

THROTTLING MIRANDA

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Originally, the term “thug” . . . was Hindi for “swindler.” Beginning in the thirteenth century, the Thugs traveled around India in bands, preying on travelers. With great cunning they would ambush their mark or lure him to an isolated spot, then throttle him.—Irving Wallace, David Wallechinsky, and Amy Wallace, SIGNIFICA, pp. 119-20 (1983)

If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.—Arthur J. Goldberg (Associate Justice, U. S. Supreme Court, 1962-65)

The 1966 *Miranda v. Arizona* decision is arguably the most important and undeniably the most famous of all U.S. Supreme Court criminal procedure decisions. The noble purpose of this legal landmark is to prevent Americans taken into custody by police on criminal charges from being subjected to improper interrogation practices calculated to compel citizens to incriminate themselves.

Few people realize that since the early 1970s the Supreme Court has been stealthily choking the life out of *Miranda*. The latest example of this process of slow strangulation occurred a few weeks ago, on June 1, when the Court in *Berghuis v. Thompkins* reversed a lower court and held that a man convicted of murder in a Michigan state court was not entitled to a new trial. This 5-4 decision, with Justice Kennedy writing the majority opinion for the Court and Justice Sotomayer authoring the opinion for the four dissenters, will be comprehensively examined later in this article.

***Miranda* resulted from the Supreme Court's enlightened determination, based on decades of reviewing cases where a criminal suspect had confessed, to curtail illegitimate yet widespread interrogation practices of American police, who take prisoners to back rooms of police stations, hold them there incommunicado, and interrogate them in secrecy and without recording what happens in the interrogation room. Until fairly recently, standard police interrogation procedures involved use of the third degree—the infliction of mental or physical pain. Although third degree practices still occur, most current police interrogation methods emphasize psychological ploys and pressures as the preferred way of softening up the interrogatee. Experienced professional interrogators barrage the isolated prisoner with a variety of mind-numbing stratagems—trickery, deceit, deception, subterfuge, chicanery, and other artifices—designed to induce him to make incriminating admissions. These police practices mean that custodial interrogation is police-dominated and inherently coercive. These practices disrespect due process and the self-incrimination privilege, to put it mildly. They also are apt to induce innocent persons to make false confessions. Approximately 15% of this nation's DNA exonerees made false confessions during police interrogation. In short, in the words of the *Miranda* decision, custodial interrogation as practiced by this country's police forces “*exacts a heavy toll on individual liberty and trades on the weaknesses of individuals.*”**

To protect Americans from illegitimate police interrogation practices, *Miranda* guarantees them the right to remain silent when interrogated and the right to have a lawyer present before and during the interrogation. These fundamental rights may be waived, but only voluntarily and only if the prisoner has, prior to interrogation, been fully advised of his *Miranda* rights by police. This is why, before questioning arrested suspects, police must advise them that they have the right to remain silent, that anything they say may be used against them, that they have the right to an

attorney's presence before and during questioning, and that if they can't afford an attorney one will be provided free.

The Supreme Court's campaign to suffocate *Miranda* is due to appointment of right-wing justices to the Supreme Court by four right-wing Republican presidents—Nixon, Reagan, and the two Bushes. These justices are leading this nation through what scholars call the Supreme Court's "Criminal Procedure Counterrevolution." These justices tend to favor government over the citizen and to subordinate the rights of individuals to the power of the state; they have broadened the powers of police and prosecutors and narrowed the rights of citizens. These justices usually take the side of government in criminal procedure cases by ruling for prosecutors against defendants, for police against suspects, and for wardens against inmates. *Miranda*, an anti-government, pro-individual rights decision, is anathema to them. In consequence these justices have over the years repeatedly wounded and weakened *Miranda* by applying it woodenly, hypertechnically, or unrealistically, and by carving out exceptions to the decision. A detailed analysis of these decisions—and there are over thirty of them—is impractical here. The worst of them was a 1986 decision in which the Court held there was no *Miranda* violation where police deceived the incommunicado interrogatee by not telling him that his lawyer had called the police station in his behalf and was trying to reach him, and where in addition police deceived the lawyer by falsely telling her that her client would not be interrogated. In a pitiful effort to defend a holding manifesting both creepy empathy for police overreaching and alarming callousness toward the rights of Americans, the Court's opinion preposterously pontificated: "We have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate self interest in deciding whether to speak or stand by his rights (!)"

Against this background let us now turn to the June 1 *Berghuis* decision. Ohio police arrested the suspect, Chester Thompkins, on a

Michigan murder charge. Two Michigan police officers then traveled to the Ohio police station where Thompsons was jailed. The two policemen took him to an 8 by 10 feet interrogation room and placed him in a straight-backed wooden chair. The interrogation session lasted three hours. Since police deliberately failed to record the session, there is some dispute about what happened. The following, however, appears to be a fairly accurate account of what transpired during this secret inquisition.

First, police properly advised Thompsons of his *Miranda* rights, whereupon Thompsons refused to sign a document acknowledging that he understood his rights, and remained silent. Police then began interrogating Thompsons, who for the next two hours and forty-five minutes remained largely silent except for complaining about his uncomfortable chair and declining an offer of a peppermint. Occasionally he nodded his head or gave a one-word or other brief response to a question, but on the whole the interrogation was, in the words of the interrogators, “very, very one-sided” and “nearly a monologue” during which Thompsons was “sullen” and “peculiar.” After nearly three hours of this, the interrogators (using the old ploy of appealing to the interrogatee’s religious beliefs) extracted a one-word incriminating remark from Thompsons. Thompsons was asked, “Do you believe in God?” and replied, in tears, “Yes.” Then he was asked, “Do you pray to God?” to which he again replied, “Yes.” In response to the question “Do you pray to God to forgive you for shooting that boy down?” Thompsons replied, “Yes.” Fifteen minutes later the interrogation ended.

The first basic issue decided by the Supreme Court was whether Thompsons had invoked his right to silence before making the incriminating statement. (Under *Miranda*, police must terminate an interrogation as soon as the suspect invokes his right to silence or requests a lawyer. Therefore, if Thompsons had invoked his right to silence before the point in the interrogation when he made the

incriminating remark, the remark would have been obtained in violation of *Miranda* and hence inadmissible.) This issue was pretty much a no-brainer, for in *Miranda* itself the Court had said that interrogation must cease if the suspect “*indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent*” Here Thompsons had remained uncooperative, almost entirely unresponsive, and nearly silent for nearly three hours; he had hardly spoken at all throughout a prolonged interrogation session. The current Court, however, held that Thompsons had not invoked his right to silence by his near-silence and uncooperative behavior. The only way the right to silence can be invoked, the Court startlingly decreed, is by the suspect unambiguously and unequivocally stating his wish to remain silent. Since Thompsons did not say the words “I want to remain silent,” or “I do not want to talk to you,” he had not invoked his right to silence. The Court did not, however, require police to tell the suspect that specific words are required to invoke the right or that anything less than the magic words is insufficient to assert the right. Furthermore, the Court held, it was of no consequence that in the face of Thompsons’ uncooperativeness police failed prior to interrogating him to ask him any questions to clarify whether he was claiming his right to silence.

The Court therefore rejected Thompsons’ claim that in violation of *Miranda* he had been interrogated after asserting his right to remain silent.

The Court was thus counterintuitively holding that remaining silent in the face of police questioning does not, by itself, invoke the right to silence, and that in order to invoke this right the suspect is compelled to speak. The Court was demanding that assertions of rights made by a secluded captive inside an interrogation room be expressed specifically and clearly. The Court was deeming it as too much of a burden on police to require them, when an interrogatee’s response to the advice of rights is ambiguous or equivocal, to simply

ask for clarification. The Court was also undermining the effectiveness of the *Miranda* warnings themselves, which do not tell the suspect what is required for him to assert his right to silence. What is the point of advising a suspect of his right to silence if he is not told the specifics of how to assert that right? Unless they are to be reduced to a mockery, the warnings will now have to be revised to tell the suspect exactly what he must do to exercise his right to silence. (Furthermore, since the Court in *Berghuis* gratuitously further held that the suspect must invoke his right to counsel unambiguously and unequivocally, the warnings with regard to counsel will also need revision if they are to remain meaningful.)

Under *Miranda*, a confession is inadmissible, even where the suspect has not invoked his right to silence or right to counsel, unless the prosecution establishes that, after the *Miranda* warnings have been given, the suspect knowingly and voluntarily waived his *Miranda* rights before confessing. Thus, even accepting that Thompson's failure to assert his right to silence with the specificity required by the Court meant that he had not invoked that right, the question remained whether there had been a waiver of *Miranda* rights. The second basic issue before the Court in *Berghuis*, therefore, was whether Thompson had waived his rights before making his one-word inculpatory statement.

Under the original *Miranda* holding, this issue was another apparent no-brainer. *Miranda* states that proving waiver is a "heavy burden;" that "[w]hatever the testimony of the authorities as to waiver of rights by an accused, 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;" and that "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."

The *Berghuis* Court, however, thought Thompson had waived his

Miranda rights when he confessed, although the Court avoided stating exactly when this waiver occurred. The Court did acknowledge that “[s]ome language in *Miranda* could read to indicate that waivers are difficult to establish absent an explicit written waiver or a formal, express oral statement.” However, the Court said, subsequent decisions—by which it meant decisions eroding *Miranda*—demonstrate that “waivers can be established even absent formal or express statements of waiver The prosecution therefore does not need to show that a waiver of *Miranda* rights was express. An ‘implicit waiver’ of the right to remain silent is sufficient” Under these post-*Miranda* holdings, therefore, the Court said, *Miranda* “does not impose a formalistic waiver procedure that a suspect must follow to relinquish those rights.” Therefore, a defendant’s silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may support a conclusion that he has impliedly waived his rights. And here, the Court thought, where Thompkins had been fully advised of his rights and understood those rights, he had thereafter “engaged in a course of conduct indicating waiver”

Both of the basic issues in the case were therefore resolved in favor of the state and against a criminal defendant’s claim of violation of rights.

The Court’s holding that Thompkins’ conduct amounted to an implicit waiver of his rights flies in the face of both the letter and spirit of *Miranda*. As Justice Sotomayer said in her dissent, it is surely “unreasonable” here to conclude that “the prosecution met its ‘heavy burden’ of proof on a record consisting of three one-word answers, following 2 hours and 45 minutes of silence punctuated by a few largely nonverbal responses to unidentified questions. . . . That Thompkins did not make the inculpatory statements at issue until after approximately 2 hours and 45 minutes of interrogation serves as strong evidence against waiver.” (The dissent also had the better of the argument on the question of whether Thompkins had

invoked his 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. . . . [W]hen a suspect sits silent throughout prolonged interrogation, long past the point when he could be deciding whether to respond—[his behavior] cannot reasonably be understood other than as an invocation of the right to remain silent.”)

The actual decision of the five-justice majority in *Berghuis* is disturbing, but even more disturbing is the pro-state, anti-individual rights mentality underlying the decision. What a bunch of cheerleaders for police the five-justice majority in *Berghuis* is! What apologists for the crime control establishment! We now have a Supreme Court which in criminal procedure cases strains and grunts in order to side with the powerful law enforcement establishment over the citizen, in complete lack of sympathy for prisoners caught up in the toils of America’s custodial interrogation system. It insists on nice technicalities when it comes to assertions of rights by a solitary prisoner detained inside an interrogation room. If a suspect wishes to remain silent or to have an attorney he must comply with formalistic requirements. He must invoke his rights unambiguously and unequivocally, and if (in the memorable words of Justice Souter) he fails to “speak with the discrimination of an Oxford don” the police may proceed as if no rights have been invoked. Moreover, if the suspect’s response to the *Miranda* advice of rights is equivocal, so that a reasonable issue exists as to whether the suspect has asserted his rights, the police need not seek clarification and may proceed the same way they would proceed if the suspect had expressly and formally announced that he was foregoing his rights.

The Court’s love affair with formalism and explicitness vanishes when it comes to waivers of rights. This Court, in its own words, “does not impose a formalistic waiver requirement that a suspect must follow to relinquish [his] rights” and believes that “waivers

can be established even absent formal or express statements of waiver” We have a Court crazily insisting that invocations of rights be express and explicit while simultaneously permitting implied and implicit waivers of rights.

What can be done about this ridiculous situation in which the fate of liberty in the nation’s highest court is in the hands of right-wing ideologues? Only future judicial appointments can produce a Court more sensitive to individual rights and less slanted in favor of government. A Court less likely inclined in criminal procedure cases to favor the state over the individual. A Court which expands *Miranda* protections—by requiring, for example, that after giving the *Miranda* warnings police expressly ask the suspect in yes or no terms whether he wants a lawyer or (if he doesn’t) whether he wishes to exercise his right to silence. A Court, in short, which breathes new life into *Miranda*, instead of asphyxiating it with chokeholds.