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You Have the Right to Remain Silent … Sort of: Berghuis v. Thompkins, the Social Costs of a Clear Statement Rule, and the Need for Amending the Miranda Warnings

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Jaime M. Rogers*

I. INTRODUCTION

In June 2010, the Supreme Court of the United States handed down its decision in *Berghuis v. Thompkins*.[1] The case involved a murder suspect who was arrested one year after the fact,[2] and who made "inculpatory statements"[3] after remaining "'[l]argely' silent during the interrogation, which lasted about three hours."[4] The Michigan Court of Appeals affirmed a jury conviction of first-

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1. 130 S. Ct. 2250, 2250 (2010).
2. *Id.* at 2256.
3. *Id.* at 2257; *see also id.* at 2266 (Sotomayor, J., dissenting) (referring to the statements as "inculpatory").
4. *Id.* at 2256 (alteration in original); *see also id.* at 2266 (Sotomayor, J., dissenting) (describing the arrestee's behavior as "tacit and uncommunicative through nearly three hours of police interrogation").

degree murder,[5] and a majority of the Supreme Court comprised of Justices Kennedy, Roberts, Scalia, Thomas, and Alito upheld the conviction[6] on the grounds that the suspect had not invoked his right to remain silent,[7] but had instead waived that right.[8] Justices Sotomayor, Stevens, Ginsburg and Breyer dissented.[9]

The result reached by the Court is incorrect because: (1) the result contravenes law established by the Court in *Miranda v. Arizona*;[10] (2) the Court misapplied precedent established in *Davis v. United States* and *North Carolina v. Butler*;[11] and (3) the Court improperly emphasized the question of invocation, while improperly relegating the question of waiver, and relied on factually unsupported premises in the analysis of both questions. Further, the result reached by the Court creates a standard that is likely to entail significant social costs, which is a paramount reason for amending the *Miranda* warnings so that they effectively apprise arrestees of their rights.

Part II provides a detailed overview of the facts and procedural history of the case. In Part III, I examine the Court's analysis and holdings and discuss why parts of the majority opinion are incorrect. In Part IV, I discuss the significant social costs that are likely to result from the Court's decision and I provide an argument for amending the *Miranda* warnings. In Part V, I conclude that if the Court's decision is to stand, the *Miranda* warnings must be amended.

II. FACTS AND PROCEDURAL HISTORY

A shooting in Southfield, Michigan on January 10, 2000 resulted in the death of Samuel Morris and the injury of Frederick France.[12] Van Chester Thompkins was identified as a suspect in

5. People v. Thompkins, No. 242478, 2004 Mich. App. LEXIS 322, at *1, *13 (Mich. Ct. App. Feb. 3, 2004).
6. *Berghuis*, 130 S. Ct. at 2255, 2265.
7. *Id.* at 2260.
8. *Id.* at 2263.
9. *Id.* at 2266.
10. 384 U.S. 436 (1966). *See also* Erwin Chemerinsky, *The Roberts Court and Criminal Procedure at Age Five*, 43 TEX. TECH L. REV. 13, 19 (2010) ("It is impossible to reconcile the Supreme Court's decision in *Berghuis v. Thompkins* with *Miranda v. Arizona*.").
11. 512 U.S. 452 (1994); 441 U.S. 369 (1979).
12. *Berghuis*, 130 S. Ct. at 2256.

the shooting, but apparently fled before being arrested in Ohio approximately one year later.[13]

Detective Christopher Helgert and partner, of the Southfield, Michigan Police Department, traveled to Ohio to interrogate Thompkins after his arrest.[14] At the beginning of the interrogation, Helgert presented Thompkins with a written "Notification of Constitutional Rights and Statement"[15] which contained the following five statements:

> 1. You have the right to remain silent.
>
> 2. Anything you say can and will be used against you in a court of law.
>
> 3. You have a right to talk to a lawyer before answering any questions and you have the right to have a lawyer present with you while you are answering any questions.
>
> 4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.
>
> 5. 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.[16]

Helgert asked Thompkins to read the fifth statement aloud, which Thompkins did.[17] Helgert then read the first four statements aloud to Thompkins and asked Thompkins to sign the form "to demonstrate that he understood his rights," which Thompkins declined to do.[18] The Court noted that the record evidence was unclear as to whether Thompkins gave any verbal acknowledgement that he understood his rights.[19]

Thompkins's only statements throughout the interrogation

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13. *Id.*
14. Thompkins v. Berghuis, 547 F.3d 572, 576 (6th Cir. 2008).
15. *Berghuis*, 130 S. Ct. at 2256.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* ("[A]t a suppression hearing, Helgert testified that Thompkins verbally confirmed that he understood his rights . . . [but] at trial, Helgert stated, 'I don't know that I orally asked him' whether Thompkins understood his rights.").

consisted of "a few limited verbal responses," "nodding his head," saying "he 'didn't want a peppermint'" that was offered to him, and saying that the chair "he was 'sitting in was hard.'"[20] After approximately two hours and forty-five minutes of interrogation, Helgert asked Thompkins whether he believed in God, to which Thompkins replied "'Yes,'" "as his eyes 'well[ed] up with tears.'"[21] Helgert then asked Thompkins whether he prayed to God, to which Thompkins also replied "'Yes,'" and finally whether Thompkins "'pray[ed] to God to forgive [him] for shooting that boy down'" to which Thompkins again replied "'Yes.'"[22] Thompkins declined to make a written confession and the interrogation ended about 15 minutes later.[23] As the dissenting Justices noted, "the '*only* thing [Thompkins said] relative to his involvement [in the shooting]' occurred near the end of the interview—*i.e.*, in response to the questions about God."[24]

Prior to trial, Thompkins moved to suppress the statements obtained during the interrogation on the grounds he had invoked his Fifth Amendment right to remain silent, that he had not waived his right to remain silent, and that the statements were involuntary.[25] The motion to suppress was denied,[26] and a jury convicted Thompkins of, among other charges, first-degree murder.[27] Thompkins was sentenced to life in prison without parole.[28] The Court of Appeals of Michigan affirmed the conviction.[29] The Michigan Supreme Court denied Thompkins's application for appeal.[30] The United States District Court for the Eastern District of Michigan denied Thompkins's request for habeas corpus relief,[31] holding, in relevant part, that "[t]he Michigan Court of Appeals' rejection of [Thompkins's] Fifth

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20. *Id.* at 2256-57 (citation omitted).
21. *Id.* at 2257 (citation omitted).
22. *Id.* (citation omitted).
23. *Id.*
24. *Id.* at 2267 (Sotomayor, J., dissenting) (citation omitted).
25. *Id.* at 2257.
26. *Id.*
27. People v. Thompkins, No. 242478, 2004 Mich. App. LEXIS 322, at *1 (Mich. Ct. App. Feb. 3, 2004).
28. *Berghuis*, 130 S. Ct. at 2258.
29. *Thompkins*, 2004 Mich. App. LEXIS 322, at *13.
30. Thompkins v. Berghuis, 547 F.3d 572, 579 (6th Cir. 2008).
31. Thompkins v. Berghuis, No. 05-CV-70188-DT, 2006 U.S. Dist. LEXIS 70204, at *46 (E.D. Mich. Sept. 28, 2006).

Amendment claim . . . was not an unreasonable application of clearly established law" because Thompkins did not invoke the right to remain silent after he was advised of his *Miranda* rights.[32]

The United States Court of Appeals for the Sixth Circuit reversed the District Court's denial of habeas relief as to Thompkins's Fifth Amendment claim.[33] The Sixth Circuit's analysis began with whether Thompkins had waived his right to remain silent,[34] which the court held was the dispositive question.[35] The court noted that, under *Miranda*, "'a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination,'"[36] and that "'a valid waiver will not be presumed . . . simply from the fact that a confession was in fact eventually obtained.'"[37] Further, the court noted that, under *Butler*,[38] there exists a strong presumption against waiver,[39] and under *Smith v. Illinois*, "'[i]nvocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together.'"[40] The court held that the Michigan Court of Appeals "misrepresent[ed] the record" when it found that "Thompkins 'talk[ed] with [Helgert], albeit sporadically,'"[41] and therefore ruled that the District Court "erred in denying Thompkins's petition for a writ of habeas corpus because the Michigan Court of Appeals's rejection of his Fifth Amendment claim 'was based on an unreasonable determination of the facts in light of the evidence' and 'involved an unreasonable application

32. *Id.* at *41.
33. *Thompkins*, 547 F.3d at 592.
34. *Id.* at 582.
35. *See id.* at 584 n.4 ("Because the resolution of this issue [of invocation] is not critical to the outcome in this case—that is, we conclude that the prosecution failed to meet its 'heavy burden' in first showing that Thompkins *waived* his *Miranda* rights—we need not address Thompkins's arguments that the *Davis* standard does not apply to invoking the right to remain silent.").
36. *Id.* at 582 (quoting Miranda v. Arizona, 384 U.S. 436, 475 (1966)).
37. *Id.* (quoting *Miranda*, 384 U.S. at 475).
38. 441 U.S. 369, 373 (1979).
39. *Thompkins*, 547 F.3d at 582.
40. *Id.* (quoting 469 U.S. 91, 98 (1984)).
41. *Id.* at 585 (quoting Thompkins v. Berghuis, No. 05-CV-70188-DT, 2006 U.S. Dist. LEXIS 70204, at *38 (E.D. Mich. Sept. 28, 2006)).

of[] clearly established Federal law,'"[42] specifically *Miranda* and *Butler*.[43] According to the Sixth Circuit, "Thompkins's persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: Thompkins did not wish to waive his rights."[44]

The Supreme Court reversed the Sixth Circuit's grant of habeas relief.[45] The Court's analysis began with the question of invocation, and the Court noted that, under *Davis*, in order for an invocation of the right to counsel to require the police to stop the interrogation, the arrestee must invoke the right "'unambiguously.'"[46] The Court held that "there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*."[47] The Court concluded that because "Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police," he did not invoke his right to remain silent.[48] Proceeding to the question of waiver, the Court held that "[w]here the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent."[49] The Court concluded that because there was "no contention that Thompkins did not understand his rights," and because Thompkins answered Helgert's question about praying to God for

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42. *Id.* at 588 (alteration in original) (quoting 28 U.S.C. § 2254(d)).
43. *Id.*
44. *Id.*
45. Berghuis v. Thompkins, 130 S. Ct. 2250, 2265 (2010).
46. *Id.* at 2259 (quoting Davis v. United States, 512 U.S. 452, 459 (1994)).
47. *Id.* at 2260.
48. *Id.*
49. *Id.* at 2262. In reaching this holding, the Court relied on *Butler*, 441 U.S. 369, 373, 379 (1979), for the proposition that a waiver can be implied from the totality of the circumstances; on *Colorado v. Connelly*, 479 U.S. 157, 168 (1986), for the proposition that the "heavy burden" required to show a *Miranda* waiver can be overcome by a preponderance of the evidence; and on *Colorado v. Spring*, 479 U.S. 564, 573-75 (1987), *Connecticut v. Barrett*, 479 U.S. 523, 530 (1987), and *Moran v. Burbine*, 475 U.S. 412, 421-22 (1986), for the proposition that the prosecution must show that the accused understood his *Miranda* rights before a waiver can be implied. *Berghuis*, 130 S. Ct. at 2261.

forgiveness for shooting Morris, and because there was no evidence that Thompkins's statement was coerced, Thompkins waived his right to remain silent.[50] "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."[51]

III. EXAMINATION OF THE COURT'S ANALYSIS AND HOLDINGS

A. Invocation of the right to remain silent

A key part of the Court's analysis was its holding that "there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*."[52] This holding is unsound for several reasons.

First, the Fifth Amendment right to remain silent and right to counsel are different rights, such that the right to counsel is designed to protect the right to remain silent.[53] Given this design, we should expect that the right to remain silent, the superordinate right, be afforded greater protection than the right to counsel, the subordinate right. The Court in *Miranda* spoke to this very notion when it held that "[i]f the individual *indicates in any manner*, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. . . . If the individual *states* that he wants an attorney, the interrogation must cease until an attorney is present."[54] It is apparent from the

50. *Berghuis*, 130 S. Ct. at 2262-63.
51. *Id.* at 2264.
52. *Id.* at 2260.
53. *See* Miranda v. Arizona, 384 U.S. 436, 469 (1966) ("[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today."); *id.* at 470 ("[T]he need for counsel to protect the Fifth Amendment privilege . . . ."); *id.* at 471 ("[A]n individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today."); *see also* Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under* Miranda, 17 WM. & MARY BILL OF RTS. J. 773, 817 (2009) ("The right to counsel exists only to protect the right to remain silent—the right to be free from compelled self-incrimination.").
54. 384 U.S. at 473-74 (emphasis added).

language of *Miranda* that different standards were meant to apply to the invocation of the right to remain silent and the invocation of the right to counsel—the *Miranda* Court made it clear that the invocation of the right to remain silent could be by "indicat[ion] in any manner," while the invocation of the right to counsel must be by "state[ment]."[55] The Court's holding in *Davis* is consistent with this,[56] but there is no reason to believe that the *Miranda* Court intended that an arrestee's invocation of the right to remain silent must be by statement, given that the Court used the word "states" to describe the standard for the invocation of the right to counsel and instead used the words "indicates in any manner" to describe the standard for the invocation of the right to remain silent.[57] The rationale offered by the Court in *Berghuis*, that invocation of the right to remain silent and the right to counsel should be subject to the same standards because "[b]oth protect the privilege against compulsory self-incrimination,"[58] while true so far as it goes, fails to account for the primacy of the right to remain silent and ignores the law established by the Court in *Miranda*.

Second, invocation of the right to remain silent can be achieved nonverbally, while the right to counsel is less susceptible to nonverbal invocation. That is to say, it is reasonable to conclude that after remaining nearly totally silent for two hours and forty-five minutes, as in *Berghuis*,[59] the arrestee has invoked or is invoking his right to remain silent.[60] After all, the *Miranda* warnings do not mention anything about invocation, and the idea that the exercise of a right differs importantly from the invocation of the right is hardly a matter of common sense.[61] Again, it is

55. *Id.*

56. 512 U.S. 452, 459 (1996) (holding that an arrestee's invocation of the right to counsel must be unambiguous).

57. 384 U.S. at 473-74.

58. 130 S. Ct. 2250, 2260 (2010).

59. *Id.* at 2257.

60. The dissent recognized this when it held that a suspect's sitting silent throughout prolonged interrogation "cannot reasonably be understood other than as an invocation of the right to remain silent." *Id.* at 2275-76 (Sotomayor, J., dissenting).

61. *See id.* at 2276 (Sotomayor, J., dissenting) ("Advising 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. . . . [T]he *Miranda* warnings give no hint that a suspect should use . . . magic words . . . ."). *See also infra* Part IV(B).

clear that the *Miranda* Court intended to allow for nonverbal invocation of the right to remain silent when it held that:

> If the individual indicates in *any* manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person *invokes* his privilege cannot be other than the product of compulsion, subtle or otherwise.[62]

In addition to the foregoing principled reasons, there are additional factual reasons that render the *Berghuis* Court's reliance on *Davis* unsound. First, the Court ignored that the facts of *Davis* are critically distinguishable from the facts of *Berghuis*.[63] Specifically, after being advised of his *Miranda* rights, Davis "waived his rights to remain silent and to counsel, both orally and in writing."[64] This waiver was essential to the holding in *Davis* "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."[65] On the other hand, in *Berghuis*, there was no express waiver of any kind.[66]

Second, the interrogating officers in *Davis* made it clear that "if [Davis] want[ed] a lawyer, then [they] w[ould] stop any kind of questioning with him, that [they] weren't going to pursue the matter unless [Davis clarified whether his statement, 'Maybe I should talk to a lawyer,' was a request for a lawyer or just a comment about a lawyer]," to which Davis replied "'No, I'm not asking for a lawyer,'" and "'No, I don't want a lawyer.'"[67] On the other hand, in *Berghuis*, Helgert and his partner made no attempt

62. *Miranda*, 384 U.S. at 473-74 (emphasis added) (footnote omitted).

63. This point was also raised by the dissent. *See Berghuis*, 130 S. Ct. at 2275 (Sotomayor, J., dissenting).

64. Davis v. United States, 512 U.S. 452, 455 (1994).

65. *Id.* at 461 (emphasis added).

66. *See Berghuis*, 130 S. Ct. at 2267 (Sotomayor, J., dissenting) ("The record contains no indication that the officers sought or obtained an express waiver."); *id.* at 2270 ("It is undisputed here that Thompkins never expressly waived his right to remain silent.").

67. 512 U.S. at 455 (internal quotation marks omitted); *see also id.* at 461 ("[W]hen a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney.").

to seek clarification from Thompkins regarding whether he was invoking his right to remain silent, or to inform Thompkins that if he was invoking his right to remain silent, Helgert and partner would be required to stop questioning him. It may be reasonable to require an unambiguous invocation of the right to counsel under circumstances such as those in *Davis*, where the arrestee, after making an ambiguous invocation of the right to counsel, was informed of the need for clarity, as well as the fact that the police were prepared to honor his invocation, and that they would be required to stop questioning him in the event that he made an unambiguous invocation, and the arrestee then specifically declined to invoke his rights.[68] On the other hand however, it is objectively unreasonable to require an unambiguous invocation of the right to remain silent from an arrestee such as Thompkins who had remained silent for two hours and forty-five minutes of interrogation,[69] and apparently had no idea of the need for an invocation of any kind, let alone an unambiguous invocation.[70]

Opting for the ease of a bright-line rule, the *Berghuis* Court also held that "[i]f an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression 'if they guess wrong.'"[71] This is unsound because it suggests that a rule requiring the police to credit an arrestee's ambiguous acts or omissions necessarily leads to guesswork, which is not true. When an interrogating officer is confronted with an ambiguous act or omission on the part of an arrestee, the officer has the option to ask questions to clarify the arrestee's intent, rather than resort to trying to guess what the arrestee's intent may be.[72] Thus, because officers are not

68. *Id.* at 455.

69. *Berghuis*, 130 S. Ct. at 2257.

70. See *id.* at 2275-76 (Sotomayor, J., dissenting) ("[O]ther statements or actions—in particular, when a suspect sits silent throughout prolonged interrogation, long past the point when he could be deciding whether to respond—cannot reasonably be understood other than as an invocation of the right to remain silent.").

71. *Id.* at 2260 (quoting *Davis*, 512 U.S. at 461).

72. For example, an officer could say, "I'm unclear as to whether you are invoking your right to remain silent. You can exercise your right to remain silent by continuing to remain silent, but if you want us to stop questioning you, you need to tell us that you are 'invoking' your right to remain silent. Are you invoking your right to remain silent?" This is more or less what the

required, under the current *Miranda* warnings, to inform arrestees that an unambiguous verbal invocation of the right to remain silent is necessary in order to cut off questioning, and because officers enjoy discretion to employ the extraordinarily practicable option of simply asking questions to clarify an arrestee's ambiguous intent, it is unsound to resolve the possibility of "'difficulties in proof'"[73] against the arrestee. In *Berghuis*, there was nothing to suggest that Thompkins was aware of the need for any sort of invocation of the right to remain silent in order to cut off questioning, and the interrogating officers elected not to ask clarifying questions to determine whether Thompkins was attempting to invoke his right to remain silent, or to inform Thompkins that if he were to invoke his right to remain silent, the officers would be required to stop questioning him.[74] Further, "contemporary police practice" is "not to engage in prolonged interrogation after a suspect has failed to respond to initial questioning"[75]—a demonstrably workable standard that has provided enough clear guidance that the Court's new bright-line rule may be altogether unnecessary.[76]

Finally, the Court held that "[s]uppression of a voluntary confession in these circumstances [of ambiguity] would place a significant burden on society's interest in prosecuting criminal

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officers in *Davis* did, which the Court in that case referred to as "good police practice." 512 U.S. at 455, 461; *see also Berghuis*, 130 S. Ct. at 2276 (Sotomayor, J., dissenting) ("If a suspect makes an ambiguous statement or engages in conduct that creates uncertainty about his intent to invoke his right, police can simply ask for clarification."); Tom Chen, Davis v. United States*: "Maybe I Should Talk to a Lawyer" Means Maybe Miranda is Unraveling*, 23 PEPP. L. REV. 607, 639 & n.259 (citing pre-*Davis* scholarship advocating the use of clarifying questions).

73. *See Berghuis*, 130 S. Ct. at 2260 (quoting *Davis*, 512 U.S. at 458-59).

74. *See id.* at 2256-57.

75. *Id.* at 2276 n.8 (Sotomayor, J., dissenting) (citing Brief for the National Association of Criminal Defense Lawyers and the American Civil Liberties Union as Amici Curiae in Support of Respondent at 32-34, Berghuis v. Thompkins, 130 S. Ct. 2250 (2010) (No. 08-1470)) (referencing various leading law enforcement training materials).

76. *See id.* at 2276 (Sotomayor, J., dissenting) (discussing how experience with the fact-specific standard of Michigan v. Mosley, 423 U.S. 96 (1975), shows that the need for a bright-line rule may not be as great as the majority suggests); *id.* at 2277-78 & n.9 (discussing how application in other jurisdictions of the bright-line rule advanced by the majority has led to unreasonable results).

activity."[77] This holding is also unsound because it assumes a voluntary confession, which was a disputed issue in the case,[78] and because it ignores the compulsion inherent in custodial interrogations.[79] Further, this holding also fails to consider that under current police protocol, extended silence is deemed to be an invocation of the right to remain silent,[80] so that the "significant burden" that the majority warned would be "place[d] . . . on society's interest in prosecuting criminal activity"[81] amounts to little more than a sort of fear mongering that tends to obfuscate fundamental American values such as the presumption of innocence, the right to be free from self-incrimination, and the prevention of erroneous convictions.[82]

B. Waiver of the right to remain silent

Proceeding to the question of waiver, the Court held that "[a]s

77. *Id.* at 2260.

78. *Id.* at 2257. The *Berghuis* Court acknowledged that at trial Thompkins argued that his statements were not voluntary, but held that "[t]he fact Helgert's question referred to Thompkins's religious beliefs . . . did not render Thompkins's statement involuntary." *Id.* at 2257, 2263.

79. Miranda v. Arizona, 384 U.S. 436, 455 (1966) ("[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."); *id.* at 468 ("[A] warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere."); *id.* at 476 ("[T]he 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."); *id.* at 478 ("In [non-custodial questioning] situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.").

80. *Berghuis*, 130 S. Ct. at 2270 n.3 (Sotomayor, J., dissenting) (referencing various leading law enforcement training materials) (citing Brief for the National Association of Criminal Defense, *supra* note 75, at 11-12).

81. *Id.* at 2260.

82. "Benjamin Franklin thought '[t]hat it is better a hundred guilty persons should escape than one innocent person should suffer.'" Alexander Volokh, *Aside: n Guilty Men*, 146 U. PA. L. REV. 173, 175 (1997). The *Berghuis* dissent discussed other "fundamental values" related to the "constitutional guarantee against self-incrimination," such as "society's 'preference for an accusatorial rather than an inquisitorial system of criminal justice'; a 'fear that self-incriminating statements will be elicited by inhumane treatment and abuses' and a resulting 'distrust of self-deprecatory statements'; and a realization that while the privilege is 'sometimes a shelter to the guilty, [it] is often a protection to the innocent.'" *Berghuis*, 130 S. Ct. at 2273 (Sotomayor, J., dissenting) (quoting Withrow v. Williams, 507 U.S. 680, 692 (1993)).

a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford."[83] The Court relied on the facts that Thompkins received a written copy of the *Miranda* warnings and that the officer determined that Thompkins could read and understand English in determining that "[t]here was more than enough evidence in the record to conclude that Thompkins understood his *Miranda* rights."[84] However, this conclusion is unsound because it relies on the assumption that an arrestee's ability to read and hear certain words necessarily indicates that the arrestee fully understands the legal significance of those words. This is important because a simple "understand[ing]"[85] of the *Miranda* rights is insufficient; rather, the Court noted, a "full understanding"[86] of the rights is required.[87] Thompkins's declination to sign the "Notification of Constitutional Rights and Statement" form, which he was asked to sign to "demonstrate that he understood his rights," provides a compelling basis from which to conclude that Thompkins did *not* understand his rights.[88] After an arrestee has decided to exercise his right to remain silent (that is, to remain silent), what more can he do to communicate that he does not understand his rights but refuse to sign a form which purports to show that he does understand his rights?

The Court went on to hold that "Thompkins's answer to Helgert's question about praying to God for forgiveness for shooting the victim was sufficient to show a course of conduct indicating waiver."[89] This conclusion is erroneous for several

83. *Berghuis*, 130 S. Ct. at 2262.

84. *Id.* The majority cited two other facts, which added very little, if anything, to the quantum of evidence from which the majority drew its conclusion. They were: (1) that "Thompkins was given time to read the warnings"; and (2) that Thompkins "read aloud the fifth warning." *Id.*

85. *Id.*

86. *Id.*

87. I contend *infra* Part IV.B that even if an arrestee fully understands the *Miranda* warnings as currently formulated, there is no reason to believe that the arrestee would understand the need for an unambiguous invocation of the rights or that a waiver of rights could be implied after hours of silence.

88. *See id.* at 2256.

89. *Id.* at 2263.

reasons. First, Thompkins's course of conduct is more accurately characterized by his declination to sign the "Notification of Constitutional Rights and Statement" form[90] and his overall silence,[91] which together form a pattern of behavior that lasted for two hours and forty-five minutes of the three-hour interrogation.[92] Furthermore, the "course of conduct" contemplated by *Butler* and its progeny requires something more substantial than a one-word remark after two hours and forty-five minutes of silence.[93] Finally, the statement indicating the waiver cannot also be the contested statement—the *Miranda* Court made it clear that a valid waiver and an inculpatory statement must be discrete from one another.[94]

Regarding the voluntariness of Thompkins's statement, the Court held that "there is no evidence that Thompkins's statement was coerced" and "there is no authority for the proposition that an interrogation of [three hours] is inherently coercive."[95] The Court noted that "even where interrogations of greater duration were held to be improper, they were accompanied, as this one was not,

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90. *Id.* at 2256; *see also id.* at 2270 (Sotomayor, J., dissenting) ("[Thompkins's] refusal to sign even an acknowledgment that he understood his *Miranda* rights evinces, if anything, an intent not to waive those rights.").

91. *Id.* at 2256 ("Thompkins was '[l]argely' silent during the interrogation.").

92. *Id.* at 2256-57.

93. *See* North Carolina v. Butler, 441 U.S. 370, 373 (1979). In *Butler*, the arrestee verbally acknowledged that he understood his rights and verbally agreed to talk to interrogators, and although the Court found a waiver in that case, it held that " [t]he courts must presume that a defendant did not waive his rights; the prosecution's burden is great." *Id.* at 370-71, 373; *see also Berghuis*, 130 S. Ct. at 2270 (Sotomayor, J., dissenting) (quoting *Butler*, 441 U.S. at 373) ("In these circumstances, Thompkins' 'actions and words' preceding the inculpatory statements simply do not evidence a 'course of conduct indicating waiver' sufficient to carry the prosecution's burden. . . . I believe it is objectively unreasonable under our clearly established precedents to conclude the prosecution met its 'heavy burden' of proof 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.").

94. 384 U.S. 436, 476 (1966) ("The warnings required and the waiver necessary in accordance with our opinion today are . . . prerequisites to the admissibility of any statement made by a defendant."); *see also Berghuis*, 130 S. Ct. at 2270 (Sotomayor, J., dissenting) ("*Miranda* and *Butler* expressly preclude the possibility that the inculpatory statements themselves are sufficient to establish waiver.").

95. *Berghuis*, 130 S. Ct. at 2263.

by other facts indicating coercion . . . ."[96] This is erroneous because there is, in fact, authority for the proposition that lengthy interrogations can be inherently coercive, even absent other facts indicating coercion. To wit, the Court in *Miranda* held both that lengthy interrogations can be inherently coercive even absent evidence of "threat[s], tricke[ry], or cajol[ing]" by the police,[97] and that the mere fact of a custodial interrogation can be inherently coercive absent specific forms of "brutality."[98] In addition, the *Berghuis* Court's own recognition that "[c]ooperation with the police may result in more favorable treatment for the suspect . . . [and] the prevention of continuing injury and fear"[99] clearly suggests that police interrogations are inherently coercive.

The Court also held that "[t]he fact that Helgert's question referred to Thompkins's religious beliefs . . . did not render Thompkins's statement involuntary" because "'the Fifth Amendment privilege is not concerned with moral and psychological pressures to confess emanating from sources other than official coercion.'"[100] This is erroneous to the extent that it asserts that Fifth Amendment protections under *Miranda* do not contemplate moral or psychological pressures,[101] and it is misleading to the extent that it suggests that custodial interrogation itself does not constitute a form of official

96. *Id.*

97. 384 U.S. at 476 ("[T]he fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.").

98. *Id.* at 455 ("Even without employing brutality, the 'third degree' or [other] specific stratagems . . . the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.").

99. *Berghuis*, 130 S. Ct. at 2264.

100. *Id.* at 2263 (quoting Colorado v. Connelly, 479 U.S. 157, 170 (1986)) (internal quotation marks omitted).

101. *See Miranda*, 384 U.S. at 448 ("[W]e stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before . . . 'this Court has recognized that coercion can be mental as well as physical.'") (citation omitted).

coercion.[102] Further, given the two hours and forty-five minutes of interrogation that passed before Thompkins's statement,[103] the sensitive personal nature of religion, and the emotional response that accompanied Thompkins's statement,[104] there is ample evidence that Thompkins's statement was not voluntary, in the sense that the statement would not have been made but for the compulsion associated with the interrogation.[105]

A key holding of the Court with respect to the issue of waiver was that "Thompkins knowingly and voluntarily made a statement to police, so he waived his right to remain silent."[106] However, this is erroneous because under *Miranda* and *Butler*, the waiver, rather than the statement, must be knowing and voluntary.[107] In *Miranda*, the Court's holding that "the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement" highlights the idea that the waiver and the statement are distinct and that the knowing and voluntary standard applies to the waiver, not the statement.[108] The Court in *Butler* affirmed that the knowing and voluntary standard applies to the waiver, rather than to the statement, when it held that "[t]he question [of waiver] is . . . whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case."[109] By concluding that Thompkins's waiver *was* his statement, the Court misapplies the

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102. *See id.* at 455 ("Even without employing brutality, the 'third degree' or the specific stratagems . . . the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.")

103. *Berghuis*, 130 S. Ct. at 2257.

104. In response to Helgert's question whether Thompkins believed in God, "Thompkins made eye contact with Helgert and said 'Yes,' as his eyes 'well[ed] up with tears.'" *Id.* (alteration in original) (citation omitted).

105. *Miranda*, 384 U.S. at 462 (quoting Bram v. United States, 168 U.S. 532, 549 (1897)) ("'The rule is not that, in order to render a statement admissible, the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that, from the causes which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement when but for the improper influences he would have remained silent.'").

106. *Berghuis*, 130 S. Ct. at 2263.

107. *See* 441 U.S. 369, 373 (1979); 384 U.S. at 479.

108. *See* 384 U.S. at 479.

109. 441 U.S. at 373.

knowing and voluntary standard set out in *Miranda* and affirmed in *Butler*.[110]

The Court's holding that *Butler* foreclosed Thompkins's argument that "the police were not allowed to question him until they obtained a waiver first," because the idea of requiring a waiver first is, according to the Court, inconsistent with the principle established in *Butler* that a waiver can be implied,[111] is also erroneous. The recognition that a waiver can be implied is not inconsistent with the requirement that the waiver must occur at the outset of questioning. Certainly, it is not difficult to conceive that an arrestee's conduct could give rise to an implied waiver at the outset of questioning, such as if the arrestee acknowledged that he understood his rights, or verbally agreed to talk, or began to talk without being questioned, none of which were true of Thompkins. Although the Court in *Butler* held that "in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated,"[112] the Court in that case did not provide any clear guidance regarding the amount or kind of actions or words from which a waiver could be implied. Further, the arrestee in *Butler* verbally acknowledged that he understood his rights, and verbally stated that he did not wish to exercise his right to remain silent,[113] which renders the facts of that case critically distinguishable from the facts in *Berghuis*. Although *Butler* established that a waiver can be implied, the specific issue in that case did not concern the right to remain silent,[114] and *Butler* did not specifically overrule the waiver-first language of *Miranda*.[115]

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110. *See* 441 U.S. at 373; 384 U.S. at 479.

111. *See Berghuis*, 130 S. Ct. at 2263.

112. 441 U.S. at 373.

113. *Id.* at 370-71 ("When [the arrestee was] asked if he understood his rights, he replied that he did. . . . [Arrestee also said], 'I will talk to you but I am not signing any form.'").

114. *Id.* at 374 ("The only question is whether he waived the exercise of one of those rights, the right to the presence of a lawyer."). *See also supra* Part III.A, arguing that the right to remain silent should be afforded greater protection than the right to counsel.

115. *See id.* at 375-76; *Miranda*, 384 U.S. at 479 ("After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of

Finally, the Court held that "[*Miranda*] waivers can be established even absent formal or express statements of waiver that would be expected in, say, a judicial hearing to determine if a guilty plea has been properly entered,"[116] and that "*Miranda* rights can . . . be waived through means less formal than a typical waiver on the record in a courtroom . . . ."[117] This too is erroneous because given that the primary effect of a *Miranda* waiver is to facilitate an adjudication of guilt,[118] we should expect *Miranda* waivers to be afforded the same protection as other waivers that lead to an adjudication of guilt. The Court's reliance on the fact that *Miranda* waivers occur outside the courtroom to support its holding that *Miranda* waivers are not entitled to the same protection as in-court waivers[119] is unsound because it is in the interrogation setting that official coercion and the lack of assistance of counsel are most likely to be present[120]—circumstances that would also tend to warrant at least equivalent protection of the arrestee's rights.

IV. SOCIAL COSTS THAT ARE LIKELY TO RESULT FROM THE COURT'S DECISION AND AN ARGUMENT FOR AMENDING THE *MIRANDA* WARNINGS

A. Social costs of applying a clear statement rule to the invocation of the right to remain silent

Most people who are arrested are low-income, minority, and/or undereducated.[121] Low socioeconomic status is also

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interrogation can be used against him.").

116. *Berghuis*, 130 S. Ct. at 2261.

117. *Id.* at 2262.

118. The Court in *Miranda* referred to confessions as "'the most compelling possible evidence of guilt.'" 384 U.S. at 466 (quoting Mapp v. Ohio, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting)).

119. *Berghuis*, 130 S. Ct. at 2262 ("*Miranda* rights can therefore be waived through means less formal than a typical waiver on the record in a courtroom . . . given the practical constraints and necessities of interrogation and the fact that *Miranda's* main protection lies in advising defendants of their rights.").

120. *Miranda*, 384 U.S. at 461 ("As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.").

121. *See Miranda*, 384 U.S. at 473 ("[I]ndigent[s] [are] the person[s] most often subjected to interrogation. . . ."); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 428

independently correlated with low educational achievement.[122] Individuals with low levels of educational achievement are unlikely to have a sound understanding of their rights or the rules governing police interrogation, and may also lack the capacity to formulate and deliver an unambiguous invocation of their right to remain silent.[123] This incapacity is likely to be exacerbated by the

(2009) ("Poor people account for more than eighty percent of individuals prosecuted in this country."); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" was a "War on Blacks"*, 6 J. GEN. RACE & JUST. 381, 400 (2002) ("A growing body of evidence suggests that Blacks are investigated and detained by the police more frequently than are other persons in the community."); Grace F. Ashikawa, Note, R.V. Brydges: *The Inadequacy of* Miranda *and a Proposal to Adopt Canada's Rule Calling for the Right to Immediate Free Counsel*, 3 SW. J.L. & TRADE AMERICAS 245, 267-68 ("The vast majority of persons arrested or detained for interrogation are poorly educated and indigent."); Matthew Dickman, Comment, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CALIF. L. REV. 1687, 1695 (2009) ("Over 85 percent of federal criminal defendants are indigent at the time of their arrest."); Margaret E. Finzen, Note, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 GEO. J. ON POVERTY L. & POL'Y 299, 321 (2005) ("[M]embers of Black communities . . . are disproportionately policed, arrested, prosecuted, and convicted."); Stephen J. Schulhofer & David D. Friedman, *Reforming Indigent Defense: How Free Market Principles Can Help to Fix a Broken System*, CATO INST. POL'Y ANALYSIS No. 666 at 2 (2010) ("The great majority of people arrested and prosecuted are indigent."); Melanca Clark & Emily Savner, *Community Oriented Defense: Stronger Public Defenders*, BRENNAN CENTER FOR JUSTICE at 7 (July 21, 2010), *available at* http://www.brennancenter.org/content/resource/CODreport/ ("More people travel though America's criminal justice system than any other justice system in the industrialized world. And these people are overwhelmingly from low-income, African-American and Latino communities."). The Court in *Miranda* emphasized the particular importance of the warnings to low-income and poorly educated arrestees when it noted that "[t]he potentiality for compulsion is forcefully apparent, for example, in *Miranda*, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in *Stewart*, in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade." *Miranda*, 384 U.S. at 457.

122. Selcuk R. Sirin, *Socioeconomic Status and Academic Achievement: A Meta-Analytic Review of Research*, 75 REV. EDUC. RES. 417, 438 (2005) (analyzing research findings on socioeconomic status and academic achievement published in scholarly journal articles between 1990 and 2000 and finding that "[o]f all the factors examined in the meta-analytic literature, family [socioeconomic status] at the student level is one of the strongest correlates of academic performance").

123. *See* Davis v. United States, 512 U.S. 452, 469-70 (1994) (Souter, J., concurring) ("A substantial percentage of [criminal suspects] lack anything

mistrust of police that is common among low-income and minority demographics.[124]

The social costs of applying a clear statement rule to the invocation of the right to remain silent are clear and pernicious—application of the clear statement rule announced by the Court in *Berghuis* will have a disproportionately adverse impact on low-income, minority, undereducated, and other demographics that may already be intimidated by or mistrustful of police, while potentially having no effect on more affluent, non-minority groups.

The Court recognized this disparate impact in *Davis* when it noted that "requiring a clear assertion of the right to counsel 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."[125] However, the *Davis* Court simply dismissed this concern by pointing out that:

> [T]he primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves. "[F]ull comprehension of the rights to remain

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like a confident command of the English language; many are 'woefully ignorant'; and many more will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that the ability to speak assertively will abandon them.") (citations omitted) (internal quotation marks omitted); Chen, *supra* note 72, at 643 (arguing that the clear statement rule announced in *Davis* "would mainly affect the rights of two main groups of individuals: those that do not have the communication skills to adequately make an unambiguous request for counsel and those who are so intimidated by the police that they do not or cannot make an unambiguous request").

124. Kami Chavis Simmons, *New Governance and the "New Paradigm" of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 411-16 (2010) ("Police-citizen interactions in poor, urban, and minority communities have consistently been strained. Numerous studies and polls show that minority groups have a disturbingly negative perception of police officers. . . . Courts, police experts, and government officials alike have recognized the negative perceptions that minority communities have of the police. . . . [E]mpirical evidence supports the notion that African Americans' perceptions of mistreatment and differential treatment by the criminal-justice system are in fact substantiated.").

125. *Davis*, 512 U.S. at 460; *see also id.* at 470 n.4 (Souter, J. concurring) ("Social science confirms what common sense would suggest, that individuals who feel intimidated or powerless are more likely to speak in equivocal or nonstandard terms when no ambiguity or equivocation is meant. . . . Suspects in police interrogation are strong candidates for these effects.").

> silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process." 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.[126]

The Court's rationale is untenable because it assumes that the *Miranda* warnings are sufficiently "expla[natory]" to effect a "[f]ull comprehension"[127] of the arrestee's rights, which is neither objectively true, nor true with respect to the low-income, minority, and undereducated demographics that account for the majority of arrestees.[128] Indeed, the Court in *Miranda* emphasized this very notion when it acknowledged that "[a]s with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it."[129]

The costs of the clear statement rule announced by the Court in *Berghuis* are not limited to the low-income, minority, and undereducated demographics discussed above; rather, the costs are likely to be society-wide.[130] The economic costs of administering criminal justice systems, especially the astronomical economic costs associated with incarceration, are borne by taxpayers. Requiring arrestees to unambiguously invoke their right to remain silent is likely to result in more convictions, many of which will be erroneous because the cases will have turned on unreliable confessions[131] made as a result of inherently

126. *Id.* at 460-61 (citations omitted).
127. *Id.* (citations omitted) (internal quotation marks omitted).
128. See *supra* note 121.
129. 384 U.S. 436, 473 (1966).
130. *See id.* at 480 (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis J., dissenting)) (noting both that "'[i]n a government of laws, existence of the government will be imperilled [sic] if it fails to observe the law scrupulously'"); *id.* (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956)) ("'The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law'.").
131. The Court in *Miranda* referred to confessions as "'the most compelling possible evidence of guilt.'" *Miranda*, 384 U.S. at 466 (quoting Mapp v. Ohio, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting)).

coercive custodial interrogations.[132] This is likely to effectuate a vicious feedback loop of increasing society-wide costs as more people are incarcerated, confidence in the criminal justice system is eroded,[133] and individuals released from incarceration are unable, owing to their criminal record, to secure lawful employment.[134] The inability of some to secure lawful employment is likely to lead to further criminality and/or increased reliance on social welfare programs, both of which will further impact taxpayers.

B. The need for amending the Miranda warnings

The *Miranda* warnings were formulated for the purpose of "secur[ing] the privilege against self-incrimination,"[135] and the Court in *Miranda* required that the warnings "adequately and effectively apprise [an arrestee] of his rights."[136] The *Miranda* Court also intended for "the warning [to] show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it."[137]

Portions of the Court's opinion in *Berghuis* rely on the idea that the *Miranda* warnings are sufficient to effectively secure the privilege against self-incrimination.[138] The *Berghuis* Court held

132. *See Miranda,* 384 U.S. at 455 ("[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."); *id.* at 468 ("[A] warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere."); *id.* at 476 ("[T]he 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."); *id.* at 478 ("In [non-custodial questioning] situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.").

133. The American Bar Association has noted that "legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." *See* MODEL RULES OF PROF'L CONDUCT Preamble at ¶ 6 (2009).

134. Anne Piehl, *Crime, Work, and Reentry*, Urban Institute Reentry Roundtable Discussion Paper at 3 (2003), *available at www.urban.org/uploadedpdf/410856_piehl.pdf* ("It is well known, and well documented, that prisoners have employment prospects and employment outcomes that are much worse than those of the rest of the population.").

135. *Miranda*, 384 U.S. at 444.

136. *Id.* at 467; *see also id.* at 445 (contemplating that the warnings would be "full and effective").

137. *Id.* at 468.

138. *See* 130 S. Ct. 2250, 2261 (2010).

that "[t]he main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel";[139] that "*Miranda*'s main protection lies in advising defendants of their rights";[140] and that "'the primary protection afforded suspects subject[ed] to custodial interrogation is the *Miranda* warnings themselves.'"[141] However, the current *Miranda* warnings are insufficient, especially given *Berghuis*'s clear statement rule, to facilitate an adequate understanding of an arrestee's rights or to effectively secure the privilege against self-incrimination, and continued reliance on the current warnings is therefore inconsistent with any fair administration of justice.[142]

The Court in *Berghuis* ultimately held 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,"[143] and that an arrestee's invocation of his right to remain silent must be unambiguous.[144] But the *Miranda* warnings themselves give absolutely no indication of these rules, and no amount of common sense would suggest to an average person, let alone an average arrestee, that the exercise of the right to remain silent (that is, simply remaining silent) differs importantly from the invocation of the right.[145]

The *Miranda* warning given in *Berghuis*, which is typical and which was considered approvingly by the Court, provides:

1. You have the right to remain silent.

2. Anything you say can and will be used against you in a court of law.

3. You have a right to talk to a lawyer before answering

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139. *Id.*

140. *Id.* at 2262.

141. *Id.* at 2263 (quoting Davis v. United States, 512 U.S. 452, 460 (1994)).

142. *See Miranda*, 384 U.S. at 472 ("[A]uthorities . . . have the obligation not to take advantage of indigence in the administration of justice.").

143. 130 S. Ct. at 2264.

144. *Id.* at 2260.

145. *See id.* at 2276 (Sotomayor, J., dissenting) ("Advising 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. . . . [And] the *Miranda* warnings give no hint that a suspect should use . . . magic words . . . .").

> any questions and you have the right to have a lawyer present with you while you are answering any questions.
>
> 4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.
>
> 5. 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.[146]

Conspicuously absent from these warnings is any suggestion of the need to invoke, nevermind unambiguously invoke, one's right to remain silent in order to cut off questioning, which the Court in *Mosley* identified as a "critical safeguard,"[147] and with which the *Berghuis* Court agreed.[148] Instead, the language of the warnings speaks only to the fact that an arrestee can "decide . . . to use [his] right to remain silent."[149] Thus, a sensible understanding of the current *Miranda* warnings would tend to militate *against* verbally invoking the right to remain silent, given that the arrestee is advised that he has the right to remain silent and that anything he says can and will be used against him. Even if an arrestee had some independent notion of the need to verbally invoke the right to remain silent, reliance on the plain import of the warnings themselves, which we should expect given the overwhelming pressures inherent in custodial interrogations,[150]

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146. *Id.* at 2256.

147. 423 U.S. 96, 103 (1975).

148. *Berghuis*, 130 S. Ct. at 2260 (quoting *Mosley*, 423 U.S. at 103) (quoting Miranda v. Arizona, 384 U.S. 436, 474 (1966)) (internal quotation marks omitted) ("Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his right to cut off questioning.").

149. *Id.* at 2262. (citation omitted).

150. *Miranda*, 384 U.S. at 455 ("[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."); *id.* at 468 ("[A] warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere."); *id.* at 476 ("[T]he 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."); *id.* at 478 ("In [non-custodial questioning] situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.").

would tend to counsel *against* verbally invoking the right.

Furthermore, the current *Miranda* warnings, especially after *Berghuis*, fail to "show the individual that his interrogators are prepared to recognize his privilege [to remain silent] should he choose to exercise it," as the *Miranda* Court contemplated,[151] because police are currently not required to advise the arrestee that he must unambiguously invoke his right to remain silent in order to cut off questioning, and because police are now free to engage in prolonged interrogation despite an arrestee's steadfast exercise of his right to remain silent or his imperfect attempt to invoke the right, and because police are not required to ask clarifying questions. The result is that police now have an incentive to interrogate arrestees *ad infinitum*, with the hope of eventually discovering an individual weakness that compels the arrestee to utter something from which courts may now imply a waiver, in contravention of the law established by the Court in *Miranda*.[152]

The *Miranda* Court held that:

> The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege.[153]

The interests of justice dictate, especially after *Berghuis*, that in addition to the need to make arrestees aware of the consequences of foregoing the right to remain silent, the warnings must also, in keeping with their design to assure a meaningful understanding and intelligent exercise of the right, make arrestees aware that a primary consequence of merely exercising the right to remain silent (that is, simply remaining silent) is to allow police to continue interrogation, and that a clear invocation

151. *Id.* at 468.

152. *See id.* at 475 ("[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.").

153. *Id.* at 469.

of the right is necessary to cut off questioning.

C. Proposed amendment to the Miranda warnings

The *Miranda* warnings can be easily amended to fully convey the scope of an arrestee's rights after *Berghuis*. Working from the warnings reproduced above, the following could be added after part two and before part three: "If you choose to exercise your right to remain silent by simply remaining silent, we will continue to question you. However, if you say that you do not want to speak with us, we will stop questioning you, and we will not be able to use that against you in court."[154]

Amending the *Miranda* warnings in this manner would require only negligible, if any, economic or other resource investments. Police officers who are already versed in the delivery of the current *Miranda* warnings would not need to be retrained; rather, officers would simply need to be apprised of the amendment, which would likely require only minutes to learn. The amended warnings would not burden police activity because the amendment would require but a few additional seconds to deliver, and the amendment does not alter the rights of any parties.

This proposed amendment to the *Miranda* warnings is not inconsistent with earlier opinions in which the Court rejected arguments that the warnings must be delivered in a particular way,[155] because the amendment proposed here is simply meant to effectuate what the Court has already indicated the *Miranda* warnings are designed to do, specifically to "adequately and effectively apprise [an arrestee] of his rights"[156] and "to ensure that an accused is advised of and understands the right to remain silent and the right to counsel";[157] and because the message contained in the proposed amendment could be effectively

154. Other writers have suggested, prior to *Berghuis*, that the *Miranda* warnings be amended to include similar language. *See* Strauss, *supra* note 53, at 823.

155. *See* California v. Prysock, 453 U.S. 355, 359 (1981) (citation omitted) ("This Court has never indicated that the 'rigidity' of *Miranda* extends to the precise formulation of the warnings given a criminal defendant.").

156. *Miranda*, 384 U.S. at 467; *see also id.* at 445 (contemplating that the warnings would be "full and effective").

157. *Berghuis*, 130 S. Ct. at 2261.

communicated in any number of ways.[158]

Amending the *Miranda* warnings does not require additional action by the Court. Congress, state legislatures, or state supreme courts could rise to the task,[159] or police departments could promulgate rules incorporating the proposed amendment.[160]

Failure to amend the *Miranda* warnings would provide an opportunity and an incentive for police officers to unjustly exploit the clear statement rule announced by the Court in *Berghuis* by interrogating arrestees at length despite their steadfast exercise of the right to remain silent and their imperfect attempts to invoke the right, and would also likely exacerbate existing trends related to the overrepresentation of low-income, minority, and undereducated demographics in the criminal justice system, leading to additional taxpayer expense and the erosion of confidence in the criminal justice system.[161]

V. CONCLUSION

The clear statement rule announced by the Court in *Berghuis*, which requires arrestees to unambiguously verbally invoke their right to remain silent in order to cut off questioning in a custodial police interrogation, is likely to have a disproportionately adverse impact on low-income, minority, and undereducated demographics, which account for the majority of arrestees. This adverse impact can and should be mitigated by amending the *Miranda* warnings to reflect the scope of an arrestee's rights,

158. That is, a verbatim recital would not be required.

159. *Miranda*, 384 U.S. at 467 ("We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws."); *id.* at 490 ("Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.").

160. *See* Florida v. Powell, 130 S. Ct. 1195, 1206 (2010) (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 12 Florida v. Powell, 130 S. Ct. 1195 (2010) (No. 08-1175) ("[I]t is 'desirable police practice' and 'in law enforcement's own interest' to state [*Miranda*] warnings with maximum clarity.").

161. The American Bar Association has noted that "legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." *See* MODEL RULES OF PROF'L CONDUCT Preamble at ¶ 6 (2009).

specifically the need to unambiguously verbally invoke the right to remain silent in order to cut off questioning. The current *Miranda* warnings are insufficient to effectively convey this requirement and therefore fail to fulfill their intended purpose, which is to "secure the privilege against self-incrimination"[162] by "adequately and effectively appris[ing an arrestee] of his rights"[163] and "show[ing] the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it."[164] The task of amending the *Miranda* warnings could be undertaken by legislatures or high courts at the state or federal level, and implementing the amendment to the *Miranda* warnings that I have proposed above would be inexpensive and uncomplicated. The legal and logical consistency inherent in amending the *Miranda* warnings as proposed finds powerful expression in the oft-quoted passage that "our system of justice is not founded on a fear that a suspect will exercise his rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."[165]

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162. *Miranda*, 384 U.S. at 444.

163. *Id.* at 467; *see also id.* at 445 (contemplating that the warnings would be "full and effective").

164. *Id.* at 468; *see also* Berghuis v. Thompkins, 130 S. Ct. 2250, 2261 (2010) ("The main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel.").

165. Moran v. Burbine, 475 U.S. 412, 458 (1986) (Stevens, J., dissenting) (quoting Escobedo v. Illinois, 378 U.S. 478, 490 (1964)) (internal quotation marks omitted), *quoted in Berghuis*, 130 S. Ct. at 2277 (Sotomayor, J., dissenting).