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## Is Silence Still Golden? The Implications of *Berghuis v. Thompkins* on the Right to Remain Silent

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# IS SILENCE STILL GOLDEN? THE IMPLICATIONS OF *BERGHUIS V. THOMPCKINS* ON THE RIGHT TO REMAIN SILENT

*Brigitte Mills\**

## I. INTRODUCTION

The Supreme Court's decision in *Berghuis v. Thompkins*<sup>1</sup> chips further away at the already tattered principles and protections originally announced in the Court's 1966 landmark decision in *Miranda v. Arizona*.<sup>2</sup> The Fifth Amendment of the U.S. Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself."<sup>3</sup> In *Miranda*, the Court found that the inherently coercive pressures of in-custody interrogation might compel a suspect to violate his Fifth Amendment right against self-incrimination.<sup>4</sup> To help prevent violations of this constitutional right, the *Miranda* Court held that law enforcement officials must apprise the suspect of his rights by way of certain warnings.<sup>5</sup> These warnings are not guaranteed constitutional rights themselves but serve to safeguard those eminently important substantive rights<sup>6</sup> and are an "absolute prerequisite to interrogation."<sup>7</sup> No inculpatory statements elicited during a custodial interrogation may be offered against the

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\* J.D. 2011, Loyola Law School Los Angeles, magna cum laude and Order of the Coif. I would like to thank Professor Marcy Strauss for her invaluable guidance and input on this comment. I would also like to give my deepest thanks to the entire staff of the *Loyola of Los Angeles Law Review*, especially the inimitable Elena Grieco, for her support, patience, and keen eye throughout the editing process.

1. 130 S. Ct. 2250 (2010).
2. 384 U.S. 436 (1966).
3. U.S. CONST. amend. V.
4. *See Miranda*, 384 U.S. at 467.
5. *See id.* at 471. These now-famous warnings must inform the suspect that he has the right to remain silent, that anything he says can be used against him, and that he has the right to the presence of an attorney during questioning. *Id.*
6. *See Davis v. United States*, 512 U.S. 452, 457 (1994).
7. *Miranda*, 384 U.S. at 471.

suspect unless the suspect was first advised of his rights.<sup>8</sup>

*Miranda* warnings do more than merely inform suspects of their rights. The *Miranda* Court found that these warnings protect a suspect from the “inherently compelling pressures” of interrogation.<sup>9</sup> First, after the warnings have been given, if the suspect “in any manner”<sup>10</sup> indicates that he wishes to remain silent or that he wishes to consult an attorney, all questioning must cease.<sup>11</sup> Alternatively, if the suspect does not invoke his rights and the interrogation continues, the government shoulders a “heavy burden” to show that the suspect “knowingly and intelligently” waived his rights.<sup>12</sup> *Miranda* made clear that “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.”<sup>13</sup>

The *Miranda* Court announced these broad principles regarding the right against self-incrimination but provided merely a blueprint of the right’s scope. In fact, the *Miranda* Court left the question for a future Court to fill in the rule’s precise contours. As discussed below, the Court has retreated from the broad principles originally announced in *Miranda*, and the rules that have developed through *Miranda*’s progeny bear little resemblance to the original decision.<sup>14</sup>

This Comment discusses the decision in *Berghuis v. Thompkins*<sup>15</sup> and the role the decision plays in further diminishing the broad protections established in *Miranda*. Part II provides a summary of the factual and procedural background of the *Thompkins* decision. Part III discusses the reasoning of the majority and dissenting opinions. Finally, Part IV discusses how the decision’s broad holding is a departure from the Court’s precedents and how it greatly undermines a suspect’s exercise of his constitutionally guaranteed rights.

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8. *See id.* at 444.

9. *Id.* at 467.

10. *See id.* at 473–74.

11. *Id.*

12. *Id.* at 475.

13. *Id.*

14. *See* Erwin Chemerinsky, *Supreme Court—October Term 2009 Foreword: Conservative Judicial Activism*, 44 LOY. L.A. L. REV. 813, 832–33.

15. 130 S. Ct. 2250 (2010).

## II. STATEMENT OF THE CASE

Samuel Morris died from multiple gunshot wounds sustained outside a mall in Southfield, Michigan, on January 10, 2000.<sup>16</sup> One of the suspects, Van Chester Thompkins, fled the scene.<sup>17</sup> He was arrested in Ohio about one year later.<sup>18</sup> Two officers from Michigan traveled to Ohio to interrogate Thompkins.<sup>19</sup> At the start of the interrogation, Detective Christopher Helgert presented Thompkins with a form containing the *Miranda* warning.<sup>20</sup> To ensure that he could read and understand English, Helgert asked Thompkins to read aloud the fifth warning on the form.<sup>21</sup> Thompkins complied.<sup>22</sup> Helgert read the remaining warnings aloud and asked Thompkins to sign the form to indicate that he understood his rights.<sup>23</sup> Thompkins declined to sign the form.<sup>24</sup> There is conflicting evidence as to whether Thompkins verbally confirmed that he understood his rights.<sup>25</sup>

The interrogation took place in a room that was eight feet by ten feet.<sup>26</sup> Thompkins sat in a chair that resembled a school desk.<sup>27</sup> After

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16. *Id.* at 2256.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* The form stated:

## NOTIFICATION OF CONSTITUTIONAL RIGHTS AND STATEMENT

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have a right to talk to a lawyer before answering any questions and you have the right to have a lawyer present with you while you are answering any questions.
4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.
5. You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned.

*Id.*

21. *Id.*; *see supra* note 20.

22. *Thompkins*, 130 S. Ct. at 2256.

23. *Id.*

24. *Id.*

25. Helgert testified at a suppression hearing that he “believe[d] [he] asked [Thompkins] if he understood the Rights, and [Helgert thought he] got a verbal answer to that as a ‘yes.’” *Id.* at 2267 n.1 (Sotomayor, J., dissenting). At trial, however, Helgert said, “I don’t know that I orally asked” Thompkins whether he understood his rights. *Id.*

26. *Id.* at 2256 (majority opinion).

27. *Id.*

the interrogation began, at no time did Thompkins say that he did not want to talk with the police, that he wanted to remain silent, or that he wanted to speak with an attorney.<sup>28</sup> During the interrogation, the officers asked Thompkins numerous questions and conveyed to him that this was his opportunity to tell his side of the story.<sup>29</sup> Thompkins, however, remained largely silent.<sup>30</sup> He gave a few limited responses, such as “Yeah,” “No,” or “I don’t know,” and occasionally nodded his head or made eye contact.<sup>31</sup> At one point, he communicated that he “didn’t want a peppermint” and that the chair he was “sitting in was hard.”<sup>32</sup> After about two hours and forty-five minutes, Helgert asked Thompkins, “Do you believe in God?”<sup>33</sup> Thompkins made eye contact with Helgert, and, with tears in his eyes, responded, “Yes.”<sup>34</sup> Helgert then asked, “Do you pray to God to forgive you for shooting that boy down?”<sup>35</sup> He responded, “Yes,” and looked away.<sup>36</sup> Thompkins refused to sign a written confession, and the interrogation ended approximately fifteen minutes later.<sup>37</sup>

Before his jury trial, Thompkins made a motion to suppress the statements made during the interrogation under *Miranda*,<sup>38</sup> claiming a violation of his Fifth Amendment right against self-incrimination.<sup>39</sup> He claimed he had invoked his right to remain silent by actually remaining silent, and that in any event, he had not waived that right.<sup>40</sup> The trial court denied the motion.<sup>41</sup> The jury subsequently convicted Thompkins of first-degree murder.<sup>42</sup>

Thompkins appealed the trial court’s refusal to suppress his

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28. *Id.*

29. *Id.* at 2267 (Sotomayor, J., dissenting).

30. *Id.* at 2256 (majority opinion).

31. *Id.* at 2256–57.

32. *Id.* at 2257.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. 384 U.S. 436 (1966).

39. *Thompkins*, 130 S. Ct. at 2257.

40. *Id.*

41. *Id.*

42. *Id.* at 2258.

pretrial statements.<sup>43</sup> The U.S. Court of Appeals for the Sixth Circuit found that while a waiver of the right to remain silent may be implied through a “course of conduct indicating waiver,”<sup>44</sup> Thompkins’s “persistent silence for nearly three hours” indicated a course of conduct that strongly suggested that Thompkins did *not* waive his right to remain silent.<sup>45</sup>

### III. REASONING OF THE COURT

#### A. Majority Opinion

Under *Miranda*, for statements made by a suspect during a custodial interrogation to be admissible against him at trial, the police must give the suspect a warning advising him of his rights.<sup>46</sup> The warning must advise the suspect that he has the right to remain silent and the right to the presence of an attorney.<sup>47</sup> If at any time during the interrogation, the suspect invokes either of these rights—for example by stating that he wants to speak to an attorney or that he does not want to answer questions—the interrogation must cease.<sup>48</sup> However, even if the suspect does not clearly invoke his rights and the interrogation continues, any statements made during the investigation are inadmissible absent a knowing and voluntary waiver of those rights.<sup>49</sup>

#### 1. Whether Thompkins Invoked His Right to Remain Silent

Thompkins argued that he invoked his right to remain silent by not saying anything for a sufficient period of time, and therefore all questioning should have ceased.<sup>50</sup> In an opinion authored by Justice Kennedy, a majority of the Court rejected this argument.<sup>51</sup>

The Court acknowledged that when a suspect invokes his right

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43. *Id.*

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

45. *Thompkins v. Berghuis*, 547 F.3d 572, 588 (6th Cir. 2008), *rev'd*, 130 S. Ct. 2250 (2010).

46. *See Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

47. *Id.*

48. *See id.*

49. *Butler*, 441 U.S. at 373.

50. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2259 (2010).

51. *Id.*

to counsel or his right to remain silent police must “scrupulously honor[]” this request by terminating the interrogation.<sup>52</sup> In *Davis v. United States*,<sup>53</sup> the Court held that a suspect who wishes to invoke his *right to counsel* must do so unambiguously.<sup>54</sup> A suspect’s ambiguous request for counsel does not trigger his right to cut off questioning.<sup>55</sup> Furthermore, police officers do not have to ask any clarifying questions to determine whether the suspect’s ambiguous statement is in fact an attempt to invoke his rights.<sup>56</sup>

The Court in *Thompkins*, for the first time, squarely addressed the issue of whether the unambiguous invocation rule from *Davis* applies with equal force to the invocation of the right to remain silent.<sup>57</sup> The Court in this case, finding no principled reason to adopt a different standard, extended the rule in *Davis* to the right to remain silent.<sup>58</sup> Therefore, unless the suspect unambiguously invokes his right to remain silent by clearly saying either that he does not want to talk to the police or that he wants to remain silent, the police are not required to cut off questioning.<sup>59</sup>

A rule requiring an unambiguous invocation of the right to remain silent, the Court reasoned, presents the police with clear guidance as to whether it is proper to proceed with an interrogation.<sup>60</sup> If the rule were otherwise, it would require the police to make difficult decisions regarding whether the suspect had invoked his rights, and a suspect’s voluntary confession could potentially be suppressed “if they guess wrong.”<sup>61</sup> This hypothetical result, the Court concluded, would place a “significant burden on society’s interest in prosecuting criminal activity.”<sup>62</sup>

Thompkins did not make any clear statements to the police that

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52. See *Michigan v. Mosley*, 423 U.S. 96, 103 (1975) (quoting *Miranda*, 384 U.S. at 479).

53. 512 U.S. 452 (1994).

54. *Id.* at 459.

55. *Id.* (finding that suspect’s statement “Maybe I should talk to a lawyer” did not constitute an unambiguous invocation of right to counsel).

56. *Id.* at 461–62.

57. *Berguis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010).

58. *Id.*

59. See *id.*

60. *Id.*

61. *Id.* (quoting *Davis*, 540 U.S. at 461) (citations omitted).

62. *Id.*

he wished to remain silent.<sup>63</sup> Therefore, Thompkins did not invoke his right to remain silent, and the police were not required to cut off questioning.<sup>64</sup>

## 2. Whether Thompkins Waived His Right to Remain Silent

Even if Thompkins did not invoke his right to remain silent his statements could not be used against him unless he “knowingly and voluntarily waived” his rights.<sup>65</sup> “The question of whether a suspect has validly waived his right is ‘entirely distinct’ as a matter of law from whether he invoked that right.”<sup>66</sup> Therefore, finding that Thompkins did not invoke his right to remain silent, the Court turned its analysis to whether he had validly waived that right.

The prosecution bears a “heavy burden” to show the suspect waived his rights.<sup>67</sup> However, it need not show that he expressly waived his rights either orally or in writing.<sup>68</sup> In *North Carolina v. Butler*,<sup>69</sup> the Court made it clear that waiver of the right to remain silent may be *implied* through “the defendant’s silence, coupled with an understanding of his rights and a course of conduct indicating waiver.”<sup>70</sup> Because Thompkins did not expressly waive his rights in writing or orally, the Court analyzed whether he had impliedly waived them.

Relying on *Butler*’s implied-waiver rule, the Court held that if the prosecution shows that a *Miranda* warning had been given, that the suspect had understood his rights, and that he had made incriminating, uncoerced statements, he had impliedly waived his right to remain silent.<sup>71</sup> According to the Court, this rule sufficiently

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63. *Id.*

64. *Id.*

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

66. *Id.* at 2268 (Sotomayor, J., dissenting) (quoting *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (per curiam)).

67. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966); *see also Colorado v. Connelly*, 479 U.S. 157, 168 (1986) (construing “heavy burden” to require no more than a preponderance-of-the-evidence standard).

68. *Butler*, 441 U.S. at 373.

69. 441 U.S. 369.

70. *Thompkins*, 130 S. Ct. at 2261 (quoting *Butler*, 441 U.S. at 373).

71. *Id.* at 2262 (“Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused’s uncoerced statement establishes implied waiver of the right to remain silent.”).



guarantees that a suspect “knowingly and voluntarily” waived his rights.<sup>72</sup> The majority reasoned that “[a]s a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford.”<sup>73</sup> As long as the prosecution can show that the suspect had been advised that he had the right to remain silent and that he had understood that right, the fact that he had spoken at all demonstrated a deliberate choice to give up the right to remain silent. His actions therefore constituted a “course of conduct indicating waiver.”<sup>74</sup>

Applying this rule to the facts on the record, the Court held that Thompkins had knowingly and voluntarily waived his rights.<sup>75</sup> The Court found that there was no evidence that Thompkins had not understood his rights, and he therefore had known what he was giving up by speaking.<sup>76</sup> In addition, the Court found that Thompkins’s response to Helgert’s questions about whether he prayed to God for forgiveness for shooting the victim, coupled with the sporadic answers he had given throughout the interview, constituted a “course of conduct indicating waiver.”<sup>77</sup> Therefore, Thompkins’s inculpatory responses were admissible at trial.

### *B. Dissent*

Justice Sotomayor, joined by Justices Stevens, Ginsburg, and Breyer, dissented. The dissent addressed the issue of waiver first. Emphasizing the prosecution’s heavy burden to prove waiver, it found that the state had not met that burden.<sup>78</sup> The dissent centered its argument on the principle announced in *Miranda* and affirmed in *Butler*, that “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.”<sup>79</sup> The dissent

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72. *See id.*

73. *Id.*

74. *See id.* at 2263.

75. *Id.* at 2262.

76. *Id.*

77. *Id.* at 2263 (quoting *North Carolina v. Butler*, 441 U.S. 369, 373 (1979)).

78. *Id.* at 2268 (Sotomayor, J., dissenting).

79. *Id.* at 2269; *Butler*, 441 U.S. at 373; *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

concluded that these precedents clearly favored a finding that the prosecution had not met its “heavy burden” to prove Thompkins had waived his constitutional right against self-incrimination.<sup>80</sup>

The dissent criticized the majority’s opinion as flatly contradicting the long-standing precedent that waiver must not be presumed simply because a confession was eventually obtained.<sup>81</sup> It viewed the opinion as announcing an unnecessarily broad new principle of law that “an accused’s uncoerced statement establishes an implied waiver of the right to remain silent.”<sup>82</sup> This decision, according to the dissent, takes an “unprecedented step away” from the high standards of proof required to prove waiver of constitutional rights.<sup>83</sup> Furthermore, the decision undermines the important interest in preventing a coercive and inquisitorial criminal justice system against which the *Miranda* warnings were designed to protect.<sup>84</sup>

The dissent also disagreed with the majority’s new rule requiring a suspect to clearly assert his right to silence.<sup>85</sup> The dissent found the majority’s decision to extend the unambiguous invocation rule from *Davis* particularly problematic in light of the lessened burden on the prosecution to show waiver.<sup>86</sup> Taken together, the new implied-waiver rule and the “novel clear-statement rule for invocation invite[] police to question a suspect at length— notwithstanding his persistent refusal to answer questions—in the hope of eventually obtaining a single inculpatory response which will suffice to prove waiver of rights.”<sup>87</sup>

Instead of extending this unambiguous assertion rule to the right to remain silent, the dissent would have applied a more precautionary and fact-specific standard, set forth in *Michigan v. Mosley*<sup>88</sup> that requires that a suspect’s “right to cut off questioning” has been “scrupulously honored.”<sup>89</sup> This standard, the dissent argues, would

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80. *Thompkins*, 130 S. Ct. at 2271 (Sotomayor, J., dissenting).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 2273.

85. *Id.*

86. *Id.*

87. *Id.*

88. 423 U.S. 96 (1975).

89. *Thompkins*, 130 S. Ct. at 2275 (Sotomayor, J., dissenting) (citing *Mosley*, 423 U.S. at

accommodate a fact-specific scenario in which a suspect's silence could be interpreted differently under different circumstances.<sup>90</sup> On the other hand, a suspect's silence throughout a prolonged interrogation should not be understood as anything other than an invocation of the right to remain silent, and under such circumstances the police would be required to terminate the interrogation.<sup>91</sup> This standard, the dissent argues, is the more faithful application of the Court's precedents than the majority's unnecessarily broad extension of *Davis*.<sup>92</sup>

#### IV. ANALYSIS

##### *A. Requiring an Unambiguous Assertion of the Right to Remain Silent Undermines the Suspect's Ability to Effectively Assert His Rights During Intimidating Interrogations*

Prior to the Court's decision in *Thompson*, nine of eleven circuit courts had either already required that a suspect unambiguously assert his right to remain silent or had held that such a requirement would not be an unreasonable application of federal law. However, the decision in *Thompson* represents the first time the Supreme Court itself squarely addressed the issue. The Court held that a suspect only invokes his right to remain silent by making an unambiguous statement to that effect.<sup>93</sup> With this decision, the Court set a new lower constitutional floor for the protection against self-incrimination.

The question of whether a suspect has invoked his right to remain silent is significant because once a suspect has invoked that right the police must "scrupulously honor[]" that request by immediately ceasing the interrogation.<sup>94</sup> However, unless or until the suspect invokes his rights, the police may continue with the interrogation unimpeded.<sup>95</sup>

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104).

90. *Id.* at 2275–76.

91. *Id.*

92. *Id.* at 2278.

93. *Id.* at 2260 (majority opinion).

94. *Mosley*, 423 U.S. at 103–04 (1975) (quoting *Miranda v. Arizona*, 384 U.S. 436, 479 (1966)).

95. *See Davis v. United States*, 512 U.S. 452, 460 (1994).

While the *Miranda* Court held that a suspect may assert his right to remain silent and his right to counsel “in any manner,”<sup>96</sup> the Court subsequently retreated from this position in *Davis*.<sup>97</sup> That case, which specifically addressed only the invocation of the right to counsel, held that a suspect must unambiguously request counsel for police questioning to cease.<sup>98</sup> After *Davis*, anything short of a clear statement expressing the desire for the assistance of counsel will not be honored.<sup>99</sup> The statement found to be ambiguous in *Davis* was “Maybe I should talk to a lawyer.”<sup>100</sup> The *Davis* Court further held that while it may be good police practice, the interrogating officer is under no obligation to clarify whether the suspect actually wants an attorney.<sup>101</sup> Therefore, it is of some moment that the Court in *Thompkins* unequivocally decided to extend this requirement of unambiguous invocation to the right to remain silent.

The application of the *Davis* requirement to the right to remain silent may not seem particularly problematic under the facts of *Thompkins*. Indeed, the suspect made no affirmative statement indicating that he did not want to speak with the police; he merely remained largely silent, gave intermittent one-word answers, occasionally nodded his head, and sometimes made eye contact.<sup>102</sup> It may therefore seem proper, in the interest of effective law enforcement, to allow an interrogation to continue absent a clear indication that a suspect does not wish to speak with the police. However, there are several types of statements that could be construed as ambiguous that likely reflect a suspect’s ultimately unsuccessful attempt to assert his right to remain silent.<sup>103</sup> For example, suspects often make statements such as “I might not want to talk,”<sup>104</sup> or “I don’t want to talk now.”<sup>105</sup> When a suspect makes

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96. *Miranda*, 384 U.S. at 444–45.

97. 512 U.S. 452.

98. *Id.* at 459.

99. *See id.* at 461–62.

100. *Id.* at 455.

101. *Id.* at 461–62.

102. *See* *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2256–57 (2010).

103. *See* Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under Miranda*, 17 WM. & MARY BILL RTS. J. 773, 787–88 (2009) (listing eight different categories of statements that could constitute an “ambiguous” assertion of the right to remain silent).

104. *Id.* at 789.

these types of uncertain, ambiguous statements, it is “at least as plausible, if not more plausible, that [the] suspect . . . is, albeit imperfectly, attempting to invoke one or more rights.”<sup>106</sup> Furthermore, by extension from *Davis*, interrogators will be at liberty to completely ignore any ambiguous indication of a desire to remain silent and will have no obligation to clarify whether the suspect wishes to speak.<sup>107</sup>

The *Miranda* Court was concerned with the “inherently compelling pressures” of the in-custody interrogation when it announced its prophylactic rule.<sup>108</sup> However, it is exactly those pressures at work that make the unambiguous-assertion requirement so problematic. Faced with the intimidating specter of police interrogation, a suspect may falter in his language and fail to unambiguously assert his desire to remain silent. Furthermore, the intimidated suspect’s uncertain statement may be completely ignored by the interrogators, further contributing to the imbalance of power in the interrogation room.

*B. The Court’s New Rule Regarding Implied Waiver  
Is a Striking Departure from Its Own Precedent*

As discussed above, if a suspect does not properly invoke his rights with a clear statement, the police may continue the interrogation. However, if the interrogation continues and the suspect makes inculpatory statements, the prosecution must still meet its burden to show that the suspect *validly waived* his rights before using his statements against him at trial.<sup>109</sup> “The question whether a suspect has validly waived his right is ‘entirely distinct’ as a matter of law from whether he invoked that right.”<sup>110</sup> In other words, even if a suspect fails to unambiguously invoke his right to silence and thereby terminate the interrogation, he must waive his right against self-incrimination before his statements may be used against him.<sup>111</sup>

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105. *Id.* at 794.

106. *Id.* at 804.

107. *See Davis v. United States*, 512 U.S. 452, 461–62 (1994).

108. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

109. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010).

110. *Id.* at 2268 (Sotomayor, J., dissenting) (citing *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (per curiam)).

111. *Id.* at 2260 (majority opinion).

As the *Miranda* Court held, the burden on the prosecution to show that the suspect knowingly and intelligently waived his privilege against self-incrimination and his right to counsel is a heavy one.<sup>112</sup> A central principle announced in the *Miranda* decision, which subsequent Supreme Court decisions have affirmed, is that “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.”<sup>113</sup> Therefore, the fact that after a defendant has been read his rights he remains silent and does not immediately assert his rights is not sufficient to show that he has waived those rights. In other words, a suspect’s failure to immediately invoke his rights does not mean he has validly waived his rights. The decision in *Butler*, which held for the first time that a valid waiver need not be express but may be implied, echoed this principle.<sup>114</sup> The Court held that mere silence will not be enough to support a finding of waiver, but that a suspect’s “silence, coupled with an understanding of his rights and a course of conduct indicating waiver” may be sufficient to show implied waiver.<sup>115</sup>

While the *Butler* Court may have retreated from the principle announced in *Miranda* that any waiver be “specifically made,”<sup>116</sup> the majority was careful to reiterate that there still must be a presumption *against* waiver and that the prosecution’s burden to show waiver is great.<sup>117</sup> Furthermore, the Court indicated that it did not intend for implied waiver to become the rule rather than the exception by emphasizing that only in *some* cases will waiver be *clearly* inferred from the actions and words of the person interrogated.<sup>118</sup>

Purportedly relying on *Butler*’s implied-waiver rule, the *Thompkins* Court announced a new formulation of that rule: “Where the prosecution shows that a *Miranda* warning was given and that it

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112. See *North Carolina v. Butler*, 441 U.S. 369, 372–73 (1979); *Miranda*, 384 U.S. at 475.

113. *Miranda*, 384 U.S. at 475; see, e.g., *Butler*, 441 U.S. at 373 (reaffirming *Miranda*’s principle that silence alone is not enough to constitute a valid waiver).

114. See *Butler*, 441 U.S. at 373.

115. *Id.*

116. *Miranda*, 384 U.S. at 470.

117. *Butler*, 441 U.S. at 373.

118. *Id.*

was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent."<sup>119</sup> The Court couched its analysis in the *Butler* framework, but this new rule is in fact a striking departure from the precedent it professes to rely on.

While the *Butler* Court did not give the lower courts any guidance for analyzing the circumstances in which words and actions would clearly imply waiver, the particular facts of *Butler* provide some guidance. In *Butler*, FBI agents gave the suspect a *Miranda* warning, and he stated that he understood his rights.<sup>120</sup> The FBI agents informed him that he did not need to speak with them or sign the waiver-of-rights form but that they would like to speak with him.<sup>121</sup> The suspect responded, "I will talk to you but I am not signing any form."<sup>122</sup> He clearly indicated a willingness to engage in a conversation with the police, which constituted a "course of conduct indicating waiver."<sup>123</sup>

Indeed, this course-of-conduct requirement has always required something more than merely giving an inculpatory response to police interrogators. Circuit courts and state courts alike have typically found implied waiver only when a suspect expresses a willingness to speak or readily engages in conversation with the police.<sup>124</sup> In fact, the Fifth Circuit, in a factual situation similar to that in *Thompkins*, found no implied waiver because there had been no indication of any willingness to talk and the only statement that the suspect had made was the one being challenged.<sup>125</sup> Notably, the court largely based its holding on the idea that "the making of the inculpatory statement

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

120. *Butler*, 441 U.S. at 370–71.

121. *Id.*

122. *Id.* at 371.

123. *Id.* at 373.

124. *See, e.g.*, *United States v. Cardwell*, 433 F.3d 378, 384, 389–90 (4th Cir. 2005) (finding implied waiver when suspect initiated conversation with police and willingly answered questions); *Stawicki v. Israel*, 778 F.2d 380, 382–84 (7th Cir. 1985) (finding implied waiver when suspect asked to speak with the detective and then fully confessed to a murder); *United States v. Velasquez*, 626 F.2d 314, 320 (3d Cir. 1980) (holding that suspect's willingness to answer questions and oral acknowledgement that she understood her rights was sufficient to show implied waiver); *People v. Hawthorne*, 205 P.3d 245, 260 (Cal. 2009) (finding implied waiver when defendant was "eager" to participate in police interrogation).

125. *McDonald v. Lucas*, 677 F.2d 518, 521–22 (5th Cir. 1982).

cannot alone indicate waiver.”<sup>126</sup>

Under the particular facts of *Thompkins*, it is arguable that the suspect’s few one-word responses and sporadic eye contact throughout the three-hour interrogation indicated some willingness to speak with the police, and therefore perhaps implied a course of conduct indicating waiver. However, the Court’s analysis did not rely heavily on the sporadic answers Thompkins had given throughout the interrogation to reach the conclusion that Thompkins’s behavior showed a course of conduct indicating waiver. The Court found that “Thompkins’s answer to Detective Helgert’s question about whether Thompkins prayed to God for forgiveness for shooting the victim *is* a ‘course of conduct indicating waiver’ of the right to remain silent.”<sup>127</sup> Therefore, the Court implied that a suspect engages in a course of conduct indicating waiver simply by making a one-word inculpatory statement.

This conclusion is in complete derogation of the principle firmly announced in *Miranda*, reaffirmed in *Butler*, and even acknowledged in the *Thompkins* decision itself—that “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.”<sup>128</sup> As almost an afterthought, the Court added that this conclusion is “confirmed” by the fact that Thompkins had given sporadic answers to questions throughout the interrogation.<sup>129</sup> Therefore, the Court seems to suggest that there is a valid waiver the minute an inculpatory statement is made, and any waiver-indicating conduct in addition to the inculpatory statement merely bolsters that conclusion but is not necessary to it. The Court supports its conclusory reasoning with the very general principle that when a suspect who, understanding his rights, acts in a manner inconsistent with the exercise of those rights, that suspect has made a deliberate choice to relinquish the protection of those rights.<sup>130</sup> Therefore, because Thompkins knew that he had the right to remain silent, the one-word response elicited after two hours and forty-five minutes of

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126. *Id.* at 522.

127. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2263 (2010) (emphasis added).

128. *Id.* at 2261; *Butler*, 441 U.S. at 373; *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

129. *Thompkins*, 130 S. Ct. at 2263.

130. *Id.* at 2262.



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one-sided interrogation is conduct that is inconsistent with the exercise of that right, and therefore clearly indicates the deliberate relinquishment of its protections.

Even if the Court did in fact rely on Thompkins's sporadic statements as part of the course of conduct indicating waiver, further analysis of those statements' nature reveals that reliance on them is misplaced. The only two actual statements Thompkins made were that he "didn't want a peppermint" and that the chair he was "sitting in was hard."<sup>131</sup> These statements are completely unrelated to the offense for which he was being questioned. They do not relate to the shooting in any manner. It is anomalous to suggest that communication with the police about matters completely unrelated to the offense—and that are not possibly incriminating—indicates a willingness to waive one's right against self-incrimination.

#### V. CONCLUSION

The *Miranda* Court introduced a rule that gave broad protections for suspects against the inherently compelling nature of in-custody interrogations. The interrogators could not continue questioning a suspect if he asserted his rights "in any manner," and if interrogation did continue, there was a "heavy burden" on the prosecution to show that a waiver had been "specifically made."

The cases that followed *Miranda* chipped away at these central principles. The *Davis* Court decided that a suspect must *unambiguously* assert his right to counsel to cut off questioning rather than being able to do so "in any manner." The *Butler* Court held that waiver did not need to be "specifically made," but could be implied through the defendant's course of conduct. The *Thompkins* decision is no exception to this trend of retreating from *Miranda*'s broad principles.

Today, a suspect's persistent silence in the face of questioning will not invoke his right to remain silent and will not cut off questioning. Therefore a suspect may sit in an interrogation room—saying nothing in response to repeated and persistent questioning by the police over a period of hours—and the interrogation can continue without pause.

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131. *Id.* at 2257.

Furthermore, before *Thompkins* even if the defendant's silence were not sufficient to invoke his right to remain silent, an extended period of silence might at least militate against a finding of implied waiver. After *Thompkins*, such silence is presumably irrelevant so long as the suspect at some point says something incriminating. If at hour three, a suspect's silence is broken and he finally makes an inculpatory one-word response to the interrogator, he has deliberately relinquished his constitutional protections against self-incrimination. The new rules announced in this decision directly undermine the original purpose of the *Miranda* warnings—to protect suspects against the coercive pressures of custodial interrogation. As Justice Sotomayor noted in her dissent, “[r]equiring proof of a course of conduct beyond the inculpatory statements themselves is critical to ensuring that those statements are voluntary admissions and not the dubious product of an overborne will.”<sup>132</sup>

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132. *Id.* at 2272–73 (Sotomayor, J., dissenting).

