Is Miranda on the Verge of Extinction? The Supreme Court Loosens Miranda’s Grip in Favor of Law Enforcement

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I. INTRODUCTION

In 1964, the Self-Incrimination Clause of the Fifth Amendment was held applicable to the States through the Due Process Clause of the Fourteenth Amendment. Just two years later, the Supreme Court of the United States would issue arguably the single most important opinion in criminal procedure in Miranda v. Arizona. This landmark case would go on to set the tone for criminal interrogations for the next half-century. Miranda was attempting to achieve a balance between the need to protect a suspect’s privilege against self-incrimination and law enforcement’s interests in interrogating criminals and legally obtaining a confession. In doing so, the Court...
created what is now known as the Miranda warning to be given any time a suspect is brought into custody and interrogated. The warnings inform a suspect of his right to remain silent and his right to an attorney before and at any time during the interrogation. \(\text{Miranda}\) is now considered "one of the court's best-known creations" and is constantly the subject of criminal procedure in the courtroom, interrogation room, and in TV crime dramas alike.

Over the years, \textit{Miranda} has sustained subtle setbacks and restrictions to provide police with more leeway in seeking confessions and avoiding the suppression of evidence. However, \textit{Miranda} fought, scratched and clawed its way to survival. But, it was not until this year when the Supreme Court issued a devastating three-punch combination of opinions which may have put \textit{Miranda} out for good. \textit{Florida v. Powell}, \textit{Maryland v. Shatzer}, and \textit{Berghuis v. Thompkins} all appear to demonstrate a trend toward an approach inconsistent with the principles outlined in \textit{Miranda}. In the span of roughly six months, the Court has decided that a suspect's rights now expire after fourteen days, an incarcerated inmate is no longer considered to be "in-custody," police no longer need to expressly inform a suspect that he has the right to have an attorney present during the interrogation, and a suspect must speak in order to remain silent, or he risks waiving his right to remain silent.

This article will present a look at the cases which have come to shape the law of the United States and illustrate how the Court's most recent opinions do or do not pose a threat to the viability of \textit{Miranda}. Part II of this

4. \textit{Id.} at 444.
5. \textit{Id.}
7. See \textit{United States v. Patane}, 542 U.S. 630, 644 (2004) (holding that although an un-Mirandized statement itself may be inadmissible, physical evidence obtained or discovered from un-Mirandized statements is admissible at trial as long as the statements were not compelled); \textit{Oregon v. Elstad}, 470 U.S. 298, 309 (1985) (noting that failure to administer \textit{Miranda} warning before a confession will not necessarily exclude admissibility of a second confession after \textit{Miranda} warning, where the statement was voluntary and uncoerced); \textit{New York v. Quarles}, 467 U.S. 649, 653 (1984) (accepting that situations exist where the rules of \textit{Miranda} should not apply); \textit{Oregon v. Hass}, 420 U.S. 714, 722 (1975) (allowing statements made in violation of \textit{Miranda} to be admitted for impeachment purposes).
8. 130 S. Ct. 1195 (2010).
12. \textit{Id.}
article will present a brief history into the *Miranda* decision and provide its rationale and underlying purpose. Part III will discuss an important decision by the Supreme Court of the United States which essentially set the record straight and established *Miranda’s* constitutional underpinnings once and for all. Part IV of the article will look at three significant Supreme Court decisions rendered so far this year. It will present the facts, holdings and rationales given by the Court in *Florida v. Powell*, *Maryland v. Shatzer*, and *Berghuis v. Thompkins*. The article will illustrate how each of these cases dealt significant blows to the long standing *Miranda* warning requirements and its underlying purpose, with the bulk of the analysis pertaining to the *Berghuis* case. The *Berghuis* analysis will point out what has historically been required for a defendant to invoke and waive his right to remain silent and discuss how the decision defies the principals set forth in *Miranda*. Part V will present the arguments that *Berghuis* is inconsistent with *Miranda* and the Constitution by pointing out the flaws in the majority’s reasoning. This section will also present the views of supporters of the decision. Lastly, Parts VI and VII, respectively, will provide the author’s critical analysis of the *Berghuis* decision and reach an ultimate conclusion and recommendation going forward.

II. THE *MIRANDA* WARNING IS BORN

The rights and protections afforded to suspects have come a long way since the days of torture and third degree brutality as a customary method of extracting confessions.\(^\text{15}\) However, this created a shift to psychologically based interrogation tactics which can still lead to coercion.\(^\text{16}\) Regardless of which method of coercion may have been used, none of the cases prior to *Miranda v. Arizona* provided a suspect with “appropriate safeguards . . . to

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15. See Wakat v. Harlib, 253 F.2d 59, 61–62 (7th Cir. 1958) (noting that the defendant was beaten by five police officers, sustaining multiple bruises and broken bones and spent eight months in the hospital); People v. Matlock, 336 P.2d 505, 511–12 (Cal. 1959) (finding that the defendant was interrogated under sleep deprivation tactics and placed on a cold board every time he became sleepy); Bruner v. People, 156 P.2d 111, 120 (Colo. 1945) (stating that the defendant was not allowed to eat for a period of fifteen hours, could not use the toilet without taking a lie detector test, and was held for over two months); Kier v. State, 132 A.2d 494, 496 (Md. 1957) (recognizing that the defendant was strapped naked to a chair and threatened to think police would take skin and hair scraping from anywhere on his body where blood or sperm could be found); People v. Portelli, 205 N.E.2d 857, 858 (N.Y. 1965) (noting that there was beating and torturing of the suspect to acquire incriminating statements).

insure that the statements were truly the product of free choice."\(^{17}\) The *Miranda* holding implemented those safeguards.

The seminal case of *Miranda v. Arizona* clarified and established the rights afforded to criminal suspects during police custodial interrogations.\(^{18}\) The Supreme Court of the United States cited a need for precise procedures and guidelines in order to guarantee and protect an individual's Fifth Amendment privilege against self incrimination.\(^{19}\) In general, *Miranda* established the rule that before any custodial interrogation,\(^{20}\) the suspect must be made aware of his or her right to remain silent and right to have an attorney present.\(^{21}\) This warning provides the best avenue for protection of an individual's privilege against self incrimination when being questioned in an inherently coercive environment under the pressure and intimidation of his adversary.\(^{22}\) Once provided, interrogation must cease "[i]f the individual indicates in any manner . . . that he wishes to remain silent."\(^{23}\) Any statement obtained without this warning or after the privilege has been invoked is considered compelled and may not be admitted into evidence.\(^{24}\)

### III. Establishing the Constitutional Status of *Miranda*

Since the *Miranda* ruling, there has been widespread debate over whether the *Miranda* safeguard is a constitutional rule or just a regulation created under the Court's supervisory authority.\(^{25}\) Some courts held firm that *Miranda* safeguards were merely prophylactic rules to protect the Fifth

\(^{17}\) *Id.* at 457. "[P]rivilege [against self-incrimination] is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own [free] will.' *Id.* at 460 (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)).

\(^{18}\) *Id.* at 479.

\(^{19}\) *Id.* at 439.

\(^{20}\) *Miranda*, 384 U.S. at 444. The Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*

\(^{21}\) *Id.* at 479. The Court specifically delineated the instructions needed to protect the suspect's constitutional rights as follows:

[A suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires.

*Id.*

\(^{22}\) *Id.* at 467.

\(^{23}\) *Miranda*, 384 U.S. at 473–74.

\(^{24}\) *Id.*

Amendment privilege against self incrimination. Others have preached the constitutional roots of *Miranda* and its own distinct constitutional status. Much of the debate has stemmed from the language of the *Miranda* opinion itself. The Supreme Court of the United States settled the debate in *Dickerson v. United States* by expressly refusing to overrule *Miranda* and reiterating the *Miranda* warning's status as "a constitutional rule that Congress may not supersede legislatively."

*Dickerson* dealt with the issue of whether Congress had proper authority to statutorily overrule *Miranda*. Congress enacted 18 U.S.C. § 3501 two years after the *Miranda* decision. This statute would turn the analysis of admissibility of a statement on whether the statement was voluntary and ignore whether *Miranda* was satisfied. Experts debated that the statute should be upheld because the Constitution does not forbid the use of a voluntary statement in a federal case. However, the Court relied on *stare decisis* for support that *Miranda* is a constitutional decision and has been consistently applied to state court prosecutions. The Court officially dubbed *Miranda*’s warning requirement as Constitutional, stating that "Congress may not legislatively supersede [judicial] decisions interpreting and applying the ...
Constitution." This decision "reject[ed] the only alternative that has been presented to [Miranda] for thirty years . . . lock[ing] our country into this particular approach."

IV. LOOSENING MIRANDA'S GRIP ON CRIMINAL PROCEDURE

A. Florida v. Powell

*Florida v. Powell* was the first of three cases this year to significantly loosen the long standing strictures of the *Miranda* warning requirement. Ignoring the *Miranda* requirement that suspects be "clearly informed" of their rights before any custodial interrogation, the Supreme Court of the United States allowed police officers in Tampa to vary the wording of the *Miranda* warning despite the potential for confusion and misunderstanding. So long as the warning "reasonable conveyed" the suspects rights, the Court would allow it. The officers in *Powell* gave the defendant the following warning:

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 the interview.

*Powell* subsequently waived his rights and confessed. On appeal, Powell argued that the warning he received was inadequate because it did not inform him of his right to an attorney during the interrogation. The Su-
The Supreme Court of Florida agreed with Powell and held that the warning did not meet the "clearly informed" standard articulated in *Miranda*. The Supreme Court of Florida further noted that this warning was misleading and indicated to the suspect that his right to an attorney only existed before questioning. The Supreme Court of the United States granted certiorari to resolve the issue.

The Court took the view that the *Miranda* warning, or its equivalent, only needs to reasonably inform suspects of their rights. Otherwise, a "suspect would have to imagine an unlikely scenario . . . [where] he would be obliged to exit and reenter the interrogation room after each query." However, this contradicts the notion that *Miranda* refuses to assume anything from the suspects. Further indicating a steer from requiring a suspect to be "clearly informed," the Court expressly admits that the warning Powell received were not the clearest of warnings. The majority relied mainly on the catchall phrase given to Powell stating that he could invoke his rights "at any time"—including his right to an attorney before questioning. While some courts have accepted an altered reading of the *Miranda* warning, *Powell* marks "the first time the Court has approved a warning which . . . entirely omitted an essential element of a suspect’s rights"—the right to have an attorney present during the interrogation.

The *Powell* decision wasted no time before flexing its muscle. *Rigterink v. State* was one of the earliest cases to be reconsidered in light of *Powell*. *Rigterink*, like *Powell*, dealt with a *Miranda* warning which failed to expressly inform the suspect of his right to counsel before and during the interrogation. The Supreme Court of Florida initially made its ruling that

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46. Id.
47. Powell, 130 S. Ct. at 1201.
48. Id. at 1205.
49. Id.
50. *Miranda v. Arizona*, 384 U.S. 436, 471–72 (1966) ("[T]his warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead.").
51. Powell, 130 S. Ct. at 1205.
52. Id.
54. Powell, 130 S. Ct. at 1210–11 (Stevens, J., dissenting).
55. See Florida v. Rigterink, 130 S. Ct. 1235 (2010) (vacating the judgment of the Supreme Court of Florida and remanding the case in consideration of *Florida v. Powell*).
56. 2 So. 3d 221 (Fla. 2009) (per curium), vacated by 130 S. Ct. 1235 (2010).
57. Rigterink, 130 S. Ct. at 1235.
58. Rigterink, 2 So. 3d at 234.
the warning was constitutionally and materially defective based on what appeared to be the long standing rules illustrated in *Miranda*.\(^{59}\) Under the exact reading of the *Miranda* decision, anything that does not “clearly inform” a suspect of his rights “constitutes a narrower and less functional warning than that required by *Miranda*.”\(^{60}\) But, as illustrated above, these *Miranda* rules that have been applied for so long, are not as relevant in light of *Powell*.\(^{61}\)

B. Maryland v. Shatzer

Just a day after *Powell*, the Supreme Court continued to craft a more police-friendly version of *Miranda* in *Maryland v. Shatzer*.\(^{62}\) In this case, the Court held that police may re-interrogate a suspect who has previously invoked his *Miranda* right to counsel.\(^{63}\) While not expressly declaring it so, the ruling modified another long standing rule of criminal procedure that was articulated in *Edwards v. Arizona*.\(^{64}\) The *Edwards* rule created a perpetual ban in which police were barred from interrogating a suspect who invoked his Fifth Amendment *Miranda* right to counsel, until counsel is provided or the suspect initiates the conversation on his own volition.\(^{65}\) Shatzer based his argument to suppress his confession pursuant to *Edwards*.\(^{66}\)

In 2003, while incarcerated on an unrelated crime, Shatzer was questioned by police regarding a sex offense.\(^{67}\) Shatzer indicated that he would

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59. *Id.* at 253–54.

This [holding] is not because Rigterink is innocent; rather, it is because the rules established to guard fundamental constitutional protections were not followed, and, under these facts, we cannot say that the videotape—which should have been suppressed based upon proper legal analysis—did not “contribute to” his convictions. The murders committed in this case were horrific, gruesome, and worthy of condemnation; moreover, there is evidence to support the verdicts returned by the jury. However, the rule of law must prevail and we must not allow the ends of punishment to trump the means that our state and federal Constitutions require.

60. *Id.* at 253.

61. *See Rigterink*, 130 S. Ct. 1235 (vacating the judgment of the Supreme Court of Florida and remanding the case in consideration of *Florida v. Powell*).


63. *Id.*

64. 451 U.S. 477, 484 (1981); *see Shatzer*, 130 S. Ct. at 1219 (refusing to extend *Edwards* and allowing a suspect who has previously invoked his right to counsel, to be questioning again despite counsel being unavailable).

65. *Edwards*, 451 U.S. at 484–85 (“[W]hen an accused has invoked his right to have counsel present during custodial interrogation, . . . [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication . . . with the police.”).


67. *Id.* at 1217.
not talk without his attorney and invoked his right to counsel. The question- ing ceased, and Shatzer was sent back into the prison's general population. Two and a half years later, police returned to question Shatzer on the same offense. He was again read his *Miranda* rights, but this time he waived them and began to talk. It was only until Shatzer made incriminating statements, which were later used to convict him, when he again requested his attorney. Shatzer argued to suppress his statements under the *Edwards* rule. The *Edwards* theory is that once a suspect invokes his Fifth Amendment right to counsel, a subsequent waiver of the right to counsel in another interrogation is presumed to be involuntary. The implicit assumption is that the second waiver was a result of police persistently attempting to get a waiver of rights and a subsequent confession. The Court held that the implicit dangers prevented by the *Miranda* safeguards and the *Edwards* rule were eliminated due to the extended interval between interrogation sessions and refused to extend *Edwards* to an "eternal" ban on interrogation; instead the Court ruled that a break in *Miranda* custody shall create an exception to the *Edwards* rule.

The Court did not stop there. Refusing to leave any open ends, the next step was to determine how long of a break in *Miranda* custody is sufficient to still meet the suspect's constitutional guarantees and dissipate any presumption of coercion. With very little thought, the Court spit out a number and agreed that a fourteen day break in *Miranda* custody is sufficient. "That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody."

Lastly, the Court was left to determine if sending an inmate back into the prison from which he was retrieved, constitutes a break in custody to

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68. *Id.*
69. *Id.*
70. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 1219–20.
75. *Id.* at 1220.
77. *Id.* at 1223.
78. *Id.*
79. *Id.* *But see Minnick v. Mississippi*, 498 U.S. 146, 156 (1990) (holding that the *Edwards* rule preventing officers from reinitiating questioning with a suspect without counsel present once the suspect has previously requested counsel, exists even after the suspect has had a chance to consult with counsel).
allow the Court to apply the newly created fourteen day rule.\textsuperscript{80} The Court went on to draw the connection that an incarcerated inmate now makes his home in the cell he has been assigned and that returning the inmate back to the general population only sends him back to the environment in which he has become most accustomed.\textsuperscript{81} "The majority ruled that a prison sentence was not custody in the relevant sense and that a return to the general prison population after questioning amounted to a break in custody for the purposes of \textit{Miranda} and \textit{Edwards}.'\textsuperscript{82} While the dissent agrees in part that perhaps the Court ultimately reached the proper substantive conclusion, it criticizes the fourteen day period established by the majority and argues that the holding ignores the \textit{Edwards} rationale "that custodial interrogation is inherently compelling."\textsuperscript{83} The dissent uses the present facts of this case—"a suspect who is in prison"—to distinguish that a suspect who is returned back to his cell is hardly placed back into a situation where he "returns to his normal life" to the extent that all coercive pressures have been eliminated.\textsuperscript{84}

\textit{Shatzer} was another major limitation to the \textit{Miranda} protections afforded to suspects. The purpose of \textit{Miranda} is to protect a suspect’s constitutional privilege against self incrimination when exposed to inherently compelling pressures\textsuperscript{85} of a police-dominated atmosphere;\textsuperscript{86} pressures which can

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  \item \textsuperscript{80} \textit{Shatzer}, 130 S. Ct. at 1224; \textit{see also} New York v. Quarles, 467 U.S. 649, 655 (1984) (stating \textit{Miranda} custody as "a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest").
  \item \textsuperscript{81} \textit{Shatzer}, 130 S. Ct. at 1224.
  \item Interrogated suspects who have previously been convicted of crime live in prison. When they are released back into the general prison population, they return to their accustomed surroundings and daily routine—they regain the degree of control they had over their lives prior to the interrogation. Sentenced prisoners, in contrast to the \textit{Miranda} paradigm, are not isolated with their accusers. They live among other inmates, guards, and workers, and often can receive visitors and communicate with people on the outside by mail or telephone.
  \item \textit{Id.}
  \item \textit{Shatzer}, 130 S. Ct. at 1231–32 (Stevens J., concurring) ("The Court ignores these understandings from the \textit{Edwards} line of cases and instead speculates that if a suspect is reinterrogated and eventually talks, it must be that ‘further deliberation in familiar surroundings has caused him to believe (rightly or wrongly) that cooperating with the investigation is in his interest.’").
  \item \textit{Id.} at 1221, 1232.
  \item A prisoner’s freedom is severely limited, and his entire life remains subject to governmental control. Such an environment is not conducive to "shak[ing] off any residual coercive effects of his prior custody." Nor can a prisoner easily "seek advice from an attorney, family members, and friends," especially not within [fourteen] days; prisoners are frequently subject to restrictions on communications. Nor, in most cases, can he live comfortably knowing that he cannot be badgered by police.
  \item \textit{Id.} at 1232.
\end{itemize}
cause an individual to be compelled to speak rather than exercise his own free will. However, Shatzer assumes all coercive pressures placed on an individual expire after fourteen days. This holding expressly permits police to engage in a tactic where, once a suspect invokes his right to counsel, police simply release the suspect, wait fourteen days, and try again hoping this time the suspect is not intelligent enough to invoke his right to counsel, which may not have been provided to him the first time around.

C. Berghuis v. Thompkins

Berghuis v. Thompkins is the most recent Supreme Court of the United States case concerning Miranda warnings and arguably the most damaging to Miranda’s protection of a suspect’s Fifth Amendment rights. The defendant, Thompkins, was arrested for suspicion of murder, placed in a small interrogation room, and made to sit in a make-shift school desk. The officers handling the investigation then read Thompkins his Miranda rights, which he refused to sign. The officer then proceeded to attempt to interrogate Thompkins for the next three hours. Thompkins remained silent during the interrogation with the exception of “a few limited verbal responses.” After nearly three hours, the officer asked Thompkins, “Do you believe in God?” This question finally elicited a response from Thompkins who replied “Yes” as he began to cry. He was then asked if he prayed to God, which he again replied, “Yes.” The next question was, “Do you pray to God to forgive you for shooting that boy down?” to which Thompkins defeatedly replied, “Yes.” Thompkins refused to make a written confession,

86. Id. at 456.
87. Id. at 467.
88. Shatzer, 130 S. Ct. at 1223.
89. Id.
90. Barnes, supra note 6.
92. Id. (“[S]ign[ing] the form [would] demonstrate that [Thompkins] understood his rights.”). Cf: United States v. Plugh, 576 F.3d 135, 142 (2d Cir. 2009) (refusing to sign a waiver form is an unequivocal assertion that the suspect is not willing to waive his rights).
93. Berghuis, 13 S. Ct. at 2256.
94. Id. Thompkins remained silent during the interrogation, with the exception of declining a peppermint and making a comment “that the chair he was sitting in was hard.” Id. at 2256–57 (citation omitted) (internal quotation marks omitted).
95. Id. at 2257.
96. Id.
97. Berghuis, 13 S. Ct. at 2257.
98. Id. at 2258.
and the interrogation ended 15 minutes later.\textsuperscript{99} His limited responses were used to convict him.\textsuperscript{100} The issue for the Court was "whether an invocation of the right to remain silent can be ambiguous or equivocal."\textsuperscript{101} This requires a look as to whether Thompkins invoked his right to remain silent and whether he waived his right to remain silent.\textsuperscript{102}

1. Invoking the Right to Remain Silent

The Supreme Court has never specifically addressed the steps required of a suspect to invoke the right to remain silent.\textsuperscript{103} The ultimate precedent regarding the right to remain silent has always been \textit{Miranda}, which states that when a suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent . . . the interrogation must cease."\textsuperscript{104} \textit{Davis v. United States}\textsuperscript{105} addressed the issue of whether an ambiguous or unequivocal statement could trigger \textit{Miranda} protection.\textsuperscript{106} But, the Court did so in relation to an ambiguous request or invocation of the right to counsel subsequent to a valid express waiver.\textsuperscript{107} The Court held that after a suspect has waived his \textit{Miranda} rights, the suspect may invoke his right to counsel only by making an unambiguous, unequivocal statement requesting counsel; otherwise, police are not required to honor the request or seek clarification.\textsuperscript{108} Davis expressly waived his rights under \textit{Miranda} and then suggested that "maybe [he] should talk to a lawyer" during the interrogation.\textsuperscript{109} This statement was not sufficient to equate to an invocation of the right to counsel.

Unlike a request for counsel, an invocation of the right to remain silent does prevent the police from attempting to interrogate the suspect again after a period of time has elapsed.\textsuperscript{110} Nevertheless, other courts have still applied

\textsuperscript{99} \textit{Id.} at 2257.
\textsuperscript{100} \textit{Id.} at 2256.
\textsuperscript{101} \textit{Id.} at 2260.
\textsuperscript{102} \textit{Berghuis}, 130. S. Ct. at 2258.
\textsuperscript{103} \textit{Id.} at 2260.
\textsuperscript{105} \textit{512 U.S.} 452 (1994).
\textsuperscript{106} \textit{Id.} at 456.
\textsuperscript{107} \textit{See id.} at 455.
\textsuperscript{108} \textit{Id.} at 459.
\textsuperscript{109} \textit{Id.} at 455.
\textsuperscript{110} \textit{Compare} \textit{Michigan v. Mosley}, 423 U.S. 96, 104 (1975) (allowing police to re-question suspect on a different crime, two hours after he invoked his right to remain silent) \textit{with Edwards v. Arizona}, 451 U.S. 477, 484 (1981) (holding that a suspect who invokes the right to counsel bars any police-initiated interrogation without counsel present).
the *Davis* rule to the right to remain silent, although providing very little explanation on its reasons for doing so. Other courts have provided that *Davis* applies only when there is a request for counsel subsequent to a valid waiver. The *Davis* rule merely requires that a suspect clarify his desire to revive a privilege that has already been waived.

The Court in *Berghuis* rejected the argument that remaining silent was an invocation of the right, finding it to be unpersuasive. It chose to rely on *Davis* and treat the *Miranda* right to counsel exactly the same as the *Miranda* right to silence. The Court stated that requiring an express and unambiguous invocation of the right to remain silent creates an objective test and makes proving the voluntariness of a confession easier. The Court shifted the focus of the analysis from the individual suspect’s constitutional rights and placed an overriding importance on the burden society would face in prosecuting criminals. Two hours and forty-five minutes of silence was not enough for the Court to conclude that Thompkins wanted to remain silent during the interrogation and invoke his rights.

2. Waiving the Right to Remain Silent

The prosecution bears the high standard and heavy burden of proving a defendant knowingly, intelligently, and voluntarily waived his rights. The

112. See United States v. Plugh, 576 F.3d 135, 143 (2d Cir. 2009) (“*Davis* only provides guidance . . . [when] a defendant makes a claim that he subsequently invoked previously waived Fifth Amendment rights.”); United States v. Rodriguez, 518 F.3d 1072, 1074 (9th Cir. 2008) (“[T]he ‘clear statement’ rule of *Davis* applies only after the police have already obtained [such a waiver], . . . however, an officer must clarify the meaning of an ambiguous or equivocal response to the *Miranda* warning before proceeding with general interrogation.”) (emphasis omitted); State v. Holloway, 760 A.2d 223, 228 (Me. 2000) (declining to extend *Davis* to require a suspect to unambiguously invoke his rights when there has not been a prior waiver); State v. Tuttle, 650 N.W.2d 20, 28 (S.D. 2002) (“*Davis*, in sum, applies to an equivocal postwaiver invocation of rights.”); State v. Leyva, 951 P.2d 738, 743 (Utah 1997) (“[T]he requirement . . . that an officer limit his questioning to clarifying a suspect’s ambiguous or equivocal statement must be limited to prewaiver scenarios.”).
115. *Id.*
116. *Id.* at 2254.
117. *Id.*
118. *Id.* at 2258–59.
defendant must fully know "the nature of the right being abandoned and the consequences of the decision to abandon it."\textsuperscript{120} \textit{Miranda} illustrated the range of the spectrum when attempting to discern the validity of a waiver as follows:

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But 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.\textsuperscript{121}

\textit{North Carolina v. Butler}\textsuperscript{122} appropriately held that the language in \textit{Miranda} should not be read to require a per se rule that only an express waiver is sufficient to illustrate a waiver.\textsuperscript{123} \textit{Butler} allowed for an implicit waiver based on "the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating a waiver."\textsuperscript{124} But a waiver shall not be presumed from a suspect's silence even if the suspect eventually confesses.\textsuperscript{125} In \textit{Butler}, the defendant refused to sign the waiver, but he expressly agreed to talk to the interrogating officer.\textsuperscript{126} The determinative factor thus turns on whether the defendant understands his rights and the consequences of his actions.\textsuperscript{127} However, if a suspect does express his desire to remain silent, a statement made thereafter may be admissible as a subsequent waiver of the right if the suspect's right to cut off questioning was scrupulously

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\item \textsuperscript{120} Moran v. Burbine, 475 U.S. 412, 421 (1986) (noting that waiver must also be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception").
\item \textsuperscript{121} \textit{Miranda}, 384 U.S. at 475.
\item \textsuperscript{122} 441 U.S. 369 (1979).
\item \textsuperscript{123} \textit{Id.} at 375.
\item \textsuperscript{124} \textit{Id.} at 373.
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} \textit{Id.} at 371. \textit{But see} Colorado v. Connelly, 479 U.S. 157, 167 (1986) (holding that the "voluntariness" of a waiver of the right to remain silent depends on the absence of an over-reaching police probe and that a mentally ill defendant may waive his rights as long as there is no police coercion).
\item \textsuperscript{127} Berghuis v. Thompkins, 130 S. Ct. 2250, 2262 (2010). "The prosecution must make the additional showing that the accused understood these rights." \textit{Id.} at 2261; \textit{see also} Colorado v. Spring, 479 U.S. 564, 574 (1987) ("The \textit{Miranda} warnings ensure that a waiver of these rights is knowing and intelligent by requiring that the suspect be fully advised of this constitutional privilege, including the critical advice that whatever he chooses to say may be used as evidence against him."); Connecticut v. Barrett, 479 U.S. 523, 530 (1987) (rejecting defendant's argument upon a finding that he understood the consequences of making incriminating statements).
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IS MIRANDA ON THE VERGE OF EXTINCTION?

honored. This requires an examination into the amount of time between interrogations, the subject matter of the second interrogation, whether a new Miranda warning was given, and the degree to which police officer pursued further interrogation.

In Berghuis, the Court relied on the fact that Thompkins “could read and understand English” and knew “that police would have to honor his right to be silent . . . during the whole course of the interrogation” in concluding that he understood he was waiving his rights when he made the incriminating statement. The Court concluded by stating broadly that “[w]here the prosecution shows that a Miranda warning was given and that it was understood [an] uncoerced statement establishes an implied waiver of the right to remain silent.” In this case, the Court held Thompkins had not invoked his right to remain silent and cut off questioning and subsequently made a valid waiver of his right to remain silent by voluntarily making a statement, three hours into the interrogation.

V. DOES BERGHUIS OVERRULE MIRANDA?

A. Arguing Against Berghuis

The Berghuis decision is claimed to have “turn[ed] Miranda upside down.” Even Justice Sotomayor, who is a former prosecutor herself and knows the difficult task police face during interrogations, has been one of the decision’s biggest critics. The crucial facts in the case are that Thompkins refused to sign a waiver showing he understood his rights and then sat in almost complete silence for nearly three hours before making an incriminating statement. Critics argue this was not sufficient to convince the Court that Thompkins had invoked his right to remain silent and that he had not made a knowing and intelligent waiver of rights.

129. See id. at 104, 106 (allowing police to attempt to reinitiate questioning with a suspect who has invoked his right to silence, after two hours).
130. Berghuis, 130 S. Ct. at 2262.
131. Id.
132. Id. at 2262–63.
133. Id. at 2278 (Sotomayor, J., dissenting).
134. Barnes, supra note 6 (“[S]ome had speculated [Sotomayor] might be less protective of the rights of suspects than other justices . . . .”).
135. Berghuis, 130 S. Ct. at 2266 (Sotomayor J., dissenting).
136. Id. at 2266–67, 2269; see also State v. Rossignol, 627 A.2d 524, 526–27 (Me. 1993) (holding that suspect had invoked right to remain silent by sitting in silence for twenty minutes).
The prosecution bears a heavy burden of demonstrating a knowing and intelligent waiver. This burden is intensified when a confession is given after a lengthy interrogation. Miranda stops just short of declaring a presumption of coercion, but courts must still presume that a suspect "did not waive his rights." If the Court properly applied Miranda it would clearly show the prosecution failed to satisfy its heavy burden. The words "yes," "yes" and "yes" were the only evidence presented to show Thompkins understood he was waiving his rights. The decision shifts the burden to the suspect to invoke his rights rather than keeping the burden on the police to obtain a valid waiver and relinquishment of rights. Previously, a suspect's rights were intact from the moment he walked into the interrogation room, and the burden was on the police to obtain a waiver. Now, a suspect must be aware of how to invoke his rights before he enters the interrogation room. Once a suspect has been read and understands his Miranda rights, anything he does after that, short of expressly stating that he wants to invoke his right to remain silent, will constitute a waiver.

The Court's application of the "clear invocation rule" announced in Davis to the right to remain silent creates an illogical irony that is "unlikely to convey that [a suspect] must speak" let alone speak in a particular manner. A "statement" is necessary for invoking the right to counsel because "there is no other way to invoke that right." A suspect cannot express that he wants a lawyer unless he states at least some variation of "I want a lawyer." Berghuis though, uses the act of keeping quiet and remaining silent to indi-

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138. See id. at 476.
140. Berghuis, 130 S. Ct. at 2268-70 (Sotomayor, J., dissenting).
Rarely do this Court's precedents provide clearly established law so closely on point with the facts of a particular case. Together, Miranda and Butler establish that a court must presume that a defendant did not waive his right; the prosecution bears a heavy burden in attempting to demonstrate waiver; the fact of a lengthy interrogation prior to obtaining statements is strong evidence against a finding of valid waiver; mere silence in response to questioning is not enough; and waiver may not be presumed simply from the fact that a confession was in fact eventually obtained. Id. at 2270 (citations omitted) (internal quotation marks omitted).
141. Id. at 2271.
142. See Barnes, supra note 6.
143. Id.
144. See id.
145. Berghuis, 130 S. Ct. at 2271 (Sotomayor, J., dissenting).
146. Id. at 2276.
148. Id.
cate a willingness to talk. 149 Logically, it follows that one manner in which a suspect may indicate that he wishes to remain silent is to remain silent. 150 Remaining silent “could be deemed the ultimate invocation.” 151 The suspect is indicating what he wants to do as he is doing it. 152 The central goal of *Miranda*—“ensur[ing] that a suspect makes a free choice to speak to the police”—is compromised by the fact that *Berghuis* now forces a suspect to talk to police, or risk waiving his rights. 153 In essence, the decision compels a suspect to engage in conversation with the police while misinforming the suspect of his right to silence.

Regardless of whether remaining silent is considered an invocation of rights, the *Berghuis* decision erases the *Miranda* requirement that a suspect be “clearly informed” and that interrogation must cease when the suspect “indicates in any manner” his desire to remain silent. 154 Surely, the requirement of informing a suspect that he has the right to remain silent is left undisturbed, but this is no longer sufficient to clearly inform the suspect of all his rights. 155 The *Miranda* warnings give no hint as to the Court’s new clear invocation rule. 156 Just as easily as a suspect may make a clearly unambiguous statement that he wishes to remain silent, the officer can just as easily ask the suspect for clarification. Requiring an officer to ask for clarification when a suspect makes an ambiguous statement is currently not required but still considered good police practice. 157 A suspect who is unaware of how to invoke his rights is unaware of his rights and is no longer clearly informed. A suspect who must clearly state that he would like to remain silent—as the only means of invoking his right to remain silent—can no longer indicate his desire to do so “in any manner” as *Miranda* so valiantly advocated.

**B. Arguing in Support of Berghuis**

Some experts agree with *Berghuis* mainly because they remain indifferent on the decision and question the actual effect, if any, that the decision

152. *Id.*
153. *Id.* at 775.
will even have on current practice.\textsuperscript{158} Police are still required to inform a suspect of his \textit{Miranda} warnings and ask him if he understands his rights.\textsuperscript{159} But now, police no longer need to conduct any follow up questions.\textsuperscript{160} "If a criminal suspect is informed of his \textit{Miranda} rights and understands these rights, the suspect can remain silent to any questioning or instead can expressly invoke the right to remain silent."\textsuperscript{161} \textit{Miranda} has been eroding since its inception, and this is just another case delaying its inevitable extinction.\textsuperscript{162} The Court did not take away a suspect's right to remain silent or privilege against self incrimination. Post-\textit{Miranda} silence still cannot be used against a suspect, and the suspect will continue to be questioned until he has invoked his rights. The decision is rather one of common sense.\textsuperscript{163} Where the dissent urges that silence demonstrates an unwillingness to talk, others argue it only demonstrates a willingness to be questioned.\textsuperscript{164} Besides, it is human nature to speak when attempting to clearly articulate an intention, and rarely does a suspect ever indicate his unwillingness to talk in a manner other than expressly stating so.\textsuperscript{165} As a result, the decision only affects an extreme minority of cases, and the human rights advocates may be exaggerating the effects of the decision.

Taking a more cynical approach, \textit{Miranda} rights are violated constantly during interrogation, and the defense can seldom win the argument when going against a police officer's word.\textsuperscript{166} \textit{Miranda} was supposed to put a serious restraint on law enforcement's ability to interrogate a suspect, but nearly eighty percent of suspects still agree to talk with police after receiving the \textit{Miranda} warning.\textsuperscript{167} \textit{Miranda} is no longer viewed as a formidable obstacle to police interrogations.\textsuperscript{168} Even police training and procedural manuals en-

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\item \textsuperscript{158} Troy Graham, \textit{Little Effect Seen from Court's \textit{Miranda} Ruling}, PHILA. INQUIRER, June 5, 2010, at B1.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} Michael Crites & Anjali P. Chavan, \textit{Is Thompkins' the Death Knell of \textit{Miranda}?}, LAW.COM (July 19, 2010), \url{http://www.law.com/jsp/article.jsp?id=1202463214195&rss=newswire}.
\item \textsuperscript{162} Graham, supra note 158.
\item \textsuperscript{164} Chapman, supra note 149.
\item \textsuperscript{165} Graham, supra note 158.
\item \textsuperscript{166} Id.
\item \textsuperscript{167} Id.
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courage police to begin the interrogation only after the suspect has demonstrated a willingness to cooperate and to take precautions with suspects where the Court does not require them to do so.\textsuperscript{169} The bottom line is if a suspect feels he wants to talk, he will, and if he does not want to talk, he will say so.\textsuperscript{170}

Others point to the flaws of \textit{Miranda} to illustrate the need for change, any change. Problems arising from \textit{Miranda} stem from the complete lack of uniformity in procedures and enforcement across jurisdictions.\textsuperscript{171} A uniform rule should advance the underlying goal of the Self-Incrimination Clause by “protecting the rights of suspects to both non-coercive and constitutionally-informed interrogation.”\textsuperscript{172} Congress no longer has authority to overrule \textit{Miranda}, and the power lies now with the Supreme Court.\textsuperscript{173} But, the flaws in \textit{Miranda} are evidenced by the countless exceptions and loopholes that have been created through case law.\textsuperscript{174}

Supporters have focused their arguments on criticizing \textit{Miranda} and its broad protections rather than supporting the logic of the \textit{Berghuis} decision, referring to \textit{Miranda} as “an artificial rule” created under the guise of the liberal Warren Court.\textsuperscript{175} \textit{Miranda} debates have created unnecessary costs, efforts, and confusion among law enforcement and defendants alike.\textsuperscript{176} \textit{Berghuis} relies heavily on the voluntariness of the statement and the absence of any evidence of police coercion.\textsuperscript{177} A voluntariness approach steers away from artificial rules created forty years ago and draws closer towards the actual words of the Constitution in “that no person shall be compelled to be a witness against himself” in a criminal case.\textsuperscript{178} But until uniformity exists, the goal of achieving constitutionally and legally effective interrogation to convict criminals while ensuring they are informed of their rights cannot be reached.\textsuperscript{179} For now, \textit{Berghuis} reasonably provided much needed aid to po-

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\bibitem{169} Brief Supporting Respondent, \textit{supra} note 113, at 11.
\bibitem{170} Graham, \textit{supra} note 158.
\bibitem{171} William F. Jung, \textit{Not Dead Yet: The Enduring Miranda Rule 25 Years After the Supreme Court's October Term 1984}, 28 ST. LOUIS U. PUB. L. REV. 447, 457 (2009) ("[T]he most acute need for improvement . . . is development of uniform warnings . . . [E]ven within jurisdictions, large differences exist in the nature of the warnings, their words, their length, their cognitive complexity and indeed their very subject matter."). \textit{Id}.
\bibitem{172} \textit{Id}. at 456.
\bibitem{173} Dickerson v. United States, 530 U.S. 428, 444 (2000).
\bibitem{174} \textit{See Jung, supra} note 171, at 457.
\bibitem{175} Barnes, \textit{supra} note 6.
\bibitem{176} Jung, \textit{supra} note 171, at 457.
\bibitem{177} Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010).
\bibitem{178} U.S. CONST. amend. V; \textit{see} Barnes, \textit{supra} note 6.
\bibitem{179} \textit{See Jung, supra} note 171, at 457.
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lice and "recognize[d] the 'practical realities that the police face in dealing with suspects.'"\textsuperscript{180}

It is clear that \textit{Miranda} tried to achieve uniformity by striking a balance between protecting a defendant’s constitutional rights and providing law enforcement with strict guidelines for police to follow.\textsuperscript{181} In theory this seemed ideal. But we have seen how in some circumstances it is counter-productive to let a criminal go free due to a technical deficiency in \textit{Miranda}, as demonstrated by the numerous exceptions to \textit{Miranda}.\textsuperscript{182} \textit{Miranda} thus created its own contradiction by preaching its constitutional protection and its need in any custodial interrogation and then creating exceptions when \textit{Miranda} does not appear to be as important.\textsuperscript{183} \textit{Miranda} began as a procedural tool to protect a suspect from the pressure of custodial interrogation.\textsuperscript{184} But it has since been casted into a limited and unintended role serving only "to insure the admissibility of post-waiver statements."\textsuperscript{185}

It makes more sense to place the burden on a suspect and require the suspect to invoke his rights.\textsuperscript{186} The only burden for the prosecution is to convince the court that the statements given by the suspect were not compelled and that \textit{Miranda} warnings were issued.\textsuperscript{187} Courts only require this to be proven by a preponderance of the evidence standard rather than the harsher, more difficult burden of clear and convincing.\textsuperscript{188} But the prosecution does not also bear the burden of convincing the court that the defendant made a wise decision by waiving the defendant’s rights.\textsuperscript{189} The Constitution itself does not even require police officers to coach a suspect and ensure that a suspect makes a constitutionally informed decision. Some even argue that the Constitution requires nothing more than a mere recitation of the Fifth Amendment and that "the statement should be admissible as long as it is not compelled."\textsuperscript{190} Ignorance of the law is not a defense although this entails

\textsuperscript{180} Barnes, \textit{supra} note 6.
\textsuperscript{183} Cassell & Litt, \textit{supra} note 34, at 1173.
\textsuperscript{184} Berger, \textit{supra} note 168, at 1063.
\textsuperscript{185} Id.
\textsuperscript{186} Liptak, \textit{supra} note 38.
\textsuperscript{187} Brief Amicus Curiae of the Criminal Justice Legal Found. at 12, Berghuis v. Thompkins, 130 S. Ct. 2250 (2010) (No. 08-1470) [hereinafter Brief Supporting Petitioner].
\textsuperscript{188} Colorado v. Connelly, 479 U.S. 157, 168 (1986).
\textsuperscript{189} Brief Supporting Petitioner, \textit{supra} note 187, at 11–12.
\textsuperscript{190} Liptak, \textit{supra} note 38.
possible infringement on an individual’s due process rights. Ignorance of the Constitution should follow, and an argument that a suspect did not know the extent of his rights should not be a defense absent evidence of police coercion. Besides, informing the suspect of his right to counsel expressly provides the suspect with an opportunity to seek assistance from someone acting in the suspect’s benefit. It is an unlikely scenario to envision a suspect knowingly and expressly waiving his right to silence and invoking his right to counsel or invoking his right to counsel, but expressly waiving his right to silence. Both options provide the same rights to the individual to cease the interrogation upon command. The difference is in how much leeway the police are afforded to re-question the suspect. The result of Berghuis is that police will no longer have to guess what the suspect is thinking when he sits in silence, having understood his rights, but choosing neither to waive them nor invoke them.

VI. CRITIQUE

The discussion here is not whether Miranda is a constitutional requirement or whether it is the only sufficient method of ensuring constitutional rights. The discussion here is whether Miranda remains intact in light of the Supreme Court's decision in Berghuis. In this respect, the answer appears to be a definitive “no.” The Supreme Court created an even greater confusion by stating that the four Miranda warnings are still required, but ignoring the essential principles and underlying reasons for the warnings—to clearly inform the suspect of his rights so that a suspect cannot argue, at least in theory, a violation of the privilege against self incrimination. The problem in Berghuis is that the Court severed core aspects of Miranda while claiming it remains intact and leaving little guidance on how police should apply the decision. What remained was a muddled opinion, chalk full of confusing logic, that would make at least four scholarly Supreme Court Justices scratch their heads.

It was only when Thompkins’ case reached the Supreme Court that he was informed of the need to expressly and explicitly invoke his right to remain silent. If Miranda’s requirement that a suspect be clearly informed of his rights during the interrogation still exists, this assumes that Thompkins was fully aware that an express statement was required to invoke his rights. It ignores the possibility that perhaps he thought he was invoking his right to

“remain” silent by remaining silent. The Court then states that Thompkins three one-word responses at the end of a three-hour interrogation demonstrated a voluntary waiver of rights.\textsuperscript{193} This assumes that Thompkins had a sudden change of heart and decided to cooperate. It ignores the possibility that perhaps, realizing that sitting in silence was not going to stop the interrogation and his rights were not being honored, his will broke and he succumbed to the pressures exerted by the police. The same principles \textit{Miranda} applied in reaching its conclusion were blatantly ignored by \textit{Berghuis}.

Since its decision, \textit{Miranda} placed a heavy burden on police to prove there was a waiver, citing the need to protect the individual from incriminating himself. \textit{Berghuis} alludes to a greater need to protect police from having to make judgments in the field and risk having a confession suppressed as the reasoning for developing a clear cut objective test as the standard of proof.\textsuperscript{194} This clearly shifts the focus of the protection to the police and ignores the notion that “clear” and “unambiguous” remains a subjective inquiry. The objective test makes voluntariness easier to prove for police, and it ignores whether the confession was actually voluntary. It looks only to whether the defendant specifically stated his desire to remain silent. In the most basic form, the distinction between \textit{Miranda} and \textit{Berghuis} is clear. \textit{Miranda} protects the defendant, and \textit{Berghuis} protects the police. \textit{Miranda} announces defendants’ rights as the ultimate importance in a confession case and takes the defendant’s side when faced with ambiguity. \textit{Berghuis} stands for the complete opposite and renounces defendants’ rights. The decision sides with the police when faced with ambiguity.

\textit{Berghuis} concludes that “full comprehension of the right to remain silent . . . [is] sufficient to dispel whatever coercion is inherent in the interrogation process.”\textsuperscript{195} True or not, this assumes that a suspect who is told that he has the right to remain silent understands this to mean that he must first express and unambiguously state he would to like to remain silent, before continuing to remain silent. Without an additional instruction by the interrogating officer, the \textit{Miranda} warning, as it stands, no longer protects the individual’s Fifth Amendment rights, nor clearly informs him of such rights. The fact is, telling a suspect that anything he says can be held against him can reasonably lead to a suspect incorrectly thinking that verbally stating he would like to remain silent may be used against him as incriminating evidence and using his refusal to talk as evidence of guilt.

\textsuperscript{193.} \textit{Id.} at 2271.
\textsuperscript{194.} \textit{Id.} at 2260.
\textsuperscript{195.} \textit{Id.} (quoting Moran v. Burbine, 475 U.S. 412, 427 (1985)).
"Voluntariness" cannot be substituted for "clearly informed" while remaining loyal to Miranda. Miranda requires that they both be met in a sequence. A suspect must be clearly informed of his rights—given a proper Miranda warning—and then must voluntarily, knowingly, and intelligently choose whether to waive those rights. It is impossible for a suspect to make such a decision when he has only been partially informed of his rights. A suspect, who is told he has the right to remain silent, but not told how to invoke that right, is left a sitting duck for police to question for countless hours. Ironically, the first step to keep Miranda intact is to change the warning that has become part of our society. Informing a suspect of the right to remain silent no longer satisfies the clearly informed standard. At the very least, Miranda must now inform the suspect of how to invoke his rights. Specifically, the warning must tell the suspect he has to expressly state that he wants to invoke his right to remain silent. Unless the Supreme Court is willing to adopt similar changes, Miranda hangs in the balance.¹⁹⁶

If the Supreme Court had only specifically stated it was overturning many, if not all, of the Miranda principals it could have avoided many of the critics' arguments. It is well established that the Supreme Court has the power to overrule its own decisions, and it does so all the time. Of course, many critics would have focused their arguments stating this could not happen because Miranda is embedded in our Constitution. But again, there is nothing that restricts the Court from overturning its own ruling so long as it abides by the Constitution. The Constitution does not require for warnings or that a suspect is clearly informed of his rights; it only requires that no suspect be compelled to be a witness against himself. It could be argued that a mere reading of the Fifth Amendment is sufficient to inform the suspect of his rights. The binding precedent for what is or is not constitutional begins first and foremost with the Constitution itself, not the Miranda opinion. Consequently, the power to make this judgment rests squarely on the Supreme Court. However, the Court owes it to everyone who is not sitting on the bench to clarify the path it seeks to take.

¹⁹⁶. See id. at 2271–72 (Sotomayor, J., dissenting).

At best, the Court today creates an unworkable and conflicting set of presumptions that will undermine Miranda's goal of providing "concrete constitutional guidelines for law enforcement agencies and courts to follow." . . . At worst, it overrules [silently] an essential aspect of the protections Miranda has long provided for the constitutional guarantee against self-incrimination.

Berghuis, 130 S. Ct. at 2271–72 (Sotomayor, J., dissenting) (citation omitted).
VII. CONCLUSION

The Supreme Court appears to have left *Miranda* on life-support and is changing the face of criminal procedure at an alarming rate. The next case to come to the Supreme Court on this issue could very well be the last of *Miranda*. Whether *Miranda* remains the best balance protecting constitutional rights and providing concrete guidelines for enforcement is a matter of opinion. But a rule drawing as much criticism as it has support must be questioned. There is rarely, if ever, a case that satisfies everyone, but what can be respected is consistency and uniformity. By reversing the lower court's ruling in *Berghuis* without expressing where *Miranda* stands, the Court has only created more confusion. *Berghuis* stands for the complete opposite of *Miranda* and trying to make them exist together is as illogical as requiring a suspect to speak to remain silent.

If *Miranda* is to remain alive, the Court has two options. The Court may erase the *Berghuis* decision or modify the *Miranda* warning to eliminate any argument that a suspect was not clearly informed of his right. If the Court wants to require an express invocation of rights, it should require an express instruction on the rights. Both options seem unlikely in light of the Supreme Court's consistent trend toward deferential police treatment. There is not enough room atop the criminal procedure pedestal for both of these landmark cases. Right now it appears the Supreme Court has grown old with *Miranda* and is looking for a change. But until the Court specifically overrules or addresses the inconsistencies discussed in this article, confusion will continue to grow in the legal community. Every defendant will cite *Miranda* in his brief and the prosecution will cite *Berghuis*. It remains to be seen which case the presiding Court will accept. After creating such a stir by requiring a suspect to clearly and unambiguously express his intent to invoke his rights, the Court could at least follow suit, and clearly and unambiguously explain to us all what to make of *Miranda* now.