *Illinois v. Perkins*, 496 U.S. 292, 297 (1990) (quoting Yale Kamisar, *Brewer v. Williams, Massiah and Miranda: What Is "Interrogation"?* *When Does It Matter?*, 67 GEO. L.J. 1, 63 (1978)).

⁸² *Mathis v. United States*, 391 U.S. 1 (1968).

⁸³ *Perkins*, 496 U.S. at 299, cited in *Shatzer*, 130 S. Ct. at 1224.

⁸⁴ *Perkins*, 496 U.S. at 297 (emphasis added); see also *id.* at 300 n.* (Brennan, J., concurring in the judgment) (noting that the case might well have come out differently if *Perkins* had previously asserted his right to counsel given that he was "in custody on an unrelated charge when he was questioned").

⁸⁵ Only Justice Stevens's separate opinion cited *Mathis*. *Shatzer*, 130 S. Ct. at 1232 n.12 (Stevens, J., concurring in the judgment).

⁸⁶ See *Mathis*, 391 U.S. at 2–3.

⁸⁷ See *id.* at 5 (finding "the reason why the person is in custody" irrelevant for purposes of *Miranda*).

attention in *Mathis* was directed at the defendant's status at the time he was being questioned (and the Court did not deny that Shatzer was in custody during both interviews).⁸⁸ Furthermore, the majority of lower courts have interpreted *Mathis* as requiring "some restraint additional to those usually imposed upon [a suspect] as an inmate."⁸⁹ But in finding that *Mathis* was entitled to *Miranda* warnings, the Supreme Court did not rely on any particular "restraints" placed on him during the interview. In fact, the Court's decision did not describe the interrogation session at all; the only detail that can be gleaned from the opinion is that the same IRS agent questioned *Mathis* twice somewhere in the prison where he was serving his sentence. Additionally, the *Mathis* majority obviously rejected the *Shatzer*-like argument Justice White made in dissent—that *Mathis* was not in custody because he was in "familiar surroundings" and therefore was no different from an individual being questioned at home or in an IRS office.⁹⁰ Therefore, despite the fact that *Perkins* gratuitously seemed to cast doubt on *Mathis*, there is at least some tension between the Court's decision in the latter case and the result in *Shatzer*, which the Court made no effort to reconcile.

After citing the *Perkins* parenthetical (and ignoring *Mathis*), the *Shatzer* Court went on to acknowledge that "all forms of incarceration"⁹¹ satisfy the definition of custody originally set out in *California v. Beheler* and *Oregon v. Mathiason*—which asks whether the suspect was subjected to "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."⁹² Nonetheless, the *Shatzer* Court continued, its precedents indicated that "the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody."⁹³ But the Court's only support here was *Berkemer v. McCarty*, which held that a suspect is not in custody for purposes of *Miranda* simply because she has been subjected to a traffic or *Terry* stop.⁹⁴ Despite the

⁸⁸ See *Shatzer*, 130 S. Ct. at 1224.

⁸⁹ Magid, *supra* note 79, at 942; cf. 2 LAFAYETTE ET AL., *supra* note 69, § 6.6(b), at 724 (calling this "'a unique body of caselaw'") (quoting *State v. Conley*, 574 N.W.2d 569, 573 (N.D. 1998)).

⁹⁰ *Mathis*, 391 U.S. at 7 (White, J., dissenting).

⁹¹ *Shatzer*, 130 S. Ct. at 1224.

⁹² *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)).

⁹³ *Shatzer*, 130 S. Ct. at 1224.

⁹⁴ *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984).

linguistic similarities between the definitions of custody⁹⁵ and *Terry* stops,⁹⁶ *Berkemer* explained that, while a stop constitutes a Fourth Amendment “seizure,” it does not rise to the level of *Miranda* custody because it usually does not last long and takes place in public rather than a police-dominated atmosphere.⁹⁷ Neither of these is a particularly apt description of incarceration, however, and therefore it is not obvious how *Berkemer* supported the *Shatzer* Court’s efforts to distinguish *Beheler* and *Mathiason* and thereby avoid the conclusion that *Shatzer* in fact was continuously in custody under the definition set out in those two cases.

Although the Court’s determination that *Shatzer* was not in custody extended Supreme Court precedent, it was consistent with the Court’s pragmatic approach to *Miranda*. A holding that inmates serving their sentences are perpetually in custody for purposes of *Miranda* would require prison guards to provide warnings before asking any incriminating questions, thus making prisoners permanently “question-proof.”⁹⁸ In the words of the Ninth Circuit, the result would be to “torture [*Miranda*] to the illogical position of providing greater protection to a prisoner than to his nonimprisoned counterpart.”⁹⁹

Nevertheless, the Court could easily have defended a contrary conclusion. Even the majority did not deny that, as Justice Stevens put it, *Shatzer*’s “entire life remain[ed] subject to government control.”¹⁰⁰ Moreover, in explaining why *Perkins* was not entitled to *Miranda* warnings, the Court in that case expressed doubt that a prisoner being questioned by

⁹⁵ See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that warnings must be given to one who “has been taken into custody or otherwise deprived of his freedom of action in any significant way”); see also *Berkemer*, 468 U.S. at 442 (indicating that the definition of custody turns on the perspective of “a reasonable man in the suspect’s position”).

⁹⁶ See *Florida v. Royer*, 460 U.S. 491, 502 (1983) (plurality opinion) (defining a stop as a situation where “a reasonable person would have believed that he was not free to leave”) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)). Interestingly, the Court has used the Fourth Amendment “free to leave” language in explaining the concept of *Miranda* custody. See *Yarborough v. Alvarado*, 541 U.S. 652, 659 (2004); *id.* at 669 (O’Connor, J., concurring); *id.* at 669–70 (Breyer, J., dissenting). For an analysis of *Alvarado*’s discussion of custody, see Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 133–43 (2007).

⁹⁷ See *Berkemer*, 468 U.S. at 436–39.

⁹⁸ Brief for Petitioner, *supra* note 44, at 22.

⁹⁹ *Cervantes v. Walker*, 589 F.2d 424, 427 (9th Cir. 1978); see also *United States v. Conley*, 779 F.2d 970, 973 (4th Cir. 1985) (agreeing that a conclusion that prisoners are always in custody “would seriously disrupt prison administration” given the “myriad informal conversations between inmates and prison guards”).

¹⁰⁰ *Maryland v. Shatzer*, 130 S. Ct. 1213, 1232 (2010) (Stevens, J., concurring in the judgment).

an undercover informant would “feel compelled to speak by the fear of reprisal for remaining silent or in the hope of more lenient treatment should he confess.”¹⁰¹ Shatzer’s situation is readily distinguishable from *Perkins*, however. Inmates serving prison terms are accustomed to receiving orders from government personnel and understand the consequences of disobeying them. Additionally, even though the detectives who questioned Shatzer may have had “no apparent power to decrease the time served,”¹⁰² that does not mean that Shatzer’s cooperation (or lack thereof) would play no role in determining his eligibility for parole.¹⁰³ Certainly, he might reasonably have feared that it could play such a role—an important consideration given that the definition of custody focuses on how a reasonable person “in the suspect’s position would have understood his situation.”¹⁰⁴ And while the majority tried to distinguish *Shatzer* from the rest of the *Edwards* line of cases on the grounds that the latter group of defendants “confronted the uncertainties of what final charges they would face, whether they would be convicted, and what sentence they would receive,” Shatzer faced those same “uncertainties” with respect to the charges involving his son that were the subject of the two interrogations.¹⁰⁵

Although the Court could therefore have justified a different outcome, *Shatzer*’s discussion of custody, like its break-in-custody holding, was not completely one-sided. The Court acknowledged that Shatzer was in custody during both prison interviews, drawing a line between “interrogative custody” and “incarceration”¹⁰⁶ (or what some call “correctional custody”¹⁰⁷). While any other conclusion would have been difficult to reconcile with *Mathis*, inmates like Shatzer “live in prison,”¹⁰⁸

¹⁰¹ *Illinois v. Perkins*, 496 U.S. 292, 296 (1990); *see also id.* at 297 (“Questioning by captors, who appear to control the suspect’s fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect’s will.”).

¹⁰² *Shatzer*, 130 S. Ct. at 1225.

¹⁰³ *See id.* at 1233 (Stevens, J., concurring in the judgment) (noting that “cooperation frequently is relevant to whether the prisoner can obtain parole,” and “even if . . . a prisoner’s fate is not controlled by the police who come to interrogate him, how is the prisoner supposed to know that?”); MD. CODE REGS tit. 12.08.01.18(A)(3) (2010) (taking into account “[t]he offender’s behavior and adjustment” as well as her “current attitude toward society, discipline, and other authority” in determining eligibility for parole).

¹⁰⁴ *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (observing that this is “the only relevant inquiry”); *see also Yarborough v. Alvarado*, 541 U.S. 652, 663 (2004) (inquiring “how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action”) (quoting *Stansbury v. California*, 511 U.S. 318, 325 (1994) (per curiam)).

¹⁰⁵ *Shatzer*, 130 S. Ct. at 1225.

¹⁰⁶ *Id.* at 1225 n.8.

¹⁰⁷ *United States v. Arrington*, 215 F.3d 855, 856 (8th Cir. 2000).

¹⁰⁸ *Shatzer*, 130 S. Ct. at 1224.

and typically interviews in one's home are not custodial.¹⁰⁹ Shatzer's second interrogation, which took place in a prison maintenance room, lasted only about half an hour, the detective was not armed, and Shatzer was not placed in handcuffs.¹¹⁰ Nevertheless, the Court considered only the location and length of the meeting important enough even to mention and stated unequivocally that "a prisoner [who] is removed from the general prison population and taken to a separate location for questioning" is in custody.¹¹¹

On balance, then, both rulings in *Shatzer* reflected some sensitivity to the interests *Miranda* was designed to protect. Although the decision that prisoners are not continuously in custody constituted a more significant departure from Supreme Court precedent, neither that holding nor the break-in-custody exception deviated substantially from the lower court case law or the Court's pragmatic approach to *Miranda*.

III. FLORIDA V. POWELL

In *Florida v. Powell*,¹¹² decided the day before *Shatzer*, the Supreme Court found that *Miranda*'s requirement that suspects be "clearly informed" of the right to the presence of counsel "during interrogation"¹¹³ was satisfied even though Powell was never explicitly told that an attorney could be with him in the interrogation room. Powell was arrested in Tampa, Florida, and pursuant to the standard *Miranda* waiver form used by that city's police department, was first advised that he had "the right to talk to a lawyer *before* answering any of our questions" and that, if he could not

¹⁰⁹ See 2 LAFAVE ET AL., *supra* note 69, § 6.6(e), at 738–40. *But cf.* *Orozco v. Texas*, 394 U.S. 324, 326–27 (1969) (finding that suspect who was questioned by four police officers in his bedroom at 4:00 a.m. was in custody).

¹¹⁰ See Brief for the United States, *supra* note 51, at 2.

¹¹¹ *Shatzer*, 130 S. Ct. at 1225 n.8; see also *id.* at 1224 (noting that "[n]o one questions" this fact). *But cf.* Magid, *supra* note 79, at 944 (reporting that many lower courts consider the following factors in determining whether a prison interview is custodial: "(1) the physical surroundings of the interrogation; (2) the language used to summon the inmate; (3) the extent to which he is confronted with evidence of his guilt; and (4) any additional pressure exerted to detain him such that there is a 'restriction of his freedom over and above that in his normal prison setting'") (quoting *Cervantes v. Walker*, 589 F.2d 424, 428 (9th Cir. 1978)). See generally 2 LAFAVE ET AL., *supra* note 69, § 6.6(c), at 729 (pointing out that custody determinations often depend on the totality of the circumstances).

¹¹² 130 S. Ct. 1195 (2010).

¹¹³ *Miranda v. Arizona*, 384 U.S. 436, 471 (1966). The Court has frequently reiterated that *Miranda* contemplates the right to the presence of counsel in the interrogation room. See, e.g., *Montejo v. Louisiana*, 129 S. Ct. 2079, 2085 (2009) ("during interrogation"); *Iowa v. Tovar*, 541 U.S. 77, 89 (2004) ("during questioning"); *Davis v. United States*, 512 U.S. 452, 457 (1994) ("during questioning"); *Minnick v. Mississippi*, 498 U.S. 146, 154 (1990) ("at custodial interrogation").

afford an attorney, one would be appointed “before any questioning.”¹¹⁴ He was then told that he had “the right to use any of these rights at any time you want during this interview.”¹¹⁵

In concluding that this information “reasonably conveyed” Powell’s right to have counsel present during interrogation, Justice Ginsburg’s opinion for the Court acknowledged that the warnings given Powell were “not the clearest possible formulation,” but nevertheless concluded that they were “sufficiently comprehensive and comprehensible when given a commonsense reading.”¹¹⁶ The majority reasoned that “[t]he first statement communicated that Powell could consult with a lawyer before answering any particular question, and the second statement confirmed that he could exercise that right while the interrogation was underway.”¹¹⁷ “In combination,” the Court explained, “the two warnings reasonably conveyed Powell’s right to have an attorney present, not only at the outset of interrogation, but at all times.”¹¹⁸

Like *Shatzer*, the Court’s decision here was not particularly divisive: Justice Stevens’s dissenting opinion was joined only by Justice Breyer. The dissenters disagreed with the majority’s interpretation of the warnings given to Powell, taking the position that “[a]n intelligent suspect could reasonably conclude” he was entitled only to “a one-time right to consult with an attorney” rather than a right to have the lawyer “present with him in the interrogation room at all times.”¹¹⁹

Although the Court was not deeply split, *Powell* effected a more dramatic change in the law than *Shatzer*. The *Powell* majority did not mention the lower courts’ treatment of this issue, but in fact it had generated more of a conflict than either of the questions before the Court in *Shatzer*. Some courts took the position that suspects must expressly be told that the right to counsel extends to the interrogation room, and even those that adopted a contrary view typically approved warnings that spoke generally about the “right to counsel” without suggesting any limitation or making any reference to timing. Only a handful of courts had upheld

¹¹⁴ *Powell*, 130 S. Ct. at 1200 (emphasis added).

¹¹⁵ *Id.* (emphasis added). The complete waiver form read as follows: “You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.” *Id.*

¹¹⁶ *Id.* at 1205 (emphasis omitted).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1212 (Stevens, J., dissenting).

warnings like the one given Powell that could be interpreted as applying only before interrogation.¹²⁰

Powell may not have referenced the current state of the lower court case law, but the Court did discuss in detail its own precedent, claiming that *California v. Prysock*¹²¹ and *Duckworth v. Eagan*¹²² “inform our judgment here.”¹²³ In each of those prior cases, the *Powell* majority explained, the Court had refused to “dictate[] the words” police use in communicating *Miranda* warnings.¹²⁴ Moreover, those were the two opinions in which *Miranda*’s requirement that suspects must be “clearly informed”¹²⁵ of their rights was first interpreted (in *Prysock*) to mean “fully conveyed,”¹²⁶ and then later (in *Duckworth*) was amended to the less rigorous “reasonably ‘convey’” standard¹²⁷ ultimately applied in *Powell*.¹²⁸

The *Powell* opinion did not tread new ground, then, in terms of the legal standard it applied. Nevertheless, as the Court acknowledged, the suspects in each of the earlier cases were expressly advised of their right to have an attorney present during interrogation,¹²⁹ and both opinions made clear that the suspects were entitled to that information.¹³⁰ The challenges

¹²⁰ See *id.* at 1211–12; Petitioner’s Brief on the Merits at 18–21, *Florida v. Powell*, 130 S. Ct. 1195 (2010) (No. 08-1175); Brief for Respondent at 28–37, *Florida v. Powell*, 130 S. Ct. 1195 (2010) (No. 08-1175); Adam S. Bazelon, Comment, *Adding (or Reaffirming) a Temporal Element to the Miranda Warning “You Have the Right to an Attorney,”* 90 MARQ. L. REV. 1009, 1019–20 (2007); Daria K. Boxer, Comment, *Miranda with Precision: Why the Current Circuit Split Should Be Solved in Favor of a Uniform Requirement of an Explicit Miranda Warning of the Right to Have Counsel Present During Interrogation*, 37 SW. U. L. REV. 425, 432–36 (2008).

¹²¹ 453 U.S. 355 (1981) (per curiam).

¹²² 492 U.S. 195 (1989).

¹²³ *Powell*, 130 S. Ct. at 1204.

¹²⁴ *Id.*; see also *Duckworth*, 492 U.S. at 202 (“We have never insisted that *Miranda* warnings be given in the exact form described in that decision.”); *Prysock*, 453 U.S. at 359 (noting that *Miranda* “indicated that no talismanic incantation was required to satisfy its strictures”).

¹²⁵ *Miranda v. Arizona*, 384 U.S. 436, 471 (1966).

¹²⁶ *Prysock*, 453 U.S. at 361.

¹²⁷ *Duckworth*, 492 U.S. at 203 (quoting *Prysock*, 453 U.S. at 361); see also Jeff L’Hote, Note, *Duckworth v. Eagan: A Semantical Debate or the Continuing Debasement of Miranda?*, 39 CATH. U. L. REV. 1267, 1290 n.186 (1990) (pointing out that *Duckworth* “cavalierly substitutes the word ‘reasonably’ for the *Prysock* Court’s ‘fully’”).

¹²⁸ *Powell*, 130 S. Ct. at 1204.

¹²⁹ See *id.* (citing *Duckworth*, 492 U.S. at 198; *Prysock*, 453 U.S. at 356–57).

¹³⁰ See *Duckworth*, 492 U.S. at 204 (noting that *Miranda* mandates that “the suspect be informed, as here, that he has the right to an attorney before and during questioning”); *Prysock*, 453 U.S. at 361 (observing that “[this] is not a case in which the defendant was not informed of his right to the presence of an attorney during questioning . . . or in which the offer of an appointed attorney was associated with a future time in court”) (quoting *United States v. Noa*, 443 F.2d 144, 146 (9th Cir. 1971)).

in those two cases were instead linked to *additional information* provided by the police during the administration of *Miranda* warnings.

In *Prysock*, for example, the suspect was informed of his right to “talk to a lawyer before you are questioned” and to have the attorney “present with you *while* you are being questioned, and all *during* the questioning.”¹³¹ In addition, he was advised that he had “the right to have a lawyer appointed to represent you at no cost to yourself.”¹³² As the *Powell* Court rightly pointed out, the *Prysock* opinion was critical of the California Court of Appeal for also requiring “an express statement that the *appointment* of an attorney would occur prior to the impending interrogation.”¹³³ But that language does not necessarily indicate that the *Prysock* Court would have approved the version of the warnings given in *Powell*. First, despite that criticism, most of the *Prysock* Court’s attention was focused elsewhere. Much of the *Prysock* opinion was devoted to correcting a more basic misstep the state appellate court made by “essentially la[ying] down a flat rule” mandating that *Miranda* warnings must be “a virtual incantation of the precise language contained in the *Miranda* opinion.”¹³⁴

Second, *Powell*’s complaint involved a more fundamental error. *Prysock*, unlike *Powell*, was explicitly told not only that he could consult a lawyer prior to interrogation but also that he had the right to have the attorney accompany him into the interrogation room. Furthermore, the basis of the California court’s determination that *Prysock* had not been adequately informed of his right to appointed counsel was “simply . . . the order in which [the warnings] were given”¹³⁵—the police had made a “needless excursion” between describing the right to counsel and the right to appointed counsel into a discussion of *Prysock*’s right to have his parents present during the interrogation.¹³⁶ Thus, the Supreme Court was able to conclude in *Prysock* that “nothing in the warnings . . . suggested any limitation on the right to the presence of appointed counsel,” and the Court expressly distinguished cases where “the reference to appointed counsel

¹³¹ *Prysock*, 453 U.S. at 356 (emphasis added).

¹³² *Id.* at 357.

¹³³ *Powell*, 130 S. Ct. at 1204 (emphasis added) (citing *Prysock*’s observation, 453 U.S. at 358–59, that the state appellate court disapproved of the warnings given there because *Prysock* “was not explicitly informed of his right to have an attorney appointed before further questioning”).

¹³⁴ *Prysock*, 453 U.S. at 355.

¹³⁵ *Id.* at 361.

¹³⁶ *Id.* at 364 n.2 (Stevens, J., dissenting) (quoting the California Court of Appeal opinion).

was linked with some future point in time after police interrogation.”¹³⁷ In *Powell*, by contrast, the conclusion that no timing restriction was placed on the right to counsel is much harder to reach.

Likewise, in *Duckworth* the suspect was told that he had “a right to talk to a lawyer for advice before we ask you any questions, and to have him with you *during* questioning,” and that “this right to the advice *and presence* of a lawyer” applied “even if you cannot afford to hire one.”¹³⁸ The Supreme Court concluded that the police thereby “touched all of the bases required by *Miranda*.”¹³⁹ The fact that the police additionally informed Eagan, “[w]e have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court” did not, in the Court’s mind, undermine the validity of the warnings.¹⁴⁰ This extra statement “accurately described” the practice in Indiana, the Court explained, and “simply anticipate[d]” what the Court thought “must be [a] relatively commonplace” question.¹⁴¹ Thus, as the *Powell* dissenters pointed out, in both *Prysock* and *Duckworth* the police “added additional, truthful information” that was “arguably misleading,” whereas in *Powell* the warnings actually “omit[ted] one of a suspect’s rights.”¹⁴²

Though the ruling in *Powell* therefore extended the Supreme Court’s precedents and made more than an incremental change in the law, the Court attempted to defend it on the pragmatic ground that police should be permitted to use “[d]ifferent words” in administering *Miranda* so long as they “communicated the same essential message.”¹⁴³ The *Duckworth* Court

¹³⁷ *Id.* at 360–61 (majority opinion); *see also* *Miranda v. Arizona*, 384 U.S. 436, 484 (1966) (describing as “consistent with the procedure which we delineate today” the FBI warnings in use at that time, which referred generally to “a right to counsel” without specifying that the right applied during interrogation or suggesting any limits on the timing of the right).

¹³⁸ *Duckworth v. Eagan*, 492 U.S. 195, 198 (1989) (emphasis added). Eagan was also informed that he had “the right to stop answering at any time until you’ve talked to a lawyer.” *Id.* For further discussion of this warning, *see infra* notes 350–54 and accompanying text.

¹³⁹ *Duckworth*, 492 U.S. at 203.

¹⁴⁰ *Id.* at 198.

¹⁴¹ *Id.* at 204. *But cf.* Yale Kamisar, *Duckworth v. Eagan: A Little-Noticed Miranda Case That May Cause Much Mischief*, 25 CRIM. L. BULL. 550, 552 (1989) (concluding that the Court’s decision “dealt *Miranda* a heavy blow”); George C. Thomas III, *Separated at Birth but Siblings Nonetheless: Miranda and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1107–08 (2001) (observing that “if the principal function of [*Miranda*] warnings is to dispel the inherent compulsion of police interrogation, the warnings in *Duckworth* don’t seem particularly well fitted for the job” because they “seem to promise an appointed lawyer only if the suspect is arraigned at some later time”).

¹⁴² *Florida v. Powell*, 130 S. Ct. 1195, 1212 (2010) (Stevens, J., dissenting).

¹⁴³ *Id.* at 1206 (majority opinion); *see also id.* (refusing to find a “precise formulation necessary to meet *Miranda*’s requirements”).

similarly expressed reluctance to suppress a confession simply because the police deviated slightly from the wording suggested in *Miranda* for fear that law enforcement personnel “may not always have access to [a] printed *Miranda* warning[], or . . . may inadvertently depart from [their] routine.”¹⁴⁴ Consistent with common practice today, however,¹⁴⁵ the warnings given to Powell were read from a printed form,¹⁴⁶ thus mitigating the Court’s pragmatic concerns.

Moreover, the decision in *Powell* creates an opportunity for police departments to circumvent *Miranda* by adopting waiver forms that are misleading and require suspects to read between the lines in order to understand their rights. The *Powell* Court responded to the argument that its decision gives law enforcement an incentive “to end-run *Miranda* by amending their warnings to introduce ambiguity” by echoing the Solicitor General’s underwhelming assertion that the police “‘have little reason to assume the litigation risk of experimenting with novel *Miranda* formulations.’”¹⁴⁷ The Court might have a point with respect to “novel” ways of tinkering with *Miranda*’s language, but *Powell* certainly opens the door for other police departments to adopt the Tampa waiver form approved by the Court. And while the State maintained that there was no flurry of movement following *Duckworth* to use the specific “if and when you go to court” language upheld in that case,¹⁴⁸ the Court’s decision in *Duckworth* did generally lead to “an unconstrained proliferation of warnings.”¹⁴⁹

In fact, there was some discussion before the Supreme Court concerning the reasons motivating the Tampa Police Department to adopt the particular wording at issue in *Powell*—especially given that an earlier version of the Tampa waiver form (like those in use in the “vast majority” of police departments elsewhere in Florida¹⁵⁰) unambiguously explained that the right to counsel applied “prior to or during” interrogation.¹⁵¹ The

¹⁴⁴ *Duckworth*, 492 U.S. at 203.

¹⁴⁵ See 2 LAFAYETTE ET AL., *supra* note 69, § 6.5(c), at 708; Godsey, *supra* note 59, at 807 n.101.

¹⁴⁶ See *Powell*, 130 S. Ct. at 1200.

¹⁴⁷ *Id.* at 1206 (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 6, *Powell*, 130 S. Ct. 1195 (No. 08-1175)).

¹⁴⁸ See Reply Brief of Petitioner at 24, *Powell*, 130 S. Ct. 1195 (No. 08-1175).

¹⁴⁹ Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1590 (2008).

¹⁵⁰ *Rigterink v. State*, 2 So. 3d 221, 254 (Fla. 2009); see also *Roberts v. State*, 874 So. 2d 1225, 1227 (Fla. Dist. Ct. App. 2004) (observing that the vast majority of waiver forms used in Florida included language indicating that the suspect “is entitled to an attorney during questioning, or words to that effect”).

¹⁵¹ *Thompson v. State*, 595 So. 2d 16, 17 (Fla. 1992) (“‘I further understand that prior to or during this interview that I have the right to have an attorney present.’”) (quoting Tampa Police Department Form 310 (1984)).

State claimed that the new form was “apparently adopted as a result of litigation” culminating in a Florida Supreme Court decision disapproving of the prior warning.¹⁵² But that state supreme court opinion invalidated an entirely different portion of the Tampa waiver form, on the theory that it did not sufficiently inform suspects of the right to have an attorney “at no cost.”¹⁵³ As Professor Richard Leo noted, “[w]hile the record does not firmly establish the Tampa Police Department’s motives” for amending its waiver form, “empirical research demonstrating that law enforcement often manipulates its interrogation strategies to undermine *Miranda* casts doubt upon the Solicitor General’s presumption that there is some innocuous explanation for the change.”¹⁵⁴

In addition, *Powell* cannot be defended on the pragmatic ground that it avoids disrupting law enforcement practices nationwide. In fact, the version of the warnings the Tampa police came up with was something of an outlier; surveys show that the overwhelming majority of police departments expressly inform suspects they have the right to have an attorney present during the interrogation session.¹⁵⁵ Moreover, adding the four words “and during the interview” to the sentence “You have the right to talk to a lawyer before answering any of our questions” is a minor and easily implemented change that would not add appreciably to the length or complexity of the Tampa waiver form.¹⁵⁶ And it does not run afoul of the Court’s pragmatic reluctance to insist on “rigidity in the *form* of the required warnings”:¹⁵⁷ the warning could be phrased in multiple other ways, for example, “and while we are chatting,” “and in the interrogation room,” etc.

¹⁵² Reply Brief of Petitioner, *supra* note 148, at 26 n.11.

¹⁵³ *Thompson*, 595 So. 2d at 18. The contested part of the earlier warning form provided: “I further understand that if I am unable to hire an attorney and I desire to consult with an attorney or have one present during this interview that I may do so and this interview will terminate.” *Id.* at 17 (quoting Tampa Police Department Form 310 (1984)) (emphasis omitted).

¹⁵⁴ Brief for Professor Richard A. Leo as *Amicus Curiae* in Support of Respondent at 16, *Powell*, 130 S. Ct. 1195 (No. 08-1175); *see also id.* at 17 (noting that a Tampa Police Department Legal Bulletin from June 2009 “outlined several techniques that officers could use to minimize the chance that a suspect will invoke his right to counsel”).

¹⁵⁵ *See* Richard Rogers et al., *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW & HUM. BEHAV. 124, 133 (2008) (surveying *Miranda* warnings given in almost 950 jurisdictions nationwide and reporting that more than 95% included language informing suspects of the right to counsel “during questioning” or “before and during questioning”).

¹⁵⁶ *Cf.* Reply Brief of Petitioner, *supra* note 148, at 26 n.11 (defending the waiver form read to *Powell* on the grounds that it was “substantially less complex,” shorter, and less “arcane” and “legalistic” than the previous form in use in Tampa).

¹⁵⁷ *California v. Prysock*, 453 U.S. 355, 359 (1981).

Not only is the result in *Powell* hard to defend on pragmatic grounds, but this case, just like *Shatzer*, could easily have been decided in the defendant's favor. *Miranda* was based on the fundamental premise that safeguards are needed to "dispel the compulsion inherent in custodial surroundings."¹⁵⁸ Given the anxiety and disorientation suspects feel as a result of that coerciveness, empirical research suggests they often do not really comprehend the information *Miranda* mandates that they be given.¹⁵⁹ Any imprecision, ambiguity, or internal inconsistency in the language used by the police cannot help but diminish even further their level of understanding.

Moreover, the majority's interpretation of the warning given to Powell was not the only plausible construction of the Tampa waiver form. The police specifically informed Powell that he had the right to "talk to a lawyer *before* answering any of our questions" and, if he did not have the funds to hire an attorney, one would be appointed for him "without cost and *before* any questioning."¹⁶⁰ The Supreme Court read those sentences as "communicat[ing] that Powell could consult with a lawyer before answering *any particular question*."¹⁶¹ But they could also refer, as the state courts believed, to the time period prior to the onset of the interrogation session.¹⁶² The *Powell* majority also asserted that this language "merely conveyed when Powell's right to an attorney became effective"—i.e., "before he answered any questions at all"—and did not "indicate[] that counsel's presence would be restricted after the questioning commenced."¹⁶³ Again, however, that is not the only defensible interpretation. Arguably, this portion of the warnings expressly linked the

¹⁵⁸ *Miranda v. Arizona*, 384 U.S. 436, 458 (1966); *see also Powell*, 130 S. Ct. at 1203 (noting that *Miranda's* right to counsel "addresses our particular concern that '[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege [to remain silent]'" (quoting *Miranda*, 384 U.S. at 469)).

¹⁵⁹ *See, e.g., Rogers et al., supra* note 155, at 129 (reporting that less than one percent of *Miranda* warnings "can be understood with a 5th grade reading level" and "[t]he large majority . . . require at least a 7th grade reading comprehension," and concluding that "[i]n light of widespread illiteracy among correctional populations, this finding is crucial"); Weisselberg, *supra* note 149, at 1577 (finding that "many warnings demand a greater educational background than many suspects possess" and often suspects are "substantially impaired with respect to their ability to understand their *Miranda* rights").

¹⁶⁰ *Florida v. Powell*, 130 S. Ct. 1195, 1200 (2010) (emphasis added).

¹⁶¹ *Id.* at 1205 (emphasis added).

¹⁶² *See State v. Powell*, 998 So. 2d 531, 540 (Fla. 2008) (commenting that "the right . . . to talk with a lawyer before answering questions . . . is not the functional equivalent of having the lawyer present with you during questioning"); *Powell v. State*, 969 So. 2d 1060, 1067 (Fla. Dist. Ct. App. 2007) (same).

¹⁶³ *Powell*, 130 S. Ct. at 1205.

right to counsel to the time period prior to interrogation and did not communicate that Powell had the right to have a lawyer with him during the interview as well. While the *Powell* majority thought it “counterintuitive” for a “reasonable suspect” to assume that her attorney would not be allowed in the interrogation room and instead that she would be “obligated, or allowed, to hop in and out” of the room in order to consult with counsel,¹⁶⁴ that is precisely what grand jury witnesses must do in many jurisdictions in order to seek legal advice from their lawyers.¹⁶⁵

Importantly, the final portion of the Tampa warning advised Powell that he had “the right to use any of these rights at any time you want during this interview.”¹⁶⁶ While the majority has a point that this language may imply that Powell “could exercise” the right to counsel “while the interrogation was underway,”¹⁶⁷ it is also possible—as Justice Stevens argued in dissent—that this “catchall clause does not meaningfully clarify Powell’s rights” because it only told him he could “exercise the *previously listed* rights at any time” and those did not include the right to have an attorney with him during the interrogation.¹⁶⁸ Alternatively, the “before” references and the final sentence could be viewed as giving conflicting signals about the nature of a suspect’s right to counsel, thus creating confusion.

Perhaps the majority properly interpreted the waiver form consistent with a “commonsense reading,” whereas Justice Stevens was guilty of “examin[ing] the words employed [by the police] ‘as if construing a will or defining the terms of an easement.’”¹⁶⁹ Interestingly, however, in other *Miranda* cases, the Court has embraced a similarly “hypertechnical”¹⁷⁰ interpretation of the words *suspects* happen to choose during interrogation. Thus, for example, the Court has drawn a distinction depending on which of the bundle of *Miranda* rights a suspect invokes—the right to silence or the

¹⁶⁴ *Id.*

¹⁶⁵ See 3 LAFAYETTE ET AL., *supra* note 69, § 8.14(c). Justice Alito made this point at oral argument, although Powell’s counsel responded that most people have not appeared before a grand jury. See Transcript of Oral Argument at 41–42, 56–57, *Powell*, 130 S. Ct. 1195 (No. 08-1175).

¹⁶⁶ *Powell*, 130 S. Ct. at 1200.

¹⁶⁷ *Id.* at 1205.

¹⁶⁸ *Id.* at 1212 (Stevens, J., dissenting) (emphasis added); see also *State v. Powell*, 998 So. 2d 531, 541 (Fla. 2008) (making the same point).

¹⁶⁹ *Powell*, 130 S. Ct. at 1204–05 (quoting *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989)).

¹⁷⁰ Transcript of Oral Argument, *supra* note 165, at 16 (argument made by the State of Florida’s attorney).

right to counsel¹⁷¹—and also refused to interpret a suspect’s statement, “[m]aybe I should talk to a lawyer,” as a successful invocation of the right to counsel.¹⁷² Such strict, formalistic interpretations of suspects’ words are inconsistent with *Powell*’s generous reading of the Tampa Police Department’s waiver form.

Although the Court could easily have defended a decision in *Powell*’s favor, its ruling will not necessarily have a catastrophic impact on *Miranda*’s protections. Anxious suspects facing the coercive pressures of custodial interrogation may be unlikely to distinguish fine variations in the precise wording police use to communicate their rights. Moreover, *Powell* did not retreat from the well-established proposition that *Miranda* entitles suspects to the presence of a lawyer in the interrogation room,¹⁷³ and the outcome of the case seemed to hinge on the final sentence in the warnings given by the Tampa police. Without the additional information that *Powell* could exercise his rights “at any time . . . during this interview,” it is not obvious the Court would have been willing to overlook the “before” references in the right-to-counsel warning. “In combination,” the Court made clear, “the two warnings” adequately apprised *Powell* of his right to have an attorney with him during interrogation.¹⁷⁴

Symbolically, moreover, the *Powell* opinion was not one-sided. The *Powell* Court did not use the word “prophylactic,” referring instead to *Miranda* as “pathmarking.”¹⁷⁵ And the Court did not take the bait offered

¹⁷¹ Compare *Michigan v. Mosley*, 423 U.S. 96, 104 (1975) (holding that the police must “scrupulously honor[]” the rights of a suspect who invokes the right to silence, but are not absolutely barred from reinitiating interrogation after some time has elapsed) (quoting *Miranda v. Arizona*, 384 U.S. 436, 479 (1966)), with *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981) (deciding, by contrast, that a suspect who invokes the right to counsel may not be interrogated “until counsel has been made available to him”). For further discussion of this dichotomy, see *infra* notes 204–07 and accompanying text.

¹⁷² *Davis v. United States*, 512 U.S. 452, 462 (1994). For further discussion of the reach of *Davis*, see *infra* notes 196–240 and accompanying text.

¹⁷³ See *Powell*, 130 S. Ct. at 1203 (observing that “an individual held for questioning ‘must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation’”) (quoting *Miranda*, 384 U.S. at 471); see also *supra* note 113 and accompanying text.

¹⁷⁴ *Powell*, 130 S. Ct. at 1205; see also *id.* (supporting the conclusion that “the warning communicated that the right to counsel carried forward to and through the interrogation” by observing that *Powell* was told he “could seek his attorney’s advice before responding to ‘any of [the officers’] questions’ and ‘at any time . . . during th[e] interview’”).

¹⁷⁵ *Id.* at 1199.

by the State and resort to a balancing test in reaching its decision in this case.¹⁷⁶

Although the *Powell* decision was fact-bound and its impact likely to be somewhat limited, it did deviate from both Supreme Court precedent and lower court case law. Furthermore, the Court's attempt to justify its ruling on pragmatic grounds was not particularly convincing, though the narrowness of the decision gives the police only limited room to try to circumvent *Miranda* by rewording their warnings.

IV. BERGHUIS V. THOMPKINS

Even if *Maryland v. Shatzer* and *Florida v. Powell* can be viewed as making only modest changes to *Miranda*, *Berghuis v. Thompkins*,¹⁷⁷ the last of the three *Miranda* opinions issued during the Court's 2009 Term, is an entirely different story. After Thompkins was arrested and jailed on murder charges, he was interrogated for about three hours by two Southfield, Michigan police officers despite the fact that he had not waived his rights. He was first given *Miranda* warnings by one of the officers, Detective Helgert, but refused to sign a form indicating that he understood his rights.¹⁷⁸ Helgert gave inconsistent testimony as to whether or not Thompkins indicated verbally that he understood his rights,¹⁷⁹ although there was evidence that he was literate and familiar with English.¹⁸⁰

At that point, the officers immediately began the interrogation process. They spent more than two hours trying to convince Thompkins that "this was his chance to explain his version of events."¹⁸¹ The police "us[ed] the ostrich head in the sand metaphor," telling Thompkins, "[y]ou need to help yourself, you need to put forth an explanation."¹⁸² According to Detective Helgert, Thompkins was "[l]argely . . . silent" and "uncommunicative."¹⁸³

¹⁷⁶ Cf. Petitioner's Brief on the Merits, *supra* note 120, at 26 n.9 (analogizing other Supreme Court opinions that balanced the costs and benefits of suppressing confessions). For discussion of the Court's use of a balancing test in other confession cases, see *supra* notes 65–66 and accompanying text.

¹⁷⁷ 130 S. Ct. 2250 (2010).

¹⁷⁸ The form, entitled "Notification of Constitutional Rights and Statement," set out the *Miranda* warnings and then asked, "Do you understand each of these rights that I have explained to you?," followed by a space for the suspect's signature. See Brief for Petitioner at 60, *Thompkins*, 130 S. Ct. 2250 (No. 08-1470).

¹⁷⁹ See *Thompkins*, 130 S. Ct. at 2267 n.1 (Sotomayor, J., dissenting).

¹⁸⁰ At Helgert's request, Thompkins read one of the warnings on the form aloud. See *Thompkins*, 130 S. Ct. at 2256.

¹⁸¹ Joint Appendix at 10a, *Thompkins*, 130 S. Ct. 2250 (No. 08-1470) (testimony of Detective Helgert).

¹⁸² *Id.* at 150a.

¹⁸³ *Id.* at 19a, 10a.

He “sat there and listened” and “spent a lot of his time . . . simply holding his head looking down.”¹⁸⁴ He made eye contact only a “few times,” in response to Helgert’s request that Thompkins “look at me and pay attention.”¹⁸⁵ Helgert described the conversation as “very, very one-sided,” “nearly a monologue,” with Thompkins speaking or nodding his head only “very sporadically.”¹⁸⁶ When he did speak, Thompkins said only “a word or two,” “[a] ‘yeah’, or a ‘no’, or ‘I don’t know.’”¹⁸⁷ The only other words Thompkins uttered were that he “didn’t want a peppermint” the police offered to him and that “the chair that he was sitting in was hard.”¹⁸⁸

After about two hours and forty-five minutes, Detective Helgert decided to “take a different tac[k], . . . a spiritual tac[k],”¹⁸⁹ and asked Thompkins whether he believed in God. Thompkins replied, “Yes,” and his eyes “well[ed] up with tears.”¹⁹⁰ The officer followed up by inquiring whether Thompkins prayed to God, and Thompkins again answered, “Yes.” Finally, Helgert asked, “Have you prayed to God to forgive you for shooting that boy down?”¹⁹¹ For the third time, Thompkins responded, “Yes.” He said nothing further other than “I ain’t writing nothing down,”¹⁹² and the interrogation session ended approximately fifteen minutes later.¹⁹³

Rejecting Thompkins’s argument that his incriminating statement was taken in violation of *Miranda*, the Supreme Court, in a five-to-four opinion, concluded both that Thompkins never invoked his right to silence and that he impliedly waived that right. The decision broke down into five separate

¹⁸⁴ *Id.* at 22a, 152a.

¹⁸⁵ *Id.* at 11a, 149a.

¹⁸⁶ *Id.* at 10a, 17a, 9a.

¹⁸⁷ *Id.* at 23a.

¹⁸⁸ *Id.* at 152a.

¹⁸⁹ *Id.* at 10a–11a.

¹⁹⁰ *Id.* at 11a.

¹⁹¹ *Id.* at 20a.

¹⁹² *Id.* at 11a.

¹⁹³ *See Thompkins*, 130 S. Ct. at 2257. The Court did not deny that Thompkins was subjected to interrogation, repeatedly referring to the session as “the interrogation.” *See, e.g., id.* at 2256–57, 2262–63. Moreover, the detectives used classic interrogation techniques, which include “focusing [suspects’] attention on the importance of telling [their] story,” Leo & White, *supra* note 22, at 435, thereby “distorting suspects’ perceptions of their choices by leading them to believe that they will benefit by making a statement.” Weisselberg, *supra* note 149, at 1537–38; *see also* Joint Appendix, *supra* note 181, at 15a, 20a (testimony of Detective Helgert) (acknowledging that the officers “did enter into an interview mode” after Thompkins refused to sign the rights form, and then brought up religion on the theory that Thompkins would likely be “[m]ore vulnerable to interrogation” if he had “a deep faith”). In any event, Thompkins’s incriminating statement came in response to a direct investigative question, which clearly satisfied the “express questioning” portion of the definition of “interrogation” set forth in *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980).

elements. In the invocation discussion, Justice Kennedy's opinion for the majority determined, first, that the unambiguous invocation requirement applies to suspects who wish to invoke their right to remain silent. Second, the majority impliedly refused to limit this clear invocation rule to those who make a preliminary waiver of their rights. And third, the Court held that *Thompkins* did not invoke his right to silence by remaining silent. In the waiver discussion, the Court found that *Thompkins* impliedly waived *Miranda* by failing to invoke his rights and then "making an uncoerced statement to the police."¹⁹⁴ Finally, the Court upheld the concept of pre-waiver interrogation, refusing to mandate that police secure a waiver of *Miranda* before they begin interrogating a suspect.¹⁹⁵

Although the Court's invocation analysis ratified the views adopted by some lower courts, its discussion of implied waiver and pre-waiver interrogation effected sweeping changes in the law, deviating from or at least dramatically expanding Supreme Court precedent. Moreover, none of the five components of the Court's opinion can be reconciled with a pragmatic approach to *Miranda*. Together, they allow law enforcement officials to do a complete end run around *Miranda*, reducing the Warren Court's decision to a formalistic requirement that warnings be read and otherwise reinstating the voluntariness due process test.

A. INVOKING THE RIGHT TO SILENCE

The Court reached its decision that *Thompkins* never asserted his right to silence in three steps: first, that the clear invocation rule announced in *Davis v. United States*¹⁹⁶ governs the right to remain silent as well as the *Miranda* right to counsel; second, that *Davis* presumably applies even where suspects did not initially waive their *Miranda* rights; and third, that *Thompkins* did not unambiguously invoke the right to remain silent by essentially remaining silent.

In *Davis*, the Court held that a suspect who wishes to assert the *Miranda* right to counsel, and thereby enjoy the protection of the *Edwards*

¹⁹⁴ *Thompkins*, 130 S. Ct. at 2264.

¹⁹⁵ Because this case came to the federal courts on habeas, the Sixth Circuit had applied the deferential standard of review mandated by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which bars the federal courts from granting habeas relief on "any claim that was adjudicated on the merits in State court," unless the state court's ruling "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (2006); see *Thompkins*, 130 S. Ct. at 2259.

¹⁹⁶ 512 U.S. 452 (1994).

line of cases,¹⁹⁷ “must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.”¹⁹⁸ Holding that the same unambiguous invocation requirement applies to the right to remain silent, the *Thompkins* majority found “no principled reason to adopt different standards” depending on which *Miranda* right a particular suspect asserted.¹⁹⁹ In defending this position, *Thompkins* also resurrected *Davis*’s argument that a clear invocation requirement “results in an objective inquiry that ‘avoid[s] difficulties of proof and . . . provide[s] guidance to officers’ on how to proceed in the face of ambiguity.”²⁰⁰

Unlike *Shatzer* and *Powell*, the Supreme Court’s decision in *Thompkins* was a closely divided one, with the four dissenters objecting that “*Davis*’ clear statement rule is . . . a poor fit for the right to silence.”²⁰¹ Nevertheless, the majority’s position aligned with the view taken by the lower courts²⁰²—although those courts had not engaged in much analysis,

¹⁹⁷ *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981) (holding that a suspect who invokes the right to counsel “is not subject to further interrogation . . . until counsel has been made available to him”). The line of cases following *Edwards* is described *supra* at note 39 and accompanying text.

¹⁹⁸ *Davis*, 512 U.S. at 459; *see also id.* (warning that a suspect will not be deemed to have asserted her *Miranda* right to counsel if she “makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel”) (emphasis added). *Davis*’s clear invocation rule has deservedly come under heavy fire. *See, e.g.*, Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 *YALE L.J.* 259, 320 (1993) (arguing that the expectation that suspects will make “direct, assertive, unqualified invocations of counsel” is not only inconsistent with *Miranda*’s basic premise that custodial interrogation is inherently coercive, but is also “a gendered doctrine that privileges male speech norms, . . . thus disadvantage[ing] women and other marginalized and relatively powerless groups in society”); Kinports, *supra* note 96, at 106–07 (observing that *Davis*’s reasonable police officer standard strayed from the focus on the suspect’s perspective in other *Miranda* cases).

¹⁹⁹ *Thompkins*, 130 S. Ct. at 2257.

²⁰⁰ *Id.* at 2260 (quoting *Davis*, 512 U.S. at 458–59).

²⁰¹ *Id.* at 2276 (Sotomayor, J., dissenting) (endorsing instead use of the “scrupulously honored” test here, which is described *infra* at note 204 and accompanying text). The dissent acknowledged, however, that under the deferential standard of review imposed by the AEDPA, “it is indeed difficult to conclude that the state court’s application of our [invocation] precedents was objectively unreasonable.” *Id.* at 2274; *see supra* note 195.

²⁰² *See, e.g.*, *United States v. Nelson*, 450 F.3d 1201, 1211–12 (10th Cir. 2006) (“[E]very circuit that has addressed the issue squarely has concluded that *Davis* applies to both components of *Miranda*: the right to counsel and the right to remain silent.”) (quoting *Bui v. DiPaolo*, 170 F.3d 232, 239 (1st Cir. 1999)); Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under Miranda*, 17 *WM. & MARY BILL RTS. J.* 773, 784–87 (2009).

extensive or otherwise, but typically had just assumed that *Davis* applies in both situations.²⁰³

Despite the assumption made by the lower courts, the Supreme Court has for years drawn a distinction between suspects who invoke the right to counsel, thereby triggering the protections of the *Edwards* line of cases, and those who invoke the right to silence. *Michigan v. Mosley* is the controlling precedent for the latter group of suspects, and it requires only that police “scrupulously honor[]” the rights of a suspect who asserts the right to remain silent.²⁰⁴ Thus, while the *Davis* Court feared that extending *Edwards*’s “‘rigid’ prophylactic rule”²⁰⁵ would create a “wholly irrational obstacle[] to legitimate police investigative activity” in cases where a suspect was not clearly asking for a lawyer,²⁰⁶ that concern “applies with less force” to *Mosley*’s “more flexible form of prophylaxis.”²⁰⁷

Discounting the relevance of this dual line of cases, the *Thompkins* majority cited *Solem v. Stumes* for the proposition that “[m]uch of the logic and language of [*Mosley*] . . . could be applied to the invocation of the [*Miranda* right to counsel].”²⁰⁸ But *Stumes* actually cuts the other way. In fact, the sentence from *Stumes* quoted in *Thompkins* began by pointing out that *Mosley* “distinguish[ed] the right to counsel from the right to silence.”²⁰⁹ Moreover, the issue before the Court in *Stumes* was whether *Edwards* ought to apply retroactively. In declining to do so, *Stumes* relied in part on the fact that *Edwards* had “establish[ed] a new rule” that was not “‘clearly’ or ‘distinctly’ foreshadowed,” and therefore that law enforcement officials could not be “faulted if they did not anticipate its per se approach.”²¹⁰ Given that *Mosley* predated *Edwards*, the Court’s reasoning

²⁰³ See Strauss, *supra* note 202, at 786 (noting that most courts acted “perfunctorily,” none offered “any detailed explanation,” and “[e]ven when some analysis is provided, it is extraordinarily cursory”).

²⁰⁴ *Michigan v. Mosley*, 423 U.S. 96, 103 (1975) (quoting *Miranda v. Arizona*, 384 U.S. 436, 479 (1966)) (finding the standard met on the facts there, where a different detective approached Mosley two hours after he invoked his right to silence, reread the *Miranda* warnings, and asked him about a different crime).

²⁰⁵ *Davis*, 512 U.S. at 458 (quoting *Smith v. Illinois*, 469 U.S. 91, 95 (1984) (per curiam) (quoting *Fare v. Michael C.*, 442 U.S. 707, 719 (1979))).

²⁰⁶ *Id.* at 460 (quoting *Mosley*, 423 U.S. at 102).

²⁰⁷ *Thompkins*, 130 S. Ct. at 2275 (Sotomayor, J., dissenting); see also Strauss, *supra* note 202, at 818–19 (arguing that the clear invocation rule should be “the ‘price’ of *Edwards*,” whereas “the combination of *Davis* and *Mosley* stacks the deck for the state” and has “an undesirable synergistic effect” that “place[s] the police] in a win–win situation”).

²⁰⁸ *Thompkins*, 130 S. Ct. at 2260 (quoting *Solem v. Stumes*, 465 U.S. 638, 648 (1984)).

²⁰⁹ *Stumes*, 465 U.S. at 648.

²¹⁰ *Id.* at 647–49 (also citing *Mosley* in support of the observation that “[t]he Court had several times refused to adopt per se rules governing the waiver of *Miranda* rights”).

in *Stumes* confirms the dichotomy between the two sets of precedents rather than supporting *Thompkins*'s decision to conflate them.

In addition to ignoring the split between *Mosley* and *Edwards*, the *Thompkins* Court's decision to extend *Davis* to the right to remain silent was not mandated by a pragmatic approach to *Miranda*. Although *Thompkins* echoed *Davis*'s plea for readily administrable rules, Justice Souter's opinion in *Davis* offered the obvious counterpoint: if the police wish to be "relieve[d] . . . of any responsibility for guessing" a suspect's preferences, they can simply "stop the[] interrogation and ask [the suspect] to make his choice clear,"²¹¹ an approach the *Davis* majority called "good police practice" but expressly declined to require.²¹²

The second step of *Thompkins*'s invocation analysis was an implicit one: the Court silently assumed that *Davis* applies in cases where suspects did not initially waive their rights. After receiving *Miranda* warnings, *Davis* executed a written waiver of his rights and expressly agreed to talk to the investigators. Only later, after about ninety minutes of questioning, did he make what the Court considered an ambiguous invocation of his right to counsel by saying "[m]aybe I should talk to a lawyer."²¹³ That preliminary waiver was an integral part of the *Davis* Court's reasoning. In justifying the decision to require an unambiguous invocation of the right to counsel, the Court explained:

A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted. Although *Edwards* provides an additional protection—if a suspect subsequently

²¹¹ *Davis*, 512 U.S. at 474–75, 467 (Souter, J., concurring in the judgment); see also *Thompkins*, 130 S. Ct. at 2277 (Sotomayor, J., dissenting) (likewise endorsing this "straightforward mechanism").

²¹² *Davis*, 512 U.S. at 461. Although the dominant lower court approach prior to *Davis* mandated that police follow this "good practice," see *id.* at 466–67 & n.1 (Souter, J., concurring in the judgment), in the wake of *Davis*, it now "appears that most [officers] do not" stop to clarify the suspect's wishes. Marcy Strauss, *Understanding Davis v. United States*, 40 LOY. L.A. L. REV. 1011, 1058 (2007).

²¹³ *Davis*, 512 U.S. at 462. *But cf.* Ainsworth, *supra* note 198, at 320 (observing that "relatively powerless groups . . . are more likely to use less direct and assertive patterns of speech"); Strauss, *supra* note 202, at 789 (finding that "many suspects subjected to the intimidation inherent in custodial interrogation employ modal verbs—indirect, tentative speech patterns"); Peter M. Tiersma & Lawrence M. Solan, *Cops and Robbers: Selective Literalism in American Criminal Law*, 38 LAW & SOC'Y REV. 229, 249 (2004) (pointing out that "[p]eople tend to hedge when they are uncertain about something, but they also do it as a means of expressing politeness," and even "in ordinary conversation," "most people speak less directly, . . . especially when they impose on someone else by making a request or command").

requests an attorney, questioning must cease—it is one that must be affirmatively invoked by the suspect.²¹⁴

The *Davis* Court’s statement of its holding was likewise expressly contingent on an initial waiver,²¹⁵ and the *Thompkins* dissenters were therefore critical of the majority’s decision to “ignore[] this aspect of *Davis*.”²¹⁶ Nevertheless, other language in *Davis* was not so limited,²¹⁷ and a substantial number of lower courts had applied the *Davis* standard even where no preliminary waiver occurred.²¹⁸ This question had provoked more of a conflict than the extension of *Davis* to the right to silence, however, and some courts had expressly restricted the clear invocation rule to suspects who initially waived their rights.²¹⁹

Again, it is difficult to reconcile any extension of *Davis* with a pragmatic approach to *Miranda* when all the police need to do in cases of ambiguity is ask the suspect to clarify her preferences. Moreover, limiting the clear invocation rule to the post-waiver context would have assuaged the *Davis* Court’s concerns about interrupting the flow of the interrogation process and requiring the “cessation of questioning” in the face of any ambiguous reference to counsel.²²⁰ As the Second Circuit pointed out, the prosecution has the burden of proving that a suspect waived *Miranda*, but once that burden is satisfied, it is appropriate to give the *suspect* the burden of establishing that she “resurrected rights previously waived” by clearly

²¹⁴ *Davis*, 512 U.S. at 460–61.

²¹⁵ *Id.* at 461 (“We therefore hold that, after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.”).

²¹⁶ *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2275 (2010) (Sotomayor, J., dissenting).

²¹⁷ *See Davis*, 512 U.S. at 460 (while acknowledging that its ruling “might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present,” the Court expressed the view that “the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves” and “[f]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process”) (quoting *Moran v. Burbine*, 475 U.S. 412, 427 (1986)). For further discussion of *Davis*’s “primary protection” language and *Moran v. Burbine*, see *infra* notes 266–75 and accompanying text.

²¹⁸ *See* 2 LAFAVE ET AL., *supra* note 69, § 6.9(g), at 866 n.185; Weisselberg, *supra* note 149, at 1579.

²¹⁹ *E.g.*, *United States v. Plugh*, 576 F.3d 135, 143 (2d Cir. 2009); *United States v. Rodriguez*, 518 F.3d 1072, 1079–80 & n.6 (9th Cir. 2008) (citing state court opinions as well); *see also* 2 LAFAVE ET AL., *supra* note 69, § 6.9(g), at 866 & n.185.

²²⁰ *Davis*, 512 U.S. at 459; *see also id.* (likewise expressing reluctance to require police to “cease questioning,” and observing that a “statement [that] fails to meet the requisite level of clarity . . . does not require that the officers stop questioning the suspect”).

invoking them.²²¹ That shifting of the burden envisioned by *Davis* does not make sense in a case where the suspect never waived *Miranda* in the first place.

Finally, applying *Davis*'s clear invocation rule to the facts before it, the Court was unsympathetic to Thompkins's argument that he asserted his right to remain silent "by not saying anything for a sufficient period of time."²²² Thompkins "did not say that he wanted to remain silent or that he did not want to talk with the police," the Court noted, and therefore he did not effectively assert his right to silence.²²³ This final step in the majority's invocation analysis was again challenged by the four dissenters, who pointed out that "[a]dvising a suspect that he has a 'right to remain silent' is unlikely to convey that he must speak (and must do so in some particular fashion) to ensure the right will be protected."²²⁴

While a number of lower courts had not been particularly generous to defendants whose statements were not crystal clear,²²⁵ some courts had ruled that a defendant who is silent is obviously asserting the right to

²²¹ *Plugh*, 576 F.3d at 143; see also *Rodriguez*, 518 F.3d at 1079 ("*Davis* addressed what the suspect must do to restore his *Miranda* rights after having already knowingly and voluntarily waived them. It did not address what the police must obtain, in the initial waiver context, to begin questioning.") (emphasis omitted).

²²² *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2259–60 (2010).

²²³ *Id.* at 2260.

²²⁴ *Id.* at 2276 (Sotomayor, J., dissenting). Again, however, the dissent conceded that Thompkins might lose under the AEDPA standard of review. See *id.* at 2274 (observing that the Court's precedents did not discuss whether a suspect who is "uncooperative and nearly silent for 2 hours and 45 minutes" has invoked the right to silence); see also *supra* note 195.

²²⁵ See Strauss, *supra* note 202, at 775 (noting that "[j]udges have gone to extraordinary lengths to classify even seemingly clear invocations as ambiguous invocations which can be ignored by the police"); Tiersma & Solan, *supra* note 213, at 250 ("[A]ll too many judges read requests for counsel the same way they would read a deed or promissory note: they expect that suspects during interrogation will speak the way that lawyers write, leading them to interpret the statements in a very literal way."). For illustrations of statements that have been found insufficient to invoke the right to silence, see *Thompkins*, 130 S. Ct. at 2277 n.9 (Sotomayor, J., dissenting) ("I'm not going to talk about nothin'," and "I just don't think that I should say anything"); Strauss, *supra* note 202, at 789–90 & n.83 ("I can't say anything more now," "I don't know if I should speak to you," and "Can I go?"); Weisselberg, *supra* note 149, at 1580 ("I don't have nothing to say" and "I think it's about time for me to stop talking").

remain silent.²²⁶ The Solicitor General distinguished those cases on the ground that Thompkins did not maintain complete silence,²²⁷ but it is difficult to imagine how a suspect could be less communicative over the space of almost three hours than Thompkins. During the course of what Detective Helgert described as “nearly a monologue,” Thompkins made one statement about a mint and another about his chair.²²⁸ Otherwise, he nodded his head and said “yeah,” “no,” or “I don’t know” only “very sporadically,”²²⁹ and in a context that the record does not specify.²³⁰ Moreover, the Court did not decide the case on that narrow ground. Rather, the Court suggested that a suspect must actually “[s]peak[] [u]p to [s]tay [s]ilent,”²³¹ a proposition that the dissent appropriately called “counterintuitive[.]”²³² Once again, the right to remain silent differs on a fundamental practical level from the right to counsel: a suspect sitting in a police interrogation room must say something in order to trigger the appearance of an attorney, but need not say or do anything affirmative in order to actualize her unwillingness to talk to the police.

²²⁶ See *United States v. Montana*, 958 F.2d 516, 518 (2d Cir. 1992) (noting that “a defendant’s silence in the face of repeated questioning has been held sufficient to invoke the Fifth Amendment privilege”); *State v. Hodges*, 77 P.3d 375, 377–78 (Wash. Ct. App. 2003) (concluding that “[s]ilence in the face of repeated questioning over a period of time may constitute an invocation of the right to remain silent,” but finding no clear invocation there based on suspect’s silence in response to one question because he initially answered questions and “shortly thereafter answered a different officer’s question without hesitation”); see also 2 LAFAYETTE ET AL., *supra* note 69, § 6.9(g), at 853–54 & n.150, 857 n.158 (citing conflicting cases on this point, but concluding that “silence in the face of repeated questioning” should be enough); Strauss, *supra* note 202, at 792 (likewise citing conflicting cases, though noting that “[m]ost courts . . . seem to deem silence, even lengthy silence, as ambiguous”).

²²⁷ Brief for the United States as Amicus Curiae Supporting Petitioner at 18, *Thompkins*, 130 S. Ct. 2250 (No. 08-1470); see also Brief for Petitioner, *supra* note 178, at 29 (“This is not a case where a suspect remained silent.”).

²²⁸ Joint Appendix, *supra* note 181, at 17a, 152a.

²²⁹ *Id.* at 9a, 23a; see also *supra* notes 181–93 and accompanying text.

²³⁰ See *Thompkins*, 130 S. Ct. at 2270–71 (Sotomayor, J., dissenting) (“[T]he record before us [is] silent as to the subject matter or context of even a single question to which Thompkins purportedly responded, other than the exchange about God and the statements respecting the peppermint and the chair.”); *Thompkins v. Berghuis*, 547 F.3d 572, 587 (6th Cir. 2008) (noting that the detective’s testimony did not “provid[e] any context” for Thompkins’s occasional one-word statements, and concluding that the case would be very different had Thompkins “nodded his head in response to a question asking whether [he] wanted his side of the story to be known”) (emphasis omitted), *rev’d*, 130 S. Ct. 2250 (2010).

²³¹ Editorial, *Speaking up to Stay Silent*, N.Y. TIMES, June 2, 2010, at A24.

²³² *Thompkins*, 130 S. Ct. at 2278 (Sotomayor, J., dissenting); see also Strauss, *supra* note 202, at 792 (noting that silence may be “the ultimate invocation”).

Although the majority did not try to defend this third step in the invocation discussion on pragmatic grounds, the Solicitor General argued that police may not know whether a suspect who says nothing is invoking the right to remain silent or instead is “formulating an explanation of events that lessens his culpability, planning an alibi, or thinking through his options.”²³³ Additionally, the “scrupulously honor” standard endorsed by the *Thompkins* dissenters, as even they acknowledged, is “fact-specific” and “does not provide police with a bright-line rule.”²³⁴ Of course, however, it is the same standard that *Mosley* articulated and that law enforcement officials “have for nearly 35 years applied.”²³⁵ Moreover, it seems that *Davis*’s “reasonable police officer”²³⁶ should have known that someone like *Thompkins*—who managed to sit in virtual silence with his eyes cast down for almost three hours—was no longer “thinking through his options,” but had no interest in participating in the conversation. And apparently that is precisely how Detective Helgert interpreted *Thompkins*’s behavior: at the suppression hearing, the officer responded affirmatively when asked whether *Thompkins*’s incriminating statement came “after [*Thompkins*] had consistently exercised his right to remain substantively silent for at least two hours and forty-five (45) minutes.”²³⁷

The Court’s tripartite analysis of *Thompkins*’s invocation claim is extremely cursory, taking up less than one page in the *Supreme Court Reporter*. Moreover, the Court’s insistence that suspects speak with absolute precision is particularly ironic given its willingness just three months earlier in *Florida v. Powell* to afford a “commonsense reading” to the words the police use in administering *Miranda* warnings,²³⁸ for fear that they “may inadvertently depart from routine practice.”²³⁹ If it makes sense to take the fluidity of the interrogation process into account and refuse to “examine the words employed [by the police] ‘as if construing a will or defining the terms of an easement,’” at minimum the same leniency should be accorded suspects, who are not in control of the situation and who are

²³³ Brief for the United States, *supra* note 227, at 18 (concluding that silence does “not convey an unambiguous message”); *see also* Strauss, *supra* note 202, at 792 (observing that suspects could be silent because “they have not yet found a topic they want to discuss”).

²³⁴ *Thompkins*, 130 S. Ct. at 2276 (Sotomayor, J., dissenting).

²³⁵ *Id.*

²³⁶ *Davis v. United States*, 512 U.S. 452, 459 (1994); *see supra* note 198 and accompanying text.

²³⁷ Joint Appendix, *supra* note 181, at 20a; *see also id.* (When asked whether *Thompkins* “exercised [his right to remain silent] continuously for two hours and forty-five (45) minutes in terms of substantive responses to your attempts to elicit statements regarding this offense,” Helgert replied, “Much of the time. Most of the time, yes.”).

²³⁸ 130 S. Ct. 1195, 1205 (2010).

²³⁹ *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989).

facing the coercive pressures of custodial interrogation.²⁴⁰ In deciding otherwise, the *Thompkins* Court's conclusory invocation discussion may have been consistent with some lower court case law, but it deviated from a pragmatic approach to *Miranda*.

B. WAIVING THE RIGHT TO SILENCE

After finding that Thompkins never invoked his right to silence, the Court turned to the question of waiver. *Miranda* required the prosecution to shoulder the burden of establishing that a suspect waived her rights, the *Thompkins* Court acknowledged, and Thompkins's failure to assert his rights did not automatically satisfy that burden.²⁴¹ As the Court noted in *Smith v. Illinois*, "[i]nvocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together."²⁴² Nevertheless, the Court concluded that Thompkins did waive his rights under the two-part implied waiver doctrine set out in *North Carolina v. Butler*, where the Court suggested that a suspect's "silence, coupled with an understanding of his rights and a course of conduct indicating waiver," constitutes an implied waiver of *Miranda*.²⁴³

First, the Court reasoned, there was sufficient evidence that Thompkins understood his rights, given that he "received a written copy of the *Miranda* warnings" and "could read and understand English."²⁴⁴ And, second, the one-word response he gave when Detective Helgert asked whether he had prayed to be forgiven for shooting the victim—even though it came "about three hours" later—was "sufficient to show a course of conduct indicating waiver."²⁴⁵ "If Thompkins wanted to remain silent," the Court explained, "he could have said nothing in response to Helgert's questions, or he could have unambiguously invoked his *Miranda* rights and

²⁴⁰ *Powell*, 130 S. Ct. at 1204 (quoting *Duckworth*, 492 U.S. at 203).

²⁴¹ See *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010) (noting that "[e]ven absent the accused's invocation of the right to remain silent," a confession is not admissible "unless the prosecution can establish" a valid waiver of *Miranda*); see also *Miranda v. Arizona*, 384 U.S. 436, 470 (1966) (cautioning that the "failure to ask for a lawyer does not constitute a waiver").

²⁴² *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (per curiam).

²⁴³ *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). But cf. 2 LAFAVE ET AL., *supra* note 69, § 6.9(d), at 832 (noting that "it has been argued with some force" that a suspect's "acknowledgement of understanding adds nothing more to the circumstances beyond mere silence" because "an understanding of rights and an intention to waive them are two different things") (quoting 2 WILLIAM E. RINGEL, *SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS* 28-6 (2d ed. 1982)).

²⁴⁴ *Thompkins*, 130 S. Ct. at 2262.

²⁴⁵ *Id.* at 2263 (reasoning that "[p]olice are not required to rewarn suspects from time to time").

ended the interrogation.”²⁴⁶ Justice Kennedy added that this conclusion was “confirmed” by the “sporadic answers” Thompkins gave to “questions throughout the interrogation,” but his opinion did not put much emphasis on that fact.²⁴⁷ He mentioned it only once; by contrast, he repeated several times that the implied waiver doctrine could be satisfied simply by an “uncoerced statement” combined with evidence that the *Miranda* warnings were “understood by the accused.”²⁴⁸ Here, again, the Court was deeply splintered, with the four dissenters objecting that the prosecutor’s burden of proving waiver could not be met “on a record consisting of three one-word answers, following 2 hours and 45 minutes of silence punctuated by a few largely nonverbal responses to unidentified questions.”²⁴⁹

Although the *Thompkins* majority did not discuss the state of the lower court case law, its implied waiver ruling effected a more dramatic change in the law than its invocation analysis. The lower courts had split on the propriety of finding a “course of conduct indicating waiver” based solely on a suspect’s incriminating statements, but even the courts that had found the *Butler* standard satisfied tended to involve scenarios very different from *Thompkins*. In most of those cases, the suspect explicitly acknowledged that she understood her rights, followed closely by an incriminating statement. The courts were therefore able to say that those defendants, unlike Thompkins, “freely talk[ed]” to the police,²⁵⁰ displayed “no hesitancy,”²⁵¹ or participated in a “two-way conversation.”²⁵² Moreover, other courts had expressly refused to uphold the validity of an implied

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 2262; *see also id.* at 2261 (“If the State establishes that a *Miranda* warning was given and the accused made an uncoerced statement, this showing, standing alone, is insufficient to demonstrate ‘a valid waiver’ of *Miranda* rights. The prosecution must make the additional showing that the accused understood these rights.”); *id.* at 2263 (“Thompkins knowingly and voluntarily made a statement to police, so he waived his right to remain silent.”); *id.* at 2264 (“In sum, a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police Understanding his rights in full, [Thompkins] waived his right to remain silent by making a voluntary statement to the police.”).

²⁴⁹ *Id.* at 2271 (Sotomayor, J., dissenting).

²⁵⁰ *United States v. Upton*, 512 F.3d 394, 399 (7th Cir. 2008).

²⁵¹ *State v. Kirtdoll*, 136 P.3d 417, 423 (Kan. 2006).

²⁵² *Bui v. DiPaolo*, 170 F.3d 232, 241 (1st Cir. 1999); *see also id.* at 240–41 (surveying other federal cases and finding that “the implied waiver profile” included cases involving a “‘steady stream’ of speech” or “back-and-forth conversation”) (citing, respectively, *Bradley v. Meachum*, 918 F.2d 338, 342 (2d Cir. 1990), and *Baskin v. Clark*, 956 F.2d 142, 146 (7th Cir. 1992)); 2 LAFAYETTE ET AL., *supra* note 69, § 6.9(d), at 832 (maintaining that “while an acknowledgement of understanding should not inevitably carry the day, it is especially significant when defendant’s incriminating statement follows immediately thereafter”).

waiver made by a suspect who was initially unresponsive to police questioning.²⁵³ Thus, as Justice Sotomayor's dissent pointed out, the courts generally "required a showing of words or conduct beyond inculpatory statements."²⁵⁴

The *Thompkins* majority did, however, cite its own prior cases, claiming that its implied waiver ruling was consistent with precedent. The Court acknowledged that *Miranda* not only spoke of the "heavy burden" required to demonstrate a waiver of rights but also made clear that waiver may not be "presumed simply from" a suspect's "silence" or "simply from the fact that a confession was in fact eventually obtained."²⁵⁵ But in the very next sentence, the *Thompkins* Court seemed to equivocate, observing that its post-*Miranda* decisions, "informed by . . . the whole course of law enforcement," had rejected any requirement of "formal or express statements of waiver."²⁵⁶ That statement is obviously unobjectionable in light of *Butler*, but the notion that waivers can be inferred does not diminish the fact that neither silence nor an eventual incriminating statement suffices to demonstrate *any* sort of waiver, express or implied.

In fact, *Butler* conceded as much. The *Butler* opinion quoted all of the relevant waiver language from *Miranda* set out in the prior paragraph.²⁵⁷ In addition, *Butler* independently referred to the Government's burden of proof as "great" and pointed out that "[t]he courts must presume that a defendant did not waive his rights."²⁵⁸ And subsequent Supreme Court

²⁵³ See *United States v. Wallace*, 848 F.2d 1464, 1475 (9th Cir. 1988) (refusing to find implied waiver where suspect "maintained her silence for several minutes and, perhaps, as many as ten minutes" "[i]n the face of repeated questioning"); cf. *United States v. Plugh*, 576 F.3d 135, 142 (2d Cir. 2009) (concluding that suspect's "refusal to sign [a waiver form] constituted an unequivocally negative answer to the question . . . whether he was willing to waive his rights").

²⁵⁴ *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2270 n.4 (2010) (Sotomayor, J., dissenting).

²⁵⁵ *Miranda v. Arizona*, 384 U.S. 436, 475 (1966), quoted in *Thompkins*, 130 S. Ct. at 2261. The Warren Court also observed that a "lengthy interrogation" preceding a confession is "strong evidence" of an invalid waiver. *Miranda*, 384 U.S. at 476. For discussion of *Thompkins*'s response to this language, see *infra* notes 375–77 and accompanying text.

²⁵⁶ *Thompkins*, 130 S. Ct. at 2261.

²⁵⁷ See *North Carolina v. Butler*, 441 U.S. 369, 372–73 (1979) (quoting both the phrase "heavy burden" and the language making clear that neither silence nor a confession satisfies that burden); see also *id.* at 373 ("As was unequivocally said in *Miranda*, mere silence is not enough.").

²⁵⁸ *Id.* at 373; cf. *Tague v. Louisiana*, 444 U.S. 469, 470 (1980) (per curiam) (endorsing the view that presuming that a suspect understands her rights contravenes *Miranda*).

decisions likewise reiterated those concepts.²⁵⁹ *Thompkins* therefore made an unwarranted leap from the noncontroversial proposition that the prosecutor “does not need to show that a waiver of *Miranda* rights was express” to the conclusion that a suspect who “understood” her rights and made an “uncoerced statement” impliedly waived her rights.²⁶⁰

Moreover, the *Thompkins* Court shortchanged *Miranda*’s underlying goals, attempting to defend the position that waivers need not be “formal or express” by describing the “main purpose” of the landmark decision as “ensur[ing] that an accused is advised of and understands” her rights.²⁶¹ While that was obviously one of *Miranda*’s objectives, it also intended to alleviate “the compelling influence of the interrogation.”²⁶² Thus, the *Miranda* Court did indicate that “[f]or those unaware of the privilege, the warning is needed simply to make them aware of it.”²⁶³ But even “[m]ore important,” the Court continued, the warnings are “an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere.”²⁶⁴ As a result, the fact that a particular suspect understood her rights was not enough to satisfy the *Miranda* Court. Rather, the Court warned, “we will not pause to inquire in individual cases whether the defendant was aware of his rights” because, “whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures.”²⁶⁵

Despite the fact that the Court clearly thought it was aiming higher in *Miranda*, *Thompkins* relied on two subsequent cases—*Davis v. United*

²⁵⁹ See *Arizona v. Roberson*, 486 U.S. 675, 680 (1988) (quoting *Miranda*’s “heavy burden” language); *Tague*, 444 U.S. at 470–71 (quoting *Miranda*’s phrase “heavy burden,” as well as the language in *Butler* characterizing the Government’s burden as “great” and refusing to allow presumptions of waiver); *Fare v. Michael C.*, 442 U.S. 707, 724 (1979) (likewise quoting *Miranda*’s “heavy burden” standard).

²⁶⁰ *Thompkins*, 130 S. Ct. at 2261, 2262.

²⁶¹ *Id.* at 2261.

²⁶² *Miranda v. Arizona*, 384 U.S. 436, 476 (1966); see *Dickerson v. United States*, 530 U.S. 428, 435 (2000) (finding that “the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements”); see also *infra* notes 302–06 and accompanying text.

²⁶³ *Miranda*, 384 U.S. at 468.

²⁶⁴ *Id.* (noting, in addition, that the warnings “show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it”).

²⁶⁵ *Id.* at 468–69; see also *id.* (observing that “[a]ssessments of the knowledge the defendant possessed . . . can never be more than speculation,” whereas “a warning is a clearcut fact”); *id.* at 471–72 (admonishing that “[n]o amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead”). For discussion of an additional way the *Thompkins* Court undermined *Miranda*—by resurrecting the voluntariness due process test—see *infra* notes 370–78 and accompanying text.

*States*²⁶⁶ and *Moran v. Burbine*²⁶⁷—for the proposition that “*Miranda*’s main protection lies in advising defendants of their rights” and therefore “less formal” waivers are permissible.²⁶⁸ To be sure, the *Davis* Court did observe that “the primary protection afforded suspects subject[ed] to custodial interrogation is the *Miranda* warnings themselves.”²⁶⁹ The *Thompkins* Court, however, took this statement wildly out of context. *Davis*, the opinion which first articulated the clear invocation rule, was addressing what the Court called the “second layer of [*Miranda*] prophylaxis,” the protection under *Edwards* (and *Mosley*) for suspects who assert their rights.²⁷⁰ Thus, several sentences later, the *Davis* Court said, “[a]lthough *Edwards* provides an additional protection—if a suspect subsequently requests an attorney, questioning must cease—it is one that must be affirmatively invoked by the suspect.”²⁷¹ When read in context, then, the *Davis* Court was pointing out that the “primary protection” given suspects is *Miranda*’s first layer—the warning and waiver procedures set out in *Miranda* itself—and that suspects must act affirmatively in order to engage the second layer. But *Davis* did not purport to address the nature of the first layer or to affect *Miranda*’s waiver requirements. In fact, as noted above, the issue of waiver did not arise in that case because *Davis* expressly waived his rights prior to interrogation.²⁷²

Thompkins’s reliance on *Moran v. Burbine* is similarly misplaced; again, *Thompkins* accurately quoted its precedent but omitted the relevant context. As the *Thompkins* Court pointed out, *Burbine* did include the observation that, “as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process.”²⁷³ Put into context, however, it is obvious that the *Burbine* Court was explaining its decision not to require the police to provide suspects with additional information above and beyond what *Miranda* contemplates—there, that an attorney had

²⁶⁶ 512 U.S. 452 (1994).

²⁶⁷ 475 U.S. 412 (1986).

²⁶⁸ *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2262 (2010).

²⁶⁹ *Id.* at 2263 (quoting *Davis*, 512 U.S. at 460); see also *id.* at 2259, 2261–62 (again citing *Davis* for this point).

²⁷⁰ *Davis*, 512 U.S. at 458 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991)). For a description of *Davis*’s clear invocation rule, see *supra* notes 197–98 and accompanying text.

²⁷¹ *Davis*, 512 U.S. at 461.

²⁷² See *supra* text accompanying note 213.

²⁷³ *Thompkins*, 130 S. Ct. at 2260 (quoting *Moran v. Burbine*, 475 U.S. 412, 427 (1986)); see also *id.* at 2261, 2262 (again citing *Burbine* for this proposition).

tried to contact Burbine.²⁷⁴ The *Burbine* Court did not intend even to address, much less “reduce[] the impact” of, *Miranda*’s core requirements or its waiver rules. Like *Davis*, *Burbine* was a case where the suspect executed a written waiver of his rights; in fact, Burbine signed three waiver forms prior to being interrogated.²⁷⁵ Thus, neither *Davis* nor *Burbine* supported the *Thompkins* Court’s grudging view of the policy goals underlying *Miranda* or its expansive view of the implied waiver doctrine.

In addition to undermining *Miranda* and misciting *Davis* and *Burbine*, *Thompkins* also dramatically extended *North Carolina v. Butler*. The implied waiver standard articulated in that case required proof that the suspect understood her rights and engaged in “a course of conduct indicating waiver.”²⁷⁶ But the *Thompkins* majority took that notion much further in holding that a single “uncoerced statement” constituted “a course of conduct indicating waiver.”²⁷⁷ In fact, most of the Supreme Court’s opinion in *Butler* was focused on rejecting the state supreme court’s “inflexible *per se* rule” that *Miranda* waivers must be express, and the Court did not even indicate whether the implied waiver standard was satisfied on the facts before it.²⁷⁸

Even so, *Butler* is a far cry from *Thompkins*. *Butler* specifically and “repeatedly” acknowledged that he understood his rights, and he expressly agreed to talk to the police.²⁷⁹ But he declined to sign a waiver form, saying “I will talk to you but I am not signing any form.”²⁸⁰ There was no indication that any time elapsed between *Butler*’s refusal to execute a written waiver and his answers to the FBI agent’s questions.²⁸¹ Moreover, he participated fully in the conversation that followed, providing detailed

²⁷⁴ The complete sentence read as follows: “Because, as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process, a rule requiring the police to inform the suspect of an attorney’s efforts to contact him would contribute to the protection of the Fifth Amendment privilege only incidentally, if at all.” *Burbine*, 475 U.S. at 427.

²⁷⁵ *See id.* at 417–18.

²⁷⁶ *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

²⁷⁷ *Thompkins*, 130 S. Ct. at 2262.

²⁷⁸ *Butler*, 441 U.S. at 375; *see also id.* at 370 (“We granted certiorari to consider whether [the North Carolina Supreme Court’s] *per se* rule reflects a proper understanding of the *Miranda* decision.”).

²⁷⁹ *State v. Butler*, 244 S.E.2d 410, 412 (N.C. 1978).

²⁸⁰ *Butler*, 441 U.S. at 371.

²⁸¹ *See Butler*, 244 S.E.2d at 412 (“Since defendant had stated he would talk to Officer Martinez, he was then asked ‘if he had participated in the armed robbery and he stated that he was there but that he did not actually participate as such in the armed robbery.’”) (quoting FBI agent’s testimony) (emphasis added).

responses to the agent's inquiries.²⁸² *Thompkins*, by contrast, refused to sign a form even acknowledging that he understood the *Miranda* warnings, and the record did not clearly indicate whether he verbally expressed an understanding of his rights.²⁸³ He then sat in virtual silence for almost three hours, ultimately uttering a single incriminating word. The two cases are therefore very different in terms of each prong of *Butler*'s implied waiver standard—both the evidence that the defendant understood his *Miranda* rights and that he engaged in a “course of conduct indicating waiver.”

By extending *Butler*'s implied waiver doctrine to a case like *Thompkins*, the Court allows the police to “persist[] in repeated efforts to wear down [a suspect's] resistance,” and then argue that she impliedly waived her rights as soon as she slips and says one responsive word.²⁸⁴ This result flies in the face of *Miranda*'s admonition that a finding of waiver cannot be predicated “simply [on] the fact that a confession was in fact eventually obtained.”²⁸⁵ In *Thompkins*'s case, there was nothing—other than the one-word “confession”—on which to base a finding of “conduct indicating waiver.”

Despite its lack of fidelity to precedent, the *Thompkins* Court purported to defend its waiver decision on pragmatic grounds, observing that “the practical constraints and necessities of interrogation” dictate that *Miranda* waivers be accomplished “through means less formal than a typical waiver on the record in a courtroom.”²⁸⁶ Likewise, the Court

²⁸² In response to the officer's first question, *Butler* admitted being present at the scene of the robbery but denied participating in the crime. See *supra* note 281. At that point, the following conversation took place:

“We asked him to explain a little further and he stated that he and an accomplice had been drinking heavily that day and were walking around and decided to rob a gas station. They came up to a gas station where the attendant was locking up for the night and walked inside the station. [Butler] stated that the fellow with him pulled out a gun and told the gas station attendant to get in his car. He then said that the gas station attendant tried to run away and that his friend shot the attendant. At this point Mr. Butler stated that he ran away from them and didn't look back. He stated that he ran to a bus station where he caught a bus to Virginia and that in Virginia he caught another bus to New York where he had been until he was apprehended that morning. We asked him if the other person was someone by the name of Elmer Lee and we had had communications from our Charlotte office saying that Elmer Lee had also been involved. Butler said that Lee was there.”

State v. Butler, 244 S.E.2d at 412 (quoting FBI agent's testimony).

²⁸³ See *supra* note 179 and accompanying text. The conflict in the testimony on this point perhaps explains why Justice Kennedy relied only on the fact that *Thompkins* was literate and understood English in finding sufficient evidence that he understood his rights. See *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2262 (2010); see also *supra* note 244 and accompanying text.

²⁸⁴ *Michigan v. Mosley*, 423 U.S. 96, 105–06 (1975).

²⁸⁵ *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

²⁸⁶ *Thompkins*, 130 S. Ct. at 2262.

referenced the importance of “reduc[ing] the impact of the *Miranda* rule on legitimate law enforcement.”²⁸⁷ But the police conduct in *Thompkins* more closely resembled a deliberate effort to circumvent *Miranda* than one prompted by the needs of “legitimate law enforcement” or the “practical constraints” of interrogation. The notification of rights paper Thompkins was given to sign was not a waiver of rights form; rather, it simply inquired whether he understood his rights.²⁸⁸ The police therefore may have made a strategic decision not to ask suspects whether they were willing to waive their rights, for fear that they would not get the answer they were looking for.²⁸⁹ Whatever the intent of Detective Helgert and the Southfield, Michigan Police Department, the Court’s decision allows law enforcement officials who are determined to subvert *Miranda* to engage in this very behavior—to manipulate the implied waiver doctrine and make a case for waiver so long as they read the warnings in a language the suspect can understand and she eventually makes some incriminating statement, even hours into the interrogation session. In so holding, *Thompkins*’s implied waiver discussion deviated substantially from both Supreme Court precedent and a pragmatic approach to *Miranda*.

C. INTERROGATING WITHOUT WAIVER

As damaging to *Miranda* as *Thompkins*’s invocation and implied waiver holdings were, the biggest blow to the landmark ruling came in the final portion of the Court’s decision. In three quick paragraphs, the Court rejected Thompkins’ argument that the officers were required to wait until he had waived his rights before beginning to interrogate him. So long as the police make sure a suspect “receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions,” the Court said, they may start the interrogation process even though the suspect “has neither invoked nor waived” *Miranda*.²⁹⁰ In combination with the Court’s implied waiver analysis, the

²⁸⁷ *Id.* at 2261 (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000)).

²⁸⁸ See *supra* note 178. The form, entitled “Notification of Constitutional Rights and Statement,” was referred to by the State as a “notification form,” see Reply Brief at 7, *Thompkins*, 130 S. Ct. 2250 (No. 08-1470), and by the Solicitor General as an “advice of rights form.” See Brief for the United States, *supra* note 227, at 2.

²⁸⁹ Compare Weisselberg, *supra* note 149, at 1585 (reporting that “[a]dvanced [police] training on implied waivers is widespread” in California, and even though “express waivers are preferred for proof purposes,” some “trainers emphasize the legality and strategic advantages of implied waivers”), with Transcript of Oral Argument at 26–27, *Thompkins*, 130 S. Ct. 2250 (No. 08-1470) (argument made by the Solicitor General’s office) (noting that federal agents often try to secure written waivers “to avoid . . . problems of proof” at trial).

²⁹⁰ *Thompkins*, 130 S. Ct. at 2263, 2264.

pre-waiver interrogation part of the opinion reduces *Miranda* to a mere formality, essentially mandating only that the police remember to administer the warnings and otherwise reinstating the voluntariness due process test *Miranda* was designed to replace.

Surprisingly, this portion of the Court's opinion did not elicit much reaction from the four dissenters,²⁹¹ even though it contradicted well-established assumptions made in both prior Supreme Court opinions and the lower courts that the proper sequencing is warnings-waiver-interrogation. Although the majority did not discuss the lower courts' treatment of this issue, its decision went well beyond the prevailing lower court practice: most courts had not allowed the police to keep a suspect in interrogation²⁹² for almost three hours before securing a *Miranda* waiver.²⁹³

The *Thompkins* majority did, however, claim that its decision was consistent with its own precedent, even *Miranda* itself. In fact, the Court set the stage for this part of the opinion when it first introduced *Miranda* without any reference to waiver, simply describing the case as having "formulated a warning that must be given to suspects before they can be subjected to custodial interrogation."²⁹⁴ Then, in the portion of the opinion approving pre-waiver interrogation, the Court cited *Miranda* for two propositions: first, that a suspect's confession is not "admissible at trial" unless she received *Miranda* warnings,²⁹⁵ and second, that once the administration of warnings has been proven, the courts may "proceed to consider" whether the suspect waived her rights.²⁹⁶ (Notably, the Court had no support for the sentence that followed—that in evaluating whether the evidence suffices to demonstrate a valid waiver of *Miranda*, the courts "of course" may "consider[] . . . the whole course of questioning."²⁹⁷)

Although the Court did not specify the precise language in *Miranda* on which it was relying for either proposition, both the State of Michigan and the Solicitor General quoted language found on the same pages cited by the Court in support of their theory that only the warnings themselves (and not

²⁹¹ The dissent did point out, however, that "many contemporary police training resources instruct officers to obtain a waiver of rights prior to proceeding at all with an interrogation." *Id.* at 2270 n.3 (Sotomayor, J., dissenting).

²⁹² As discussed above, *see supra* note 193, there was no dispute that *Thompkins* was subjected to interrogation.

²⁹³ *See supra* notes 250–54 and accompanying text (citing cases where suspects freely participated in the conversation from the beginning).

²⁹⁴ *Thompkins*, 130 S. Ct. at 2259.

²⁹⁵ *Id.* at 2264 (citing *Miranda v. Arizona*, 384 U.S. 436, 471 (1966)).

²⁹⁶ *Id.* (citing *Miranda*, 384 U.S. at 476).

²⁹⁷ *Id.*

a preliminary waiver) are “an absolute prerequisite to *interrogation*,”²⁹⁸ whereas both the warnings and proof of waiver are “prerequisites to the *admissibility*” of the defendant’s confession in court.²⁹⁹ Thus, these parties took the position that *Miranda*’s “unstated point here” was that *the police* are allowed to interrogate as soon as they read the warnings, but *the prosecution* may not introduce any statement emerging from that interrogation until “it establishes that a waiver occurred.”³⁰⁰ This formalistic interpretation of Chief Justice Warren’s words, while literally accurate, contradicts other language in his opinion, undermines the *Miranda* Court’s fundamental assumptions about police interrogation, and contravenes the very notion of waiver.

First, other portions of the *Miranda* opinion linked the concept of “warnings and waiver” together, thus explicitly repudiating the *Thompkins* Court’s approval of pre-waiver interrogation. The *Miranda* Court noted, for example, that “[t]he requirement of warnings *and* waiver of rights is a fundamental with respect to the Fifth Amendment privilege and *not simply a preliminary ritual* to existing methods of interrogation.”³⁰¹ This language suggested that both the administration of *Miranda* warnings *and* the elicitation of a waiver are at minimum the “preliminary ritual” necessary before interrogation may begin.

Second, the notion that police may conduct interrogations before obtaining a waiver contravenes *Miranda*’s fundamental premise about the inherent coerciveness of police interrogation—that, in the words of Chief Justice Warren, “the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.”³⁰² Even though the *Miranda* decision was a compromise—it did not go so far as to place a lawyer in every interrogation room, prohibit particular interrogation

²⁹⁸ *Miranda*, 384 U.S. at 471 (emphasis added), *quoted in* Brief for the United States, *supra* note 227, at 20–21; *see also* Brief for Petitioner, *supra* note 178, at 41 (relying on *Miranda*’s statement that a suspect must “be warned prior to any questioning” in support of the same argument) (quoting *Miranda*, 384 U.S. at 479).

²⁹⁹ *Miranda*, 384 U.S. at 476 (emphasis added), *quoted in* Brief for Petitioner, *supra* note 178, at 40 and Brief for the United States, *supra* note 227, at 21; *see also* Reply Brief, *supra* note 288, at 15–16 (citing *Miranda*’s statement that a confession is inadmissible “unless and until such warnings and waiver are demonstrated by the prosecution at trial” in support of the same argument) (quoting *Miranda*, 384 U.S. at 479).

³⁰⁰ Brief for Petitioner, *supra* note 178, at 41; *see also* Brief for the United States, *supra* note 227, at 20–21 (making the same argument).

³⁰¹ *Miranda*, 384 U.S. at 476 (emphasis added); *see also id.* at 477 (observing that “[t]he principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation”).

³⁰² *Id.* at 455.

techniques, or put an end to interrogation altogether³⁰³—the Court was not naive enough to believe that the coercive potential of interrogation suddenly disappears as soon as a suspect is read her rights.

In fact, the *Miranda* opinion repeatedly spoke of the compulsion that continues to pervade the interrogation room *after* warnings are read. For example, the Court recognized that even “[o]nce warnings have been given . . . , the setting of in-custody interrogation operates on the individual to overcome free choice.”³⁰⁴ Likewise, in discussing the importance of the right to counsel, the *Miranda* Court noted that “[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators.”³⁰⁵ Therefore, the Court realistically acknowledged, “[a] once-stated warning, delivered by those who will conduct the interrogation,” cannot dispel the inherent compulsion characterizing the interrogation process.³⁰⁶ The same Court could not have envisioned that the police would merely read the required warnings and then immediately launch into what the Court saw as an inherently coercive process without first securing a waiver.

Finally, *Thompkins*’s concept of pre-waiver interrogation flies in the face of the fundamental essence of waiver. By waiving *Miranda*, a suspect is giving up her right not to be interrogated if she prefers not to speak to the police at all or wishes to do so only with the assistance of an attorney. Thus, the notion of pre-waiver interrogation allows the police to conduct a procedure that requires a waiver and hope that evidence of that waiver will turn up later. No one would argue that the police may begin a warrantless consent search without first obtaining consent,³⁰⁷ or that the prosecutor may start calling witnesses at trial in the absence of defense counsel unless the defendant has already waived the right to counsel,³⁰⁸ and then rely on “the

³⁰³ See *supra* notes 6–8 and accompanying text.

³⁰⁴ *Miranda*, 384 U.S. at 473–74.

³⁰⁵ *Id.* at 469; see also *Florida v. Powell*, 130 S. Ct. 1195, 1203 (2010) (quoting this language in making the same point).

³⁰⁶ *Miranda*, 384 U.S. at 469; see also *id.* at 469–70 (likewise observing that “[a] mere warning given by the interrogators is not alone sufficient to accomplish that end”). The Court has reiterated this point on other occasions. See *Minnick v. Mississippi*, 498 U.S. 146, 153–54 (1990) (noting that *Miranda* “specifically rejected [the] theory that [even] the opportunity to consult with one’s attorney would substantially counteract the compulsion created by custodial interrogation,” given that “[a] single consultation with an attorney does not remove the suspect from . . . the coercive pressures that accompany custody”).

³⁰⁷ See *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (allowing searches without probable cause or a warrant if “conducted pursuant to consent”).

³⁰⁸ See *Faretta v. California*, 422 U.S. 806, 807 (1975) (deciding that criminal defendants have a Sixth Amendment right to “proceed without counsel” at trial if they “voluntarily and intelligently elect[] to do so”) (emphasis omitted).

whole course” of subsequent developments to prove the necessary waiver.³⁰⁹

Thus, the more plausible explanation for the language in *Miranda* quoted by the State and Solicitor General is that everyone assumed the proper sequencing would be warnings-waiver-interrogation and Chief Justice Warren never considered the possibility that the few isolated references to “warnings” preceding interrogation would be interpreted literally and not as shorthand for the whole “warnings and waiver” process. Certainly, that is how the majority opinion was interpreted by the *Miranda* dissenters,³¹⁰ and how it has been read by later Supreme Court opinions,³¹¹

³⁰⁹ *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2264 (2010); *cf.* *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (per curiam) (holding that a suspect’s “subsequent statements” cannot be used to cast doubt on her prior invocation of *Miranda* rights, but instead are “relevant only to the question” whether she later waived the rights she had previously invoked). *But cf.* Laurent Sacharoff, *Miranda’s Hidden Right*, 3–4 (Working Paper Series Nov. 18, 2010) (draft), available at <http://ssrn.com/abstract=1711410> (posted Nov. 19, 2010) (arguing that the Supreme Court has implicitly treated the *Miranda* right to silence as encompassing “two distinct sub-rights”—the right “literally not to speak” and the right “to cut off police questioning”—and has required affirmative invocation only of the latter, thus allowing the police to begin interrogation so long as the suspect “has not invoked his right to cut off police questioning,” but refusing to admit any confession that results from the interrogation absent proof that “he waived the right not to speak”).

³¹⁰ *See Miranda*, 384 U.S. at 526 (White, J., dissenting) (opening his dissent by objecting that “[t]he proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment”); *id.* at 537 (describing the majority opinion as “declar[ing] that the accused may not be interrogated without counsel present, absent a waiver of the right to counsel”); *id.* at 502 (Clark, J., dissenting) (protesting that “even in *Escobedo* the Court never hinted that an affirmative ‘waiver’ was a prerequisite to questioning”); *id.* at 521 (Harlan, J., dissenting) (illustrating his observation that the FBI procedure in effect at that time “falls sensibly short of the Court’s formalistic rule[]” by noting that “there is no indication that FBI agents must obtain an affirmative ‘waiver’ before they pursue their questioning”).

³¹¹ *See Missouri v. Seibert*, 542 U.S. 600, 608 (2004) (plurality opinion) (noting, in explaining the procedures dictated by *Miranda*, that “failure to give the prescribed warnings and obtain a waiver of rights *before custodial questioning* generally requires exclusion of any statements obtained”) (emphasis added); *Davis v. United States*, 512 U.S. 452, 458 (1994) (describing the *Miranda* rules and observing, “[i]f the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him”); *Moran v. Burbine*, 475 U.S. 412, 420 (1986) (pointing out that the police “followed [the *Miranda*] procedures with precision,” and explaining that they “administered the required warnings, sought to assure that respondent understood his rights, and obtained an express written waiver prior to eliciting each of the three statements”).

by the authors of interrogation manuals,³¹² and by commentators.³¹³ In fact, in a recent symposium honoring *Miranda*'s fortieth anniversary, both a persistent critic of the decision and one of its most ardent supporters made that same assumption.³¹⁴ As Professor Kamisar pointed out, “[t]he assertion of rights or their waiver is supposed to occur shortly after the curtain goes up—not postponed until the second or third act.”³¹⁵

Although the *Thompkins* majority's discussion of pre-waiver interrogation did include two somewhat cryptic citations to *Miranda*, the Court derived its primary precedential support from *Butler*. That is, the Court argued that the implied waiver doctrine was “inconsistent with a rule that requires a waiver at the outset.”³¹⁶ But, while *Butler* did suggest that *Miranda* waivers can be inferred from “a course of conduct indicating waiver,” it did not specify when that “course of conduct” must occur.³¹⁷ The question of timing or sequencing was not before the Court in that case. In fact, allowing police to conduct pre-waiver interrogation and then support a finding of implied waiver based on “the whole course of questioning”³¹⁸ is contrary to what *Butler* (and, of course, *Miranda*) expressly provided—that proof of implied waiver cannot be premised simply on a confession.³¹⁹

³¹² This includes both manuals published in the wake of *Miranda*, see INBAU & REID, *supra* note 7, at 1 (commenting, one year after *Miranda*, that police may conduct interrogations “after the recently prescribed warnings have been given to the suspect. . . , and after he has waived his self-incrimination privilege and his right to counsel”), as well as contemporary ones. See *Thompkins*, 130 S. Ct. at 2270 n.3 (Sotomayor, J., dissenting) (citing recent manuals, including the current edition of the Inbau and Reid book); Brief for the National Association of Criminal Defense Lawyers and the American Civil Liberties Union as Amici Curiae in Support of Respondent at 11–12, *Thompkins*, 130 S. Ct. 2250 (No. 08-1470) (same).

³¹³ See, e.g., 2 LAFAYETTE ET AL., *supra* note 69, § 6.1(c), at 607 (introducing *Miranda* by explaining that it protects a suspect from being “questioned unless he waived his rights after being advised” of the required warnings); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 858–59 (1996) (observing that a suspect “can refuse at the start of an interview to waive his rights. . . , thus precluding any interview”); Weisselberg, *supra* note 149, at 1529 (noting that *Miranda* “characterized the warnings and waivers as procedural predicates that must be met before questioning could be initiated”).

³¹⁴ See Ronald J. Allen, *The Misguided Defenses of Miranda v. Arizona*, 5 OHIO ST. J. CRIM. L. 205, 211 (2007) (observing that “in one sense *Miranda* is quite precise: give the warnings and get a waiver or you can’t engage in custodial interrogation”); Kamisar, *supra* note 4, at 172 (likewise noting that *Miranda* “conditions [custodial police questioning] on the giving of certain warnings by the police and the obtaining of waivers”).

³¹⁵ Kamisar, *supra* note 4, at 188.

³¹⁶ *Thompkins*, 130 S. Ct. at 2263.

³¹⁷ *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

³¹⁸ *Thompkins*, 130 S. Ct. at 2264.

³¹⁹ See *supra* notes 255, 257 and accompanying text.

Nevertheless, the *Thompkins* Court pointed to language in *Butler* indicating that waiver can be inferred from “the actions and words of the person interrogated.”³²⁰ But *Butler*’s reference to “the person interrogated” does not signal that police may begin the interrogation process without first securing a waiver of *Miranda* (whether express or implied). Given that the issue of sequencing never arose in *Butler*, the more plausible reading of this phrase is that the Court was using “the person interrogated” as a synonym for “the suspect” or “the defendant.”

The *Thompkins* Court also observed that the *Butler* majority “rejected the rule proposed” by Justice Brennan in dissent, who would have “require[ed] the police to obtain an *express* waiver of [*Miranda* rights] before proceeding with interrogation.”³²¹ As discussed in the prior section, however, the *Butler* Court’s attention was focused on the question whether *Miranda* allowed implied waivers at all or instead required that they be express, and not on the timing of those waivers.³²² Thus, while the Justices in the *Butler* majority obviously did not subscribe to Justice Brennan’s dissenting views, what they presumably objected to was his requirement of an “express waiver” and not his suggestion—which simply reflected the widely held assumption post *Miranda*—that any waiver must occur “before” interrogation.

Like the *Thompkins* majority, the State of Michigan and the Solicitor General also relied on *Butler*, echoing the Court’s point that “the decision in *Butler* clearly contemplates pre-waiver interrogation.”³²³ Their briefs maintained that without pre-waiver interrogation, nothing is left of the implied waiver doctrine because police are “effectively requir[ed] to obtain an express waiver from the inception of the interview.”³²⁴ But the Court and the parties are wrong to suggest that there is no work for the implied waiver doctrine to do if the police must secure a waiver of *Miranda* prior to initiating interrogation. *Butler*, for example, sent conflicting signals as to his willingness to waive his rights, but his refusal to sign the waiver form was not fatal to the prosecution’s waiver argument given his verbal agreement to talk to the FBI and his ready response to questions.³²⁵ Thus, the concept of implied waiver is still necessary to support a finding of

³²⁰ *Thompkins*, 130 S. Ct. at 2263 (quoting *Butler*, 441 U.S. at 373).

³²¹ *Id.* (quoting *Butler*, 441 U.S. at 379 (Brennan, J., dissenting)) (emphasis added).

³²² See *supra* note 278 and accompanying text.

³²³ Reply Brief, *supra* note 288, at 16; see also Brief for the United States, *supra* note 227, at 21 (“A rule demanding pre-interrogation waiver also would be inconsistent with the Court’s implied waiver doctrine.”).

³²⁴ Reply Brief, *supra* note 288, at 18.

³²⁵ See *Butler*, 441 U.S. at 371. *Butler* was decided before the Court accepted the concept of qualified waiver in *Connecticut v. Barrett*, 479 U.S. 523 (1987).

waiver in cases where a suspect equivocates about her intentions. Moreover, the notion of implied waiver is responsive to the contention that, even though Butler waived his right to remain silent by agreeing to speak to the FBI, he never waived his *Miranda* right to counsel.³²⁶ Additionally, as Justice Alito suggested at oral argument, the implied waiver doctrine enables the police to interrogate a suspect who does not agree to talk but does express a willingness at least to listen to the police officer's questions.³²⁷ Similarly, the suspect who initiates a conversation with the police following the administration of *Miranda* warnings has impliedly waived her rights and is subject to interrogation.³²⁸ Accordingly, *Butler* cannot reasonably be interpreted as upsetting the *Miranda* Court's assumptions about the proper sequencing of warnings-waiver-interrogation, and the continued vitality of the implied waiver doctrine provides no justification for allowing pre-waiver interrogation.

In addition to *Miranda* and *Butler*, the *Thompkins* majority also relied on *Davis v. United States* to support its approval of pre-waiver interrogation, specifically *Davis*'s observation that "the primary protection afforded suspects subject[ed] to custodial interrogation is the *Miranda* warnings themselves."³²⁹ Here again, however, the Court took this statement out of context. As discussed in the prior section, the *Davis* Court was observing in this part of the opinion that the "primary protection" given

³²⁶ See Brief for Petitioner, *supra* note 178, at 33; Transcript of Oral Argument, *supra* note 289, at 20 (argument made by Solicitor General's office). Note, however, that the Court has never required that each of the *Miranda* rights be waived individually, but has assumed that a suspect who responds affirmatively when asked whether she is "willing to waive her rights" or "willing to talk to us" has made a valid waiver of *Miranda*. See, e.g., *Florida v. Powell*, 130 S. Ct. 1195, 1200 (2010) (noting that Powell said that he was "'willing to talk' to the officers") (quoting *Powell v. State*, 969 So. 2d 1060, 1063 (Fla. Dist. Ct. App. 2007)); *Colorado v. Spring*, 479 U.S. 564, 567 (1987) ("Spring then signed a written form stating that he understood and waived his rights, and that he was willing to make a statement and answer questions."); *Colorado v. Connelly*, 479 U.S. 157, 160 (1986) ("Respondent stated that he understood these rights but he still wanted to talk about the murder.").

³²⁷ See Transcript of Oral Argument, *supra* note 289, at 32. Although Justice Kennedy commented that *Thompkins*'s behavior "implied the very kind of statement" Justice Alito posited, *id.* at 37, a suspect who is in custody, and therefore by definition cannot get up and leave the room, does not indicate a willingness to listen to the police by spending more than two hours "looking down" and speaking a few words "very sporadically." Joint Appendix, *supra* note 181, at 152a, 9a.

³²⁸ E.g., *United States v. Gell-Iren*, 146 F.3d 827, 829 (10th Cir. 1998) (suspect asked to "talk confidentially" to an FBI agent); *Stawicki v. Israel*, 778 F.2d 380, 383-84 (7th Cir. 1985) (finding that suspect's "request to speak to" another detective who had left the room "prior to confessing indicated his willingness to make a statement").

³²⁹ *Davis v. United States*, 512 U.S. 452, 460 (1994), *quoted in Berghuis v. Thompkins*, 130 S. Ct. 2250, 2263 (2010).

suspects is *Miranda*'s first layer (the warning and waiver procedures set out in *Miranda* itself) and that suspects must act affirmatively in order to trigger the “second layer of [*Miranda*] prophylaxis” (the protections accorded suspects who invoke their rights).³³⁰ But *Davis* did not purport to effect any changes in the first layer or to disturb the warnings-waiver-interrogation sequencing that *Miranda* envisioned—and that was scrupulously followed by the investigators who questioned *Davis*.³³¹

Not only did the *Thompkins* Court misconstrue the precedents it did cite, it also ignored the implications of the decision in *Oregon v. Bradshaw*.³³² *Bradshaw* invoked his right to counsel, thus placing himself under the protective shield of *Edwards*, but a plurality of the Court found that he then lost the *Edwards* protection by asking, “Well, what’s going to happen to me now?” and thereby “initiat[ing] dialogue with the authorities.”³³³ The opinion did not end there, however. Rather, the plurality said—and all but Justice Powell agreed³³⁴—that “[s]ince there was no violation of the *Edwards* rule in this case” (given *Bradshaw*’s initiation), “the next inquiry” was whether the prosecution had sustained its burden of proving that *Bradshaw* had “validly waive[d]” his rights.³³⁵

Bradshaw’s admonition that initiation and waiver are “separate” inquiries³³⁶ suggests that *Miranda* divided the universe of suspects into three categories: those who invoke their rights (and fall under the protection of *Edwards* or *Mosley*), those who waive their rights (and may be interrogated), and those who neither invoke nor waive their rights. The last group—the suspects in limbo as it were—are not entitled to the special

³³⁰ *Id.* at 458 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991)). For further discussion of this language, see *supra* notes 266–72 and accompanying text.

³³¹ See *Davis*, 512 U.S. at 454–55.

³³² *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) (plurality opinion).

³³³ *Id.* at 1044–46 (quoting *Wyrick v. Fields*, 459 U.S. 42, 46 (1982) (per curiam)) (concluding that *Bradshaw*’s question was not “merely a necessary inquiry arising out of the incidents of the custodial relationship,” but instead “evinced a willingness and a desire for a generalized discussion about the investigation”). Justice Marshall’s dissent rightly pointed out, however, that the question “might well have evinced a desire for a ‘generalized’ discussion” if “posed by Jean-Paul Sartre before a class of philosophy students,” but here showed only *Bradshaw*’s “‘desire’ . . . to find out where the police were going to take him.” *Id.* at 1055 (Marshall, J., dissenting).

³³⁴ See *Bradshaw*, 462 U.S. at 1050 (Powell, J., concurring in the judgment) (arguing that a “two-step analysis could confound the confusion” surrounding *Edwards*).

³³⁵ *Bradshaw*, 462 U.S. at 1046 (quoting *Edwards v. Arizona*, 451 U.S. 477, 486 n.9 (1981)) (emphasis added).

³³⁶ *Id.* at 1045 (calling the initiation and waiver “inquiries . . . separate,” and rejecting the state court’s view that a suspect’s “‘initiation’ of a conversation or discussion . . . not only satisfied the *Edwards* rule, but *ex proprio vigore* sufficed to show a waiver of the previously asserted right to counsel”).

protections afforded by *Edwards* and *Mosley*, but they may not be subjected to interrogation until they execute a waiver of their rights. Bradshaw's initiation of further discussion with the police took him out of the "invocation" box and returned him to "limbo." But the police could not justify interrogating him until they were able to move him into the "waiver" box by securing some sort of waiver of his *Miranda* rights. Thus, the *Bradshaw* plurality pointed out, *Edwards* barred "further interrogation" of a suspect who asserted the right to counsel (and did nothing to initiate further communication), but *Edwards* "did not . . . hold that the 'initiation' of a conversation by a defendant . . . would amount to a waiver of a previously invoked right to counsel."³³⁷

Bradshaw's support for the notion that *Miranda* created three classifications of suspects cannot be reconciled with *Thompkins's* concept of pre-waiver interrogation. The *Thompkins* Court effectively saw only two types of suspects: those who invoke their rights and those who waive them. Thus, in putting *Thompkins* in the latter category, the Court reasoned that "a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police."³³⁸ By thereby assuming that every suspect who has not invoked her rights is deemed to have waived them and eliminating the "limbo" box, the Court undermined the well-established propositions that suspects may not be presumed to have waived their rights³³⁹ and that silence does not constitute waiver.³⁴⁰ Likewise, it contradicted the admonition that waiver and invocation are "entirely distinct inquiries" that should not be "blurred" or "merg[ed] together."³⁴¹

Not only is the three-box paradigm faithful to Supreme Court precedent, it also resolves the slippery slope concerns raised at oral argument in *Thompkins*. Until the police administer *Miranda* warnings and secure a waiver, they may not engage in any behavior that rises to the level of "interrogation" under *Rhode Island v. Innis*,³⁴² whether they do so for hours (as in *Thompkins*) or only for a few minutes.³⁴³ On the other hand,

³³⁷ *Id.* at 1044.

³³⁸ *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2264 (2010).

³³⁹ See *supra* notes 258–59 and accompanying text.

³⁴⁰ See *supra* notes 255, 257 and accompanying text.

³⁴¹ *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (per curiam); see also *supra* notes 241–42 and accompanying text.

³⁴² *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980); see *supra* note 74.

³⁴³ See Transcript of Oral Argument, *supra* note 289, at 51–52 (Justice Kennedy and Chief Justice Roberts asking *Thompkins's* attorney whether her "argument would be the same if [the interview] was compressed to 45 minutes" or even "30 seconds").

anything they do short of “interrogation” prior to obtaining a waiver does not violate the warnings-waiver-interrogation sequencing.³⁴⁴

In addition to trying to shoehorn its decision into its precedents, the *Thompkins* majority also attempted to defend pre-waiver interrogation on pragmatic grounds. In advancing its pragmatic argument, the Court made the interesting observation that the interrogation process can provide suspects with “additional information” and help them make “a more informed decision, either to insist on silence or to cooperate.”³⁴⁵ This reasoning is fundamentally different from the core premise about the coerciveness of custodial interrogation that underlies *Miranda* and is reiterated in subsequent Supreme Court opinions. Given that premise, the only “additional information” the police are likely to be willing to provide will be designed to “overbear the [suspect’s] will” and “trade[] on [her] weakness.”³⁴⁶ In *Thompkins*, for example, the officers admittedly were not trying to educate the suspect about his options, but to “[e]licit . . . information . . . pertinent to [the] investigation.”³⁴⁷ They did so by trying to convince him—erroneously, of course—that telling his side of the story was to his advantage,³⁴⁸ and even by giving him (in Detective Helgert’s words) “disinformation” about a confession his accomplice had purportedly made.³⁴⁹

Moreover, the Court’s pragmatic defense of pre-waiver interrogation explicitly rested on its assumption that when suspects are aware that *Miranda* rights “can be invoked at any time,” they have “the opportunity to reassess [their] immediate and long-term interests.”³⁵⁰ Although the *Miranda* opinion spoke of the importance of the “right to cut off questioning,” Chief Justice Warren did not include it among the four

³⁴⁴ The same analysis applies to the tactic of “softening up” suspects even prior to administering *Miranda* warnings. See, e.g., Robert P. Mosteller, *Police Deception Before Miranda Warnings: The Case for Per Se Prohibition of an Entirely Unjustified Practice at the Most Critical Moment*, 39 TEX. TECH L. REV. 1239, 1260–62 (2007); Weisselberg, *supra* note 149, at 1555–57.

³⁴⁵ *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2264 (2010).

³⁴⁶ *Miranda v. Arizona*, 384 U.S. 436, 469, 455 (1966); see also *supra* notes 302–06 and accompanying text.

³⁴⁷ Joint Appendix, *supra* note 181, at 16a (testimony of Detective Helgert admitting that he spent “that whole period of time . . . using your skills as a detective and your training as a detective, and your experience as a human being, and police officer to attempt to [e]licit from Mr. Thompkins information which might be pertinent to your investigation for this offense”).

³⁴⁸ See *supra* notes 181–82, 193 and accompanying text.

³⁴⁹ Joint Appendix, *supra* note 181, at 149a (testimony of Detective Helgert).

³⁵⁰ *Thompkins*, 130 S. Ct. at 2264.

mandated warnings.³⁵¹ Thus, *Miranda* does not require that suspects be told they can assert their rights and end the interrogation at any time—even though some police departments (like Southfield, Michigan³⁵²) have added this information to their *Miranda* forms.³⁵³ In jurisdictions that choose not to do so but only to supply the baseline of advice required by *Miranda*, suspects often do not realize that they can change their mind, invoke their rights, and thereby put an end to the interrogation.³⁵⁴ In those cases, then, the *Thompkins* Court’s confidence that suspects can “reassess” their options is misplaced.

Finally, the *Thompkins* Court’s pragmatic argument is ironic given other Supreme Court cases where defendants have been the ones seeking “additional information.” On those occasions, the Court has not hesitated to reject such requests on the ground that the police need not “supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak,”³⁵⁵ or that “the additional information could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature.”³⁵⁶ Thus, the Court seems to envision that the flow of information is completely subject to the control of the police, despite *Miranda*’s efforts to “place the accused on a more equal footing with the police.”³⁵⁷

³⁵¹ *Miranda*, 384 U.S. at 474; see also *id.* (envisioning that suspects may exercise their rights “at any time prior to or during questioning”); *id.* at 475–76 (noting that “where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent”).

³⁵² In addition to laying out the four basic *Miranda* rights, the waiver form provided to *Thompkins* said: “You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned.” *Thompkins*, 130 S. Ct. at 2256.

³⁵³ See Rogers et al., *supra* note 155, at 131 (reporting that the “vast majority” of police departments surveyed included this information in their warnings). For specific examples, see *Duckworth v. Eagan*, 492 U.S. 195, 198 (1989); *Colorado v. Spring*, 479 U.S. 564, 567 (1987); *Godsey*, *supra* note 59, at 806–07 n.100 (citing examples).

³⁵⁴ See *Godsey*, *supra* note 59, at 783–84 (describing the *Miranda* warnings as “out of date,” in part because they do not include this information); *Stuntz*, *supra* note 25, at 988 (finding that “[a]lmost no one invokes his *Miranda* rights once questioning has begun”); *Thomas*, *supra* note 6, at 228–29 (suggesting, therefore, that this information be required as part of *Miranda* warnings).

³⁵⁵ *Moran v. Burbine*, 475 U.S. 412, 422 (1986) (ruling that police need not inform suspect that an attorney tried to contact him).

³⁵⁶ *Colorado v. Spring*, 479 U.S. 564, 577 (1987) (holding that police need not tell suspect what crimes will be discussed during the interrogation); see also *id.* at 576 (“We have held that a valid waiver does not require that an individual be informed of all information ‘useful’ in making his decision or all information that ‘might . . . [affect] his decision to confess.’”) (quoting *Burbine*, 475 U.S. at 422).

³⁵⁷ 2 LAFAYETTE ET AL., *supra* note 69, § 6.9(e), at 834 (quoting *Recent Cases*, *Frazier v. United States*, 419 F.2d 1161 (D.C. Cir. 1969), 26 VAND. L. REV. 1069, 1076 (1973)).

This lack of symmetry is part of a larger pattern. The Court has consistently been willing to give an expansive reading to statements made by the police and the suspect in the interrogation room when doing so favors the prosecution,³⁵⁸ but it has been much more literal and shown greater reluctance to adopt similarly generous interpretations that support the defendant.³⁵⁹ In fact, the decision in *Thompkins* seems all the more one-sided given that the Court reached out to issue a wide-reaching substantive decision in a case that could have been resolved under the deferential AEDPA standard of review.³⁶⁰

From a pragmatic viewpoint, then, the *Thompkins* opinion falls short. By endorsing the police procedures used in that case, the Court reversed widely held assumptions about the proper sequencing of warnings-waiver-interrogation and essentially eviscerated the *Miranda* doctrine. A police officer may now read the *Miranda* warnings in a quick, bureaucratic tone of voice, trying to give the impression that they are mere formalities,³⁶¹ ask if the suspect understands (or just make sure she can read the form or speaks the language in which the warnings were given³⁶²), wait a split second to give her “an opportunity to invoke” her rights,³⁶³ and then immediately launch into the interrogation. This strategy will be foolproof except in the unusual case where the suspect has the nerve to interrupt and speak up—and can manage to do so with the specificity needed to satisfy the strict unequivocal invocation standard.³⁶⁴ And, given *Thompkins*’s implied waiver holding, any statement the suspect makes—even a one-word response that comes hours into the interrogation session—is then

³⁵⁸ See *supra* notes 160–72, 332–33 and accompanying text (discussing *Florida v. Powell*, 130 S. Ct. 1195 (2010), and *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) (plurality opinion)).

³⁵⁹ See *supra* notes 197–200, 213, 222–40 and accompanying text (discussing *Davis v. United States*, 512 U.S. 452 (1994), and *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010)).

³⁶⁰ Compare *Thompkins*, 130 S. Ct. at 2264 (concluding that the state court’s rejection of *Thompkins*’s *Miranda* claim was “correct under de novo review and therefore necessarily reasonable under the more deferential AEDPA standard of review”), with *id.* at 2266 (Sotomayor, J., dissenting) (criticizing the majority for ignoring “longstanding principles of judicial restraint,” which “counsel leaving for another day the questions of law the Court reaches out to decide”). For the standard of review mandated by the AEDPA, see *supra* note 195.

³⁶¹ See *supra* note 22 and accompanying text.

³⁶² See *supra* note 244 and accompanying text.

³⁶³ *Thompkins*, 130 S. Ct. at 2263.

³⁶⁴ For cases illustrating how high a hurdle this has proven to be, see *supra* note 225 and accompanying text.

considered conclusive evidence that she impliedly waived her *Miranda* rights.³⁶⁵

In so holding, the Court basically reduced *Miranda* to a formality, requiring only that the police remember to read the warnings. As such, the Court allowed the police to engage in tactics not far removed from the “question first” strategy disapproved in *Missouri v. Seibert*.³⁶⁶ To be sure, the quick recital of warnings came first here rather than midway through the interrogation, but it is difficult to see how “a reasonable person in [Thompkins’s] shoes” would have thought “he had a genuine right to remain silent” when Detective Helgert immediately began the interrogation process and persisted for almost three hours in the face of almost complete silence on Thompkins’s part.³⁶⁷ By the time Thompkins made an incriminating comment, a reasonable person “would not have understood [the *Miranda* warnings] to convey a message that [he] retained a choice about continuing to [maintain his silence or instead to] talk.”³⁶⁸ Rather than requiring that the police “reasonably ‘conve[y]’” Thompkins’s rights, as the *Seibert* plurality did, the *Thompkins* Court endorsed “a police strategy adapted to undermine the *Miranda* warnings.”³⁶⁹

Thompkins is reminiscent not only of *Seibert* but also of *Dickerson*, as it essentially pushes back to center stage the voluntariness due process test the Court sought to replace in *Miranda*.³⁷⁰ Assuming the police administer the *Miranda* warnings, the only other road to suppression of a confession goes through the totality of the circumstances test. Thus, when the *Thompkins* Court held that the implied waiver doctrine’s requirement of “a course of conduct indicating waiver” is satisfied simply by an “uncoerced statement,”³⁷¹ it went on to find that standard met on the facts before it using standard voluntariness due process analysis, looking at the totality of

³⁶⁵ See *Thompkins*, 130 S. Ct. at 2264 (holding that “a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police”).

³⁶⁶ *Missouri v. Seibert*, 542 U.S. 600 (2004) (plurality opinion); see *supra* notes 18–21 and accompanying text.

³⁶⁷ *Seibert*, 542 U.S. at 617, 613.

³⁶⁸ *Id.* at 617.

³⁶⁹ *Id.* at 611 (quoting *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (quoting *California v. Prysock*, 453 U.S. 355, 361 (1981) (per curiam))).

³⁷⁰ *Dickerson v. United States*, 530 U.S. 428 (2000); see *supra* notes 12–17 and accompanying text.

³⁷¹ *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2262 (2010); see *supra* notes 245–48 and accompanying text.

the circumstances and finding no “facts indicating coercion.”³⁷² Similarly, at oral argument, when Thompkins’s attorney expressed concern that allowing the police to “immediately . . . go[] into interview mode” would lead to “badgering,” Chief Justice Roberts responded: “I thought there was no dispute on this record that there was no involuntariness. We are talking about a violation of the technical, important but formal, *Miranda* requirements. This is not a case where the person says: My statements were involuntary.”³⁷³

Moreover, in reaching the conclusion that there was no coercion undermining the validity of Thompkins’s implied waiver, the majority was basically satisfied that Thompkins was not “threatened or injured.”³⁷⁴ The dissenters, by contrast, invoked *Miranda*’s admonition that a “lengthy interrogation” preceding a confession is “strong evidence” of an invalid waiver—that “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 [and] inconsistent with any notion of a voluntary relinquishment of the privilege.”³⁷⁵ While the *Thompkins* majority did not cite this language, it found “no authority for the proposition that an interrogation of this length is inherently coercive.”³⁷⁶ In fact, it then went on to suggest that a finding of implied waiver could be made even in a case where the suspect held out longer than Thompkins did, noting that “even where interrogations of greater duration were held to be improper, they were accompanied, as this one was not, by other facts indicating coercion, such as an incapacitated and sedated suspect, sleep and food deprivation, and threats.”³⁷⁷

Obviously, this is not what the *Miranda* Court had in mind. There the Court made clear that its concerns extended beyond the suspect whose

³⁷² *Thompkins*, 130 S. Ct. at 2263; *see also id.* at 2262 (finding “no reason to require more in the way of a “voluntariness” inquiry in the *Miranda* waiver context than in the [due process] confession context”) (quoting *Colorado v. Connelly*, 479 U.S. 157, 169–70 (1986)).

³⁷³ *See* Transcript of Oral Argument, *supra* note 289, at 50. Likewise, in response to Justice Scalia’s comment, “I assume, that you . . . acknowledge that if the interrogation had . . . gone on for so long that it had become coercive, then that . . . last statement would . . . not be a voluntary waiver,” the attorney from the Solicitor General’s Office replied: “That’s right. But Respondent made a voluntariness argument throughout all of the courts in this case, and every court has rejected it.” *Id.* at 30; *see also* *State v. Kirtdoll*, 136 P.3d 417, 424 (Kan. 2006) (describing the implied waiver doctrine as “virtually indistinguishable” from the voluntariness test).

³⁷⁴ *Thompkins*, 130 S. Ct. at 2263.

³⁷⁵ *Miranda v. Arizona*, 384 U.S. 436, 476 (1966), *quoted in Thompkins*, 130 S. Ct. at 2269 (Sotomayor, J., dissenting).

³⁷⁶ *Thompkins*, 130 S. Ct. at 2263.

³⁷⁷ *Id.*

confession would have been suppressed under the voluntariness due process test. In fact, the *Miranda* opinion included an observation that would be an equally apt description of the facts of *Thompkins*:

It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury.³⁷⁸

Thompkins may not have been “subnormal” or “woefully ignorant” enough, and the three-hour interrogation session may not have been “lengthy” enough, to allow him to argue “[m]y statements were involuntary” under the totality of the circumstances test. But his inability to demonstrate coercion under the voluntariness due process test does not mean the police should have been allowed—in direct contravention of *Miranda*—to begin interrogating him before he had waived his rights, trying to convince him that “silence” would be “damning” and leaving him with the distinct impression that the interrogation was going to “continue” (despite his lack of participation) “until a confession [was] obtained.”

The predominance given the voluntariness due process test in *Thompkins* is likewise inconsistent with *Dickerson*'s recognition that efforts to “reinstate[] the totality test” undermine *Miranda*.³⁷⁹ And it is even more anomalous given that the amorphous voluntariness due process test—which has always been a difficult standard to satisfy and has been “condemned as ‘useless’ . . . ‘legal “double-talk””³⁸⁰—became an even higher hurdle after *Miranda*. As Chief Justice Rehnquist acknowledged in *Dickerson*, “‘cases in which a defendant can make a colorable argument that a self-incriminating statement was “compelled” despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.’”³⁸¹ By allowing police to reorder the well-established warnings-waiver-interrogation sequencing and reducing *Miranda* to a mere formality, the

³⁷⁸ *Miranda*, 384 U.S. at 468; see also *id.* at 457 (disapproving of even police interrogations that “do not evince overt physical coercion or patent psychological ploys”).

³⁷⁹ *Dickerson v. United States*, 530 U.S. 428, 442 (2000).

³⁸⁰ *Miller v. Fenton*, 474 U.S. 104, 116 n.4 (1985) (quoting Monrad G. Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 430 (1954), and ALBERT R. BEISEL, JR., CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT 48 (1955)).

³⁸¹ *Dickerson*, 530 U.S. at 444 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984)); see also Leo, *supra* note 24, at 1026 (noting that *Miranda* “creat[ed] a bright line but diminish[ed] the salience and effectiveness of the voluntariness test by lulling judges into admitting confessions with little inquiry into voluntariness”); Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 745–46 (1992) (observing that, in the wake of *Miranda*, “many lower courts have adopted an attitude toward voluntariness claims that can only be called cavalier”).

Thompkins Court essentially resurrected the voluntariness due process test in contravention of *Miranda*, *Dickerson*, and any semblance of pragmatism.

V. CONCLUSION

The Supreme Court's pragmatic approach to *Miranda* has enabled the Court to chip away at the landmark ruling over the years while stopping short of permitting deliberate attempts to subvert it. The three *Miranda* decisions issued by the Supreme Court last Term—the first to come from the Roberts Court—certainly did nothing to stem the tide gradually weakening *Miranda*. In fact, all eight of the issues resolved in the three cases were decided in favor of the prosecution.

Interestingly, it was Justice Scalia's opinion for the Court in *Maryland v. Shatzer*³⁸² that was most sensitive to the policy concerns underlying *Miranda* and most faithful to the Court's pragmatic approach. Both aspects of the Court's decision in that case—the recognition of a break-in-custody exception to *Edwards* and the ruling that inmates serving prison terms are not continuously in custody for purposes of *Miranda*—endorsed the dominant lower court view and could be defended on pragmatic grounds.³⁸³

Justice Ginsburg's majority opinion in *Florida v. Powell*³⁸⁴ fell in the middle. In upholding a warning that the state courts had interpreted as improperly limiting the right to counsel to the time period prior to interrogation, the Court acted inconsistently with the trend in the lower courts and extended its own precedents in the area. In addition, the ruling is harder to justify on pragmatic grounds. Nevertheless, the Court's decision was relatively narrow and tied to the particular facts of the case, and therefore does not give the police a great deal of room to circumvent *Miranda*.³⁸⁵

Justice Kennedy's opinion for the five Justices in the majority in *Berghuis v. Thompkins*,³⁸⁶ however, can neither be discounted as an incremental change in the law nor reconciled with a pragmatic approach to *Miranda*. By putting its stamp of approval on the interrogation techniques used in that case, the Court basically reduces *Miranda*'s sixty pages to a requirement that the police must not forget to read the warnings. Assuming they are conveyed in a language the suspect can understand, the police are allowed to move directly into full interrogation mode and then use anything the suspect says—even hours later—to demonstrate that she impliedly

³⁸² 130 S. Ct. 1213 (2010).

³⁸³ See *supra* notes 37–111 and accompanying text.

³⁸⁴ 130 S. Ct. 1195 (2010).

³⁸⁵ See *supra* notes 112–76 and accompanying text.

³⁸⁶ 130 S. Ct. 2250 (2010).

waived her rights. *Thompkins* thereby renders *Miranda* a mere formality and resurrects the voluntariness due process test, turning the Court's love-hate relationship with *Miranda* into one of pure disdain. The fact that the Court chose to reach out unnecessarily and adopt far-reaching substantive changes on such critical issues—and then did so in such a cursory fashion—makes the opinion seem even more disrespectful.³⁸⁷

To the extent that the Court's decisions from last Term, *Thompkins* in particular, signal a change in the Court's commitment to the pragmatic approach, that shift comes at a fortuitous time for those advocating that Congress create an exception to *Miranda* for terrorism cases.³⁸⁸ In true emergencies, of course, the government does not need additional legislative tools. It can already rely on the "public safety exception" created in *New York v. Quarles*, which allowed law enforcement officials to dispense with *Miranda* warnings before asking questions "reasonably prompted by a concern for the public safety."³⁸⁹

On the one hand, an exception for a particular category of cases would be narrower than the 1968 Crime Control Bill, which completely superseded *Miranda* and reinstated the voluntariness due process test in federal court.³⁹⁰ In invalidating that statute, the Court reasoned in *Dickerson v. United States* that *Miranda* was a "constitutional decision" that may not be "overruled" by Congress.³⁹¹ An "exception" for terrorism cases might be distinguished from an "overruling" and thus might survive constitutional scrutiny despite *Dickerson*. Moreover, allowing interrogators to violate *Miranda* when questioning suspected terrorists seems relatively

³⁸⁷ See *supra* notes 177–381 and accompanying text. *But cf.* Friedman, *supra* note 21, at 5 (arguing that the Court has engaged in the "stealth overruling" of *Miranda* for some time—by "disingenuous[ly] treat[ing] precedents in a manner that obscures fundamental change in the law" and thereby "avoid[s] public attention to the Court's diminishing of its own precedents").

³⁸⁸ See Charlie Savage, *Holder Backing Law to Restrict Miranda Rules*, N.Y. TIMES, May 10, 2010, at A1 (reporting that the Obama Administration is considering asking Congress to create such an exception); see also Questioning of Terrorism Suspects Act of 2010, H.R. 5934, 111th Cong. (2010) (bill introduced by Rep. Adam Schiff, which would express "the 'sense of Congress'" that *Miranda*'s public safety exception permits "unwarned interrogation of terrorism suspects for as long as is necessary to protect the public from pending or planned attacks when a significant purpose of the interrogation is to gather intelligence and not solely to elicit testimonial evidence").

³⁸⁹ *New York v. Quarles*, 467 U.S. 649, 656 (1984).

³⁹⁰ 18 U.S.C. § 3501 (2006); see *supra* note 9 and accompanying text.

³⁹¹ *Dickerson v. United States*, 530 U.S. 428, 432 (2000).

tame compared with the “torture warrants” advocated by some commentators and therefore might be palatable to the Court.³⁹²

On the other hand, *Dickerson* suggests the Court might have similar qualms about a statutory exception for terrorism cases. The Court might view a blanket exemption that goes beyond the public safety exception it already created in *Quarles* as unconstitutionally interfering with the judicial prerogative to interpret “constitutional decisions.” Moreover, the Court has recently been sympathetic to Guantanamo detainees seeking to challenge their designation as enemy combatants in federal court.³⁹³ But the Court’s refusal to carve out a “terrorism exception” for habeas corpus and completely foreclose the detainees from access to judicial proceedings does not necessarily mean it would likewise disapprove of efforts to deny suspected terrorists the protection of every “prophylactic” procedural rule³⁹⁴ available to other criminal defendants.³⁹⁵ And certainly any decline in the Roberts Court’s enthusiasm for the pragmatic approach to *Miranda* is bound to affect this calculus.

³⁹² See ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 131–64 (2002) (suggesting that judges should be permitted to issue “torture warrants” in extraordinary cases). *But cf.* Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 324–25 (2003) (“conced[ing] that there is room for debate” on the morality of torture as an interrogation technique where necessary to avert “a threat of mass devastation,” but rejecting the idea of judges “announc[ing] before the fact that the Constitution permits torture”); John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option?*, 63 U. PITT. L. REV. 743, 763–64 (2002) (taking the position that, although “the government should not have the authority to torture even in . . . extreme circumstances,” individual government agents should resort to torture if doing so “provides the last remaining chance to save lives that are in imminent peril” and then raise the necessity defense in “any resulting criminal prosecution”); Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 267 (2003) (arguing that “[w]ithout an absolute prohibition on the use of torture, it is virtually impossible to ensure that ‘special cases’ remain special”).

³⁹³ See *Rasul v. Bush*, 542 U.S. 466 (2004) (concluding that foreign nationals held at Guantanamo Bay may file federal habeas petitions to challenge the legality of their detention as enemy combatants); *see also* *Boumediene v. Bush*, 553 U.S. 723, 732 (2008) (holding that the procedures created by the Detainee Treatment Act of 2005 were not “an adequate and effective substitute” for habeas); *Hamdan v. Rumsfeld*, 548 U.S. 557, 633, 567 (2006) (finding that the Government had not shown a “practical need explain[ing] deviations from court-martial practice,” and therefore that the “structure and procedures” of the military commissions convened by President Bush violated the Uniform Code of Military Justice and the Geneva Conventions).

³⁹⁴ *Michigan v. Tucker*, 417 U.S. 433, 439 (1974) (plurality opinion); *see supra* note 13 and accompanying text.

³⁹⁵ *Cf.* *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (refusing to allow a nonresident alien to rely on the Fourth Amendment, which grants certain rights to “the people” of the United States, to challenge a search by United States officials on foreign soil).

Given the multiple ways in which the police have adapted to and accommodated *Miranda* over the years and the overwhelming rate of *Miranda* waivers, perhaps Chief Justice Warren's opinion was essentially a dead letter already, an "irrelevanc[y],"³⁹⁶ an "out of date"³⁹⁷ "mistake."³⁹⁸ If so, then *Thompkins* merely makes the demise of *Miranda* more transparent. That transparency may motivate those who have been critical of *Miranda* for not going far enough to search for more meaningful ways to protect suspects from the coerciveness of custodial interrogation. In the meantime, one cannot count on the current Supreme Court to adhere to the pragmatic approach to *Miranda* taken by its predecessors.

³⁹⁶ Leo, *supra* note 24, at 1000.

³⁹⁷ Godsey, *supra* note 59, at 783–84.

³⁹⁸ Stuntz, *supra* note 25, at 975.