2. Fifth Amendment — Invocation of the Right to Cut Off Questioning. — Despite their iconic status,[1] the "warnings" of constitutional rights that law enforcement officers have been obliged to give to suspects since *Miranda v. Arizona*[2] continue to raise difficult questions for courts. Determining the scope of the *Miranda* protections requires the Supreme Court to perform a challenging judicial task: crafting rules of constitutional application that are both jurisprudentially consistent and applicable by law enforcement officers in the trying situations of everyday policing. Last Term, in *Berghuis v. Thompkins*,[3] the Court held that a defendant who has been informed of his rights and voluntarily speaks during a police interview impliedly waives his right to remain silent and that, should he wish to invoke his right to cut off further questioning, he must express that desire explicitly.[4] The decision serves a variety of values well, both harmonizing the Court's jurisprudence on the right to remain silent with prior decisions on the right to counsel during questioning and crafting a practical rule easily applied by both police and courts. The decision does suggest some lack of clarity in *Miranda* case law, however, created by the conflation of a suspect's "right to remain silent" with his "right to cut off questioning." Although the latter has been consistently treated as derivative of the former, it is in fact a distinct right created by the decision in *Miranda*. The Court's ruling, treating waiver of silence differently from invocation of the right not to be questioned, offers a way to separate these concepts going forward.

In February 2001, Van Chester Thompkins, Jr., was arrested in Columbus, Ohio, for murder in connection with a January 2000 shooting in a strip mall parking lot in Southfield, Michigan.[5] While Thompkins was awaiting transfer to Michigan, two officers from the Southfield Police Department arrived to interview him.[6] The officers advised Thompkins of his *Miranda* rights, but Thompkins refused to sign a form acknowledging that he had been read his rights.[7] The interroga-

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[1] Dickerson v. United States, 530 U.S. 428, 443 (2000) ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.").

[2] 384 U.S. 436 (1966). Although the specific content of these warnings varies slightly based on local police practice, they generally retain the formulation urged by the Court in *Miranda* itself. A suspect in police custody "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.* at 479. *Compare id.*, *with Law & Order* (NBC television broadcast Sept. 13, 1990–May 24, 2010).

[3] 130 S. Ct. 2250 (2010).

[4] *Id.* at 2264.

[5] Thompkins v. Berghuis, 547 F.3d 572, 575–76 (6th Cir. 2008).

[6] *Thompkins*, 130 S. Ct. at 2256.

[7] *Thompkins*, 547 F.3d at 576.

tion proceeded for three hours, during which Thompkins only "talk[ed] with [the police] very sporadically."[8] After two hours and forty-five minutes, the detectives began to question Thompkins about his faith in God, asking if he prayed to God to forgive him for "shooting that boy down."[9] Thompkins answered "Yes," but refused to write anything down, whereupon the interview ended.[10]

Before trial, Thompkins filed a motion to suppress his statements, which the Oakland County Circuit Court denied, finding that Thompkins "never invoked his right to remain silent."[11] After trial, a jury convicted Thompkins of first-degree murder and several related counts.[12] Thompkins appealed the suppression ruling, arguing "that the police improperly continued to interrogate him after he 'implicitly' invoked his right to remain silent by failing to answer the officers' questions."[13] The state court of appeals found that Thompkins had voluntarily waived his right to remain silent and that he never subsequently invoked that right.[14] The Michigan Supreme Court denied discretionary review.[15]

In 2005, Thompkins filed a habeas corpus petition in the Eastern District of Michigan, renewing the arguments he made to the Michigan Court of Appeals.[16] The district court denied the petition,[17] noting in particular that, under the Antiterrorism and Effective Death Penalty Act of 1996[18] (AEDPA), "a federal court is bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of clearly established federal law."[19] The court emphasized that the Supreme Court, in *Davis v. United States*,[20] had held that a suspect must unambiguously invoke *Miranda*'s right to counsel during interrogation in order to cut off further questioning,[21] and that "every circuit that has ad-

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[8] *Id.* (first alteration in original) (quoting testimony of Detective Christopher Helgert, Supplemental Hearing Transcript at 81) (internal quotation marks omitted).

[9] *Id.* (quoting testimony of Detective Christopher Helgert, Supplemental Hearing Transcript at 83) (internal quotation marks omitted).

[10] *Id.* at 576–77.

[11] *Id.* at 577 (quoting Order Denying Motion to Suppress at 4).

[12] People v. Thompkins, No. 242478, 2004 WL 202898, at *1 (Mich. Ct. App. Feb. 3, 2004) (per curiam) (unpublished).

[13] *Id.*

[14] *Id.*

[15] People v. Thompkins, 683 N.W.2d 676 (Mich. 2004) (unpublished table decision).

[16] Thompkins v. Berghuis, No. 05-CV-70188-DT, 2006 WL 2811303, at *1–2 (E.D. Mich. Sept. 28, 2006).

[17] *Id.* at *16.

[18] Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

[19] *Thompkins*, 2006 WL 2811303, at *4.

[20] 512 U.S. 452 (1994).

[21] *Thompkins*, 2006 WL 2811303, at *13; *see Davis*, 512 U.S. at 458–59.

dressed the issue squarely has concluded that *Davis* applies to both components of *Miranda*: the right to counsel and the right to remain silent."[22] As a result, the district court found that Thompkins could not surmount the high bar AEDPA sets for overturning a state court decision on habeas review.[23]

The Sixth Circuit disagreed and, in 2008, reversed in relevant part.[24] The court reviewed much of the post-*Miranda* case law on the right to remain silent, focusing both on the government's burden to prove a waiver of the right to remain silent and on the defendant's invocation of his right to silence, which cuts off further questioning.[25] The court noted that Thompkins had been significantly less cooperative than defendants in other cases in which courts had found an implied waiver of *Miranda* rights, and held that no such waiver could be inferred in this case.[26] Having determined that habeas relief was warranted on those grounds, the court declined to rule on the question of whether Thompkins had implicitly invoked his right to silence such that the continued questioning was improper.[27]

The Supreme Court reversed and remanded for denial of the petition.[28] Writing for the Court, Justice Kennedy[29] held, first, that "an ambiguous or equivocal act, omission, or statement" cannot be considered an invocation of the right to cut off questioning;[30] and second, that when a suspect "has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, [he] waives the right to remain silent by making an uncoerced statement to the police."[31] In short, an invocation of the right to end an interview must be explicit, but a waiver of the right to silence may be implied from a suspect's speech to the interviewing officer.

Addressing first the question of "invocation" of the right to end a police interview, Justice Kennedy drew the same analogy to the Court's decision in *Davis* as the district court. He emphasized 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*," since either

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[22] *Thompkins*, 2006 WL 2811303, at *13 (quoting Bui v. DiPaola, 170 F.3d 232, 239 (1st Cir. 1999)) (internal quotation mark omitted).

[23] *See id.* at *16.

[24] Thompkins v. Berghuis, 547 F.3d 572, 575 (6th Cir. 2008).

[25] *Id.* at 582–83.

[26] *Id.* at 587–88.

[27] *Id.* at 588.

[28] *Thompkins*, 130 S. Ct. at 2265.

[29] Justice Kennedy was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.

[30] *Thompkins*, 130 S. Ct. at 2260.

[31] *Id.* at 2264.

invocation achieves the same result — "requiring an interrogation to cease."[32] Quoting extensively from *Davis*, Justice Kennedy emphasized the procedural benefits of requiring an unambiguous declaration, particularly avoiding problems of proof at trial and providing clear guidance to officers about when they must stop an interview.[33]

Turning next to the question of whether Thompkins waived his right to remain silent by responding to the detectives' questions, Justice Kennedy surveyed the evolution of the *Miranda* requirements in the Court's jurisprudence. The Court had previously held that an "implicit waiver,"[34] established by the prosecution by a preponderance of the evidence, was sufficient to satisfy the waiver requirement of *Miranda*.[35] Justice Kennedy clarified the application of that rule: "Where 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."[36] Holding that Thompkins had properly understood his rights and that there was no evidence of coercion, the Court found that Thompkins, by "knowingly and voluntarily ma[king] a statement to police, . . . waived his right to remain silent."[37]

Justice Kennedy finally addressed whether police are required to obtain a waiver of the right to remain silent before beginning any questioning of a suspect. He noted that the Court had largely considered this question previously in *North Carolina v. Butler*,[38] in which it rejected a rule to "requir[e] the police to obtain an express waiver of [*Miranda* rights] before proceeding with interrogation."[39] Justice Kennedy also addressed two practical considerations. First, he noted that a requirement that waiver be obtained before interrogation would be inconsistent with the implied waiver rule, adopted in *Butler* and here reaffirmed.[40] Second, Justice Kennedy noted that, once the eponymous warnings — *Miranda*'s primary protection — have been given, "[i]nterrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. . . . When the suspect knows that *Miranda* rights can be invoked at any time, he or she has the opportunity to reassess his or her imme-

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[32] *Id.* at 2260.

[33] *Id.*

[34] *Id.* at 2261 (quoting North Carolina v. Butler, 441 U.S. 369, 376 (1979)) (internal quotation marks omitted).

[35] *Id.* (citing Colorado v. Connelly, 479 U.S. 157, 168 (1986)).

[36] *Id.* at 2262.

[37] *Id.* at 2263.

[38] 441 U.S. 369 (1979).

[39] *Thompkins*, 130 S. Ct. at 2263 (alterations in original) (quoting *Butler*, 441 U.S. at 379 (Brennan, J., dissenting)) (internal quotation marks omitted).

[40] *Id.*

diate and long-term interests."[41] Based on this combination of precedent and pragmatism, the Court concluded that police can permissibly question a suspect who has been advised of his *Miranda* rights, but has neither waived nor invoked them.[42]

Justice Sotomayor[43] dissented, taking issue with virtually every aspect of the Court's analysis in what has been described as "her first major dissent."[44] She first considered the question of waiver, emphasizing that *Miranda* gave the government a "heavy burden" of proving that a suspect voluntarily relinquished his right to silence.[45] She noted that this burden evolved into a "presum[ption] that a defendant did not waive his rights,"[46] a presumption that *Miranda* held could not be overcome "simply from the fact that a confession was in fact eventually obtained."[47] Justice Sotomayor would have found that Thompkins's few responses to the detectives' questions, after prolonged interrogation, did not meet the high burden the government bears to prove waiver. In her view, the Court's holding could be read to "overrule[] *sub silentio* an essential aspect of the [*Miranda*] protections" by allowing inculpatory statements themselves to prove waiver.[48] Justice Sotomayor criticized this aspect of the Court's ruling as overreaching, noting that denial of habeas under AEDPA did not require "a new general principle of law" and attempting to limit the Court's holdings with regard to invocation and waiver as "unnecessary to the disposition of this case."[49]

Second, Justice Sotomayor would have followed the reasoning of the Sixth Circuit in declining to address the question of invocation, finding the question of waiver to be sufficient grounds to grant habeas

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[41] *Id.* at 2264.

[42] Justice Kennedy noted that this analysis would have been sufficient to affirm the Michigan Court of Appeals under demanding de novo review, so that court's ruling was "necessarily reasonable under the more deferential AEDPA standard of review." *Id.* The Court also considered Thompkins's claim that he received ineffective assistance of counsel, based on his attorney's failure to request a limiting instruction to the jury regarding evidence of an accomplice's prior trial. The Sixth Circuit had agreed that Thompkins's representation was inadequate, Thompkins v. Berghuis, 547 F.3d 572, 592 (6th Cir. 2008), but the Court reversed, finding ample other evidence in support of Thompkins's conviction such that, even assuming the representation was deficient, Thompkins could not show any resulting prejudice. *See Thompkins*, 130 S. Ct. at 2264–65. The dissent did not address this argument, although no dissenter joined the Court's opinion with respect to the relevant section.

[43] Justice Sotomayor was joined by Justices Stevens, Ginsburg, and Breyer.

[44] Adam Liptak, *Mere Silence Doesn't Invoke Miranda, Justices Say*, N.Y. TIMES, June 1, 2010, at A15.

[45] *Thompkins*, 130 S. Ct. at 2269 (Sotomayor, J., dissenting).

[46] *Id.* (quoting North Carolina v. Butler, 441 U.S. 369, 373 (1979)).

[47] *Id.* at 2270 (quoting Miranda v. Arizona, 384 U.S. 436, 475 (1966)).

[48] *Id.* at 2272.

[49] *Id.* at 2271.

relief.[50] In responding to the Court's analysis, however, she agreed that, in light of circuit courts' persistent application of *Davis*'s clear statement rule to the invocation of the right to silence, "there was no clearly established federal law prohibiting the state court from requiring an unambiguous invocation."[51] Justice Sotomayor nevertheless made clear that she disagreed with the majority's formal extension of *Davis*'s clear statement requirement to the right to remain silent.[52] In addition to taking issue with the majority's conclusion that permitting ambiguous invocations of the right would unjustifiably complicate police work,[53] Justice Sotomayor noted the paradox of requiring a declaration to invoke a right to silence: "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."[54] Highlighting a wide variety of cases in which suspects had used ambiguous language in attempts to invoke their rights, Justice Sotomayor deplored the possible impacts of the Court's decision on the ability of suspects to exercise effectively their *Miranda* rights.[55] Finally, in a particularly pointed conclusion, Justice Sotomayor questioned whether the Court had created an irreconcilable double standard, requiring a suspect to invoke his right to silence unambiguously in order to cut off further questioning, but allowing the police to infer waiver of the right to silence merely from the fact of the suspect's speech.[56]

The Court in *Thompkins* reached the correct result under the prevailing approach to *Miranda*. Its extension of *Davis* both promotes doctrinal consistency among the prophylactic rights *Miranda* established and shows creditable deference to the need for rules capable of practical application by police. A stronger justification for this extension, however, requires reconceptualizing the Court's approach to *Miranda*. Both *Davis* and *Thompkins* are actually about the same right — the right to cut off further questioning — which is distinct from the rights to consult with an attorney or not to answer specific questions. Ultimately, this perspective may require a change the Court did not consider in *Thompkins*: amending the *Miranda* warnings themselves to more accurately inform suspects of their rights.

Although the dissent attempted to frame the case as a watershed retreat from the guarantees of *Miranda*, the Court's requirement of clarity merely took the short step of applying the holding of *Davis* to

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[50] *Id.* at 2273.
[51] *Id.* at 2274.
[52] *Id.* at 2275.
[53] *Id.* at 2275–76.
[54] *Id.* at 2276.
[55] *Id.* at 2276–78.
[56] *Id.* at 2278.

invocations of both the right to counsel and the right to remain silent. In so doing, the Court affirmed a wide range of state and federal courts that had previously construed *Davis* to apply to both *Miranda* protections.[57] As a matter of practical jurisprudence, the Court was wise to keep the application of invocation rules consistent across the *Miranda* rights. The right to silence and the right to counsel during interrogation both operate to "protect the privilege against compulsory self-incrimination,"[58] and the Court has suggested that these rights — of the Court's own making — ought to operate under the same set of rules.[59] Some in the academy have criticized the holding of *Davis* on a variety of grounds — notably, that suspects are likely to equivocate in the face of authority figures,[60] that a suspect whose ambiguous request for an attorney is ignored is unlikely to renew the request with greater clarity,[61] and most bluntly, that courts will subjectively invoke ambiguity to avoid suppressing evidence purely to reach their preferred outcomes.[62] Having previously rejected these counterarguments in *Davis*, however, the Court was correct that "there is no principled reason"[63] to treat the right to silence any differently.

In addition to providing jurisprudential value, this harmony serves a pragmatic purpose as well. In *Dickerson v. United States*,[64] the Court concluded that *Miranda*'s prophylaxis "announced a constitutional rule that Congress may not supersede legislatively."[65] In so doing, however, the Court shouldered the responsibility of ensuring that its decisions do not "place a significant burden on society's interest in prosecuting criminal activity."[66] In dissent in *Thompkins*, Justice Sotomayor acknowledged that requiring the police to divine the meaning of ambiguous requests to end questioning "does not provide police

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[57] *See* United States v. Banks, 78 F.3d 1190, 1197 (7th Cir. 1996) (collecting cases).

[58] *Thompkins*, 130 S. Ct. at 2260.

[59] *See, e.g.*, Solem v. Stumes, 465 U.S. 638, 648 (1984) ("[W]hile *Mosley* did distinguish the right to counsel from the right to silence, much of the logic and language of the opinion could be applied to the invocation of the former." (citation omitted)).

[60] Peter M. Tiersma & Lawrence M. Solan, *Cops and Robbers: Selective Literalism in American Criminal Law*, 38 LAW & SOC'Y REV. 229, 248–51 (2004).

[61] Marcy Strauss, *Understanding* Davis v. United States, 40 LOY. L.A. L. REV. 1011, 1059 (2007).

[62] *See* David Aram Kaiser & Paul Lufkin, *Deconstructing* Davis v. United States*: Intention and Meaning in Ambiguous Requests for Counsel*, 32 HASTINGS CONST. L.Q. 737, 762 (2005). There is ample room for debate about the validity of these concerns — a debate invoking sources ranging from police training manuals, *see* Brief for the NACDL and the ACLU as Amici Curiae in Support of Respondent at 11–12, *Thompkins*, 130 S. Ct. 2250 (No. 08-1470), to the linguistic theories of Jacques Derrida, *see* Kaiser & Lufkin, *supra*, at 738–42.

[63] *Thompkins*, 130 S. Ct. at 2260.

[64] 530 U.S. 428 (2000).

[65] *Id.* at 444.

[66] *Thompkins*, 130 S. Ct. at 2260.

with a bright-line rule,"[67] but nevertheless found that there was "[no] evidence in this case that the status quo has proved unworkable."[68] She did not consider, however, the additional difficulty imposed by asking police to apply two different standards — the clear statement rule of *Davis* for the right to counsel and whatever lesser standard of clarity she would have found acceptable for the right to silence — to two closely related situations. This would raise a variety of questions; notably, could an ambiguous request for counsel, insufficient under *Davis*, nevertheless effectively indicate a suspect's unwillingness to answer further questions?[69] By applying the same standard to both the rights to silence and to counsel, the Court significantly simplified the standards for law enforcement officers, avoiding the sort of "wholly irrational obstacle[]"[70] to effective policing that *Davis* eschewed.

The Court's extension of the *Davis* "clear statement" rule in this case is also sensible because both cases are fundamentally about the invocation of the same right: "the right to cut off questioning."[71] In *Thompkins*, both the majority and the dissent viewed this "right" not as a separate privilege to be independently exercised by a suspect, but as a subsidiary effect of invoking either the right to remain silent or the right to counsel.[72] In reality, however, this right not to be interrogated at all is distinct from both the right to remain silent and the right to be advised by counsel during questioning.[73] The right to re-

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[67] *Id.* at 2276 (Sotomayor, J., dissenting).

[68] *Id.*

[69] Consider a suspect who tells police, "I'm not sure I should talk to you before I talk to my lawyer." This statement would be too ambiguous to qualify as "actually request[ing] an attorney," *Davis v. United States*, 512 U.S. 452, 462 (1994), but it could be read as a desire not to be asked further questions.

[70] *Davis*, 512 U.S. at 460 (quoting Michigan v. Mosley, 423 U.S. 96, 102 (1975)).

[71] Miranda v. Arizona, 384 U.S. 436, 474 (1966).

[72] *See Thompkins*, 130 S. Ct. at 2260 ("Both protect the privilege against compulsory self-incrimination by requiring an interrogation to cease when either right is invoked." (citations omitted)); *id.* at 2274 (Sotomayor, J., dissenting) ("Thompkins contends that in refusing to respond to questions he effectively invoked his right to remain silent, such that police were required to terminate the interrogation . . . .").

[73] The Court did not consider in this case the validity of this "right to cut off questioning." This rule was first announced in *Miranda* itself in slightly more than one page of the decision in which the Court cited no authority in support of the proposition. *See Miranda*, 384 U.S. at 473–74. The Court has continually cited this passage with authority, albeit without elaborating on the validity of the principle's underlying logic. *See, e.g.*, *Mosley*, 423 U.S. at 100–01. Of course, the Fifth Amendment's protection against self-incrimination, which *Miranda* purports to implement, merely guarantees that no defendant "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. This provides obvious logical support for the proposition that a suspect has the proverbial "right to remain silent" — that is, the right not to be compelled to answer questions. It is less clear, however, that this guarantees a right not to be asked such questions at all. *Miranda* established as a prophylaxis the practice of ensuring that a suspect is advised of his right to remain silent, and provided atop that a right to the advice of counsel regarding the exercise or waiver of that right during the course of an interrogation. These safe-

main silent is invoked or waived by a suspect on a rolling basis during any questioning — it is exercised every time a suspect refuses to answer a question, and, as the Court held in *Thompkins*, it is waived any time he gives an uncoerced answer to a question. This is quite a different matter from the accused's right not to be asked any further questions at all. The Court has recognized that the exercise of the right to refuse to answer questions and of the right to cut off questioning altogether call for separate evaluation,[74] further supporting the idea that the "right not to be interrogated" is distinct from the right not to answer specific — or any — questions during such an interrogation. Likewise, although the right to counsel operates in a manner similar to the "right to cut off questioning," simply because station house attorneys are not available to satisfy the accused's request immediately, in theory, once an attorney has been provided, the right is satisfied and police could resume questioning a suspect with counsel now present.

One key distinction between the right to cut off questioning and the right not to answer questions is that the former requires action by another party — the police must end the interrogation — whereas the latter merely requires restraint — the suspect must refrain from answering questions. When a right entitles a suspect to action by another party — concluding the questioning — it seems only fair that the suspect be required to communicate a request for that action clearly. Indeed, *Davis* implicitly noted that one of the chief problems with honoring ambiguous requests is the burden that they place on the police: "Police officers would be forced to make difficult judgment calls about

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guards are ample to ensure that the actual Fifth Amendment right against compulsory self-incrimination is protected. If the ultimate goal is to ensure, consistent with the Fifth Amendment's actual command, that coerced statements are not admitted in evidence, then the question of whether a statement was made voluntarily, after proper advice of the rights *Miranda* guarantees and possibly the advice of counsel, should suffice. *See Davis*, 512 U.S. at 464 (Scalia, J., concurring) ("For most of this century, voluntariness *vel non* was the touchstone of admissibility of confessions."). Although *Miranda* itself posited that "the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights," *Miranda*, 384 U.S. at 476, the Court has since noted that "[f]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process," *Davis*, 512 U.S. at 460 (second alteration in original) (quoting Moran v. Burbine, 475 U.S. 412, 427 (1986)) (internal quotation marks omitted). The state bears the burden of showing that the incriminating answers were given voluntarily; if it can demonstrate that even a lengthy interrogation was not coercive, *e.g.*, *Thompkins*, 130 S. Ct. at 2263 ("[T]here is no evidence that Thompkins's statement was coerced."), then the Fifth Amendment has been satisfied. *Miranda* perhaps went too far in holding, effectively, that the possibility that continued interrogation could become coercive warrants granting suspects the right to end the questioning at any time.

[74] In *Smith v. Illinois*, 469 U.S. 91 (1984) (per curiam), the Court held that "[i]nvocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together." *Id.* at 98. In this context, "waiver" refers to the accused's decision to answer any particular question put to him, whereas "invocation" deals with the right to end all further questioning.

whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong."[75] One could easily replace "wants a lawyer" with "wishes not to be questioned," and directly apply the same logic to the right in question here.

There may be room for consensus between the majority and the dissenters on this point. One of Justice Sotomayor's key objections to the Court's holding is that the *Miranda* warning "You have the right to remain silent" "is unlikely to convey that [a suspect] must speak,"[76] whereas the right to counsel warning "implies the need for speech to exercise that right."[77] By disaggregating the right to refuse to answer questions from the right to end the questioning and by acknowledging that the latter is a separate right, the Court may clarify its own jurisprudence going forward.

To the extent that Justice Sotomayor's concern that the warnings fail to convey the need to make a clear statement is accurate, a simpler solution suggests itself. It would certainly be the tail wagging the dog to hold that, because the warnings are improperly aligned with the substantive rights, the rights should be reformulated to comport with the warnings. Despite the evolution of the Court's jurisprudence on *Miranda*, the warnings have themselves changed little, if at all, since that decision.[78] Rather than contort the Fifth Amendment based on what those warnings imply, the Court should instead update the warnings themselves. Such a solution would require little editorial judgment and would serve the primary concern of *Miranda* that "the accused . . . be adequately and effectively apprised of his rights."[79] A revision would not significantly burden police; an additional sentence could be added, notifying suspects: "If you do not wish to answer any questions, you may ask that questioning cease at any time."

The argument that "*Davis*' clear-statement rule is also a poor fit for the right to silence"[80] is ultimately irrelevant to the issue in *Thompkins*. The Court fundamentally addressed the right to cut off questioning and not the right to refuse to answer, a distinction the Court should explicitly acknowledge in the future. In practice, however, the ubiquitous *Miranda* warnings may not adequately inform defendants of their rights and the steps necessary to exercise them. The Court can readily remedy this defect in the future, narrowing the gap between its jurisprudence and the realities faced by suspects and police alike.

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[75] *Davis*, 512 U.S. at 461.

[76] *Thompkins*, 130 S. Ct. at 2276 (Sotomayor, J., dissenting).

[77] *Id.*

[78] *Compare Miranda*, 384 U.S. at 479, *with Thompkins*, 130 S. Ct. at 2256 (quoting "Notification of Constitutional Rights and Statement" given to Thompkins).

[79] *Miranda*, 384 U.S. at 467.

[80] *Thompkins*, 130 S. Ct. at 2276 (Sotomayor, J., dissenting).