

POST-*MIRANDA* SILENCE IN THE WIRED ERA: RECONSTRUCTING REAL TIME SILENCE IN THE FACE OF POLICE QUESTIONING

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“And the vision that was planted in my brain, Still remains,
within the sound of silence”¹

“Can you hear me now?”²

INTRODUCTION

“Silence is golden” is a centuries-old adage passed down from generation to generation.³ Such an adage, however, recently became a significant issue in determining the meaning of the right to remain silent under the Fifth Amendment,⁴ particularly with respect to the requirements for invoking and waiving that right.

While *Miranda v. Arizona*⁵ famously declared that the Fifth Amendment privilege against compelled incrimination protects a suspect’s right to remain silent,⁶ *Miranda* did not

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¹ SIMON AND GARFUNKEL, *THE SOUNDS OF SILENCE* (Columbia Records 1965).

² This question has been asked in many situations over the years, but was most recently made famous as the tag-line in a Verizon Wireless cellular telephone commercial in 2004.

³ As one commentator noted, “It is said of Cicero, the Roman statesman and rhetorician, that he felt there was an art as well as an eloquence of silence.” Thomas J. Bruneau, *How Americans Use Silence and Silences to Communicate*, 4(2) CHINA MEDIA RES. 77, 77 (2008).

⁴ U.S. CONST. amend. V.

⁵ 384 U.S. 436 (1966).

⁶ The Supreme Court has not confronted all of the permutations involving the use of an accused’s silence. Pre-*Miranda* silence is still not constitutionally settled, prompting much discussion and debate. *See, e.g.*, Jan Martin Rybnicek, *Damned if You Do, Damned if You Don’t?: The Absence of a Constitutional Protection Prohibiting the Admission of Post-Arrest, Pre-Miranda Silence*, 19 GEO. MASON U. CIV. RTS. L.J. 405 (2009); Marc Scott Hennes, *Manipulating Miranda: United States v. Frazier and the*

consider the constitutional significance of silence—especially protracted silence—in the face of post-*Miranda* police questioning.⁷ Several issues remained open. Could an individual's knowing silence constitute an invocation of the right to silence? Could a person who answers a question after a period of sustained silence⁸ be considered to have waived his or her rights? If so, what is the burden that must be met to show waiver?

Miranda offers some bright lines for determining whether an accused's statements are eligible for admissibility in a subsequent trial. *Miranda* dictates that statements will be presumptively inadmissible if there are no prefatory warnings and a showing that the warnings are understood. Yet, *Miranda* offers no parallel structured process for the waiver of those rights, other than to say the burden “rests on the government,” which must show that the rights have been “knowingly and intelligently waived.”⁹ The Court stated: “Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.”¹⁰

The Supreme Court in *Miranda* admonished that a waiver must meet a high standard:

This Court has always set high standards of proof for the waiver of constitutional rights, *Johnson v. Zerbst*,¹¹ and we

Case-in-Chief Use of Post-Arrest, Pre-Miranda Silence, 92 CORNELL L. REV. 1013 (2007); Marty Skrapka, *Silence Should Be Golden: A Case Against the Use of a Defendant's Post-Arrest, Pre-Miranda Silence as Evidence of Guilt*, 59 OKLA. L. REV. 357 (2006).

⁷ It is now well-established that post-*Miranda* silence cannot be used by a prosecutor against a suspect in a later criminal trial. In *Doyle v. Ohio*, 426 U.S. 610, 619 (1976), the Supreme Court held that such silence by an accused cannot be used by the prosecution to impeach the accused if he should testify. In addition, the Court held in *Wainright v. Greenfield*, 474 U.S. 284, 295 (1986), that the prosecution also cannot use the equivalent silence by an accused as evidence in the prosecution's case-in-chief.

⁸ Or mostly sustained silence constitutes an invocation, which was apparently the situation in *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010).

⁹ *Id.* at 2261 (quoting *Miranda*, 384 U.S. at 475).

¹⁰ *Miranda*, 384 U.S. at 473-74. Thus, a more narrowly framed question arises—does “in any manner” include silence?

¹¹ 304 U.S. 458 (1938).

re-assert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.¹²

The Court added: “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.”¹³

By setting clear, predictive guidelines for lawyers and those working in the stationhouses around the country, *Miranda* addressed issues of formalism and functionalism.¹⁴ Further, both the formal and functional attributes of the warnings mattered in weathering a rocky and turbulent response. Despite, or perhaps because of, the *Miranda* framework, the area of police interrogation still presents a fertile and unsettled legal area, with persistent issues such as subtle coercion¹⁵ remaining.

Because of the continuing debate, *Miranda* spawned a generous progeny. In *Michigan v. Mosley*,¹⁶ the Supreme Court discussed the effect of invoking the right to remain silent, characterizing it as a “right to cut off questioning” that must be scrupulously honored by the police.¹⁷ In *North Carolina v. Butler*,¹⁸ the Court permitted an implied waiver of the right to

¹² *Miranda*, 384 U.S. at 475 (citation omitted).

¹³ *Id.*

¹⁴ This duality was recognized in *Berghuis v. Thompkins*, citing *Moran v. Burbine*, 475 U.S. 412, 427 (1986), which called *Miranda* “both formalistic and practical when it prevents [the police] from interrogating suspects without first providing them with a *Miranda* warning.” *Berghuis*, 130 S. Ct. at 2262.

¹⁵ See, e.g., Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their Miranda Rights: The Power of Innocence*, 28 LAW & HUM. BEHAV. 211 (2004); Richard Rogers, Kimberly S. Harrison, Jill E. Rogstad, Kathryn A. LaFortune & Lisa L. Hazelwood, *The Role of Suggestibility in Determinations of Miranda Abilities: A Study of the Gudjonsson Suggestibility Scales*, 34 LAW & HUM. BEHAV. 66 (2010).

¹⁶ 423 U.S. 96 (1975).

¹⁷ *Id.* at 100-01 (quoting *Miranda*, 384 U.S. at 474).

¹⁸ 441 U.S. 369 (1979).

remain silent based on “a course of conduct.”¹⁹ Recently, in *Berghuis v. Thompkins*,²⁰ the Supreme Court confronted the constitutional significance of post-*Miranda* silence, answering questions about the impact of silence on the invocation and waiver of the Fifth Amendment rights, and the respective burdens attached to each. In a 5-4 decision, with Justice Anthony Kennedy writing the majority opinion, the Court first concluded that the police need not obtain a waiver of the right to remain silent prior to commencing interrogation.²¹ Justice Kennedy then fleshed out *Butler’s* “course of conduct” protocol by stating, “an accused’s uncoerced statement establishes an implied waiver of the right to remain silent.”²²

What led to this apparent shift in the burdens and epistemology of implied waiver from *Miranda* to *Thompkins*? To begin with, the Court characterized the intermediary case, *Butler*,²³ as sounding a retreat from *Miranda* when it allowed an implied waiver as a result of a course of conduct indicating as such.²⁴ But the retreat into a valley from the *Miranda* mountaintop appears to be much more than just a slide down the slippery slope started by *Butler*, at least in part when understood by the Court’s construction of the meaning of silence.

The nature of communication has changed dramatically in American society in the past few decades, particularly with the advent of cellular technology and other technologies promoting the immediacy of communication, from the mobile phone, to text messaging, to Facebook and Twitter.²⁵ While the norm in prior decades had been to speak with others directly in real time, the shift toward indirect, remote, unfiltered and even asynchronous conversations has exploded in the twenty-first

¹⁹ *Id.* at 373.

²⁰ *Thompkins*, 130 S. Ct. 2250 (2010).

²¹ *Id.* at 2262.

²² *Id.*

²³ *Butler*, 441 U.S. 369 (1979)

²⁴ *Thompkins*, 130 S. Ct. at 2261. Justice Sotomayor, in a strongly worded dissent in *Thompkins*, stated that the opinion “turns *Miranda* upside down” and categorized the case as a “substantial retreat from the protection against compelled self-incrimination.” *Id.* at 2266, 2278 (Sotomayor, J., dissenting).

²⁵ See, e.g., TWITTER, <http://www.twitter.com> (last visited Feb. 25, 2011); see also FACEBOOK, <http://www.facebook.com> (last visited Feb. 25, 2011).

century. Young people “born digital”²⁶ have experienced life in no other way. Although dialogue remains as a basic form of relationship, it has been transformed by the peripatetic evolution of Web-era media. Silence²⁷ is in danger of becoming outdated.

Facebook alone has 500 million active users,²⁸ more than most countries have in population. Twitter has brought a whole new meaning to the question, “What are you doing now?”, and instant messaging is common, if not epidemic. “Wired” is part of a new vocabulary describing the developing media and the transnational culture arising around it.

The counterpart of speech, silence, is likewise affected by this communication revolution. The concept of silence is metamorphasizing with every new technological advance, and those persons who are completely unconnected electronically to others are becoming anachronistic.²⁹ A closer examination of “silence” shows that it can be parsed and differentiated, from a void of conversation, to communicative silences constituting active listening, to a deeper withdrawal.³⁰

Based on traditional analysis, the Fifth Amendment right to remain silent and its waiver have been measured in reference to historical interrogation techniques of intimidation and coercion. In more modern times, with the ever-present electronic stimuli of cell phones, the Internet and other technological devices, the yardstick for the meaning of silence and unconnected non-participation has changed. A new conventionality about silence—and response time in

²⁶ “Born digital” is a common reference for members of the young generation who have grown up solely in the digital age, where dial-up land-line telephones, typewriters, black and white televisions with only 12 channels, and telephone booths are mere anachronisms.

²⁷ Especially for a younger generation weaned on a steady diet of highly stimulating electronic games and gadgets, boredom also might be in danger of destruction, or at least diminishment, as well.

²⁸ Facebook Statistics, <http://www.facebook.com/press/info.php?statistics> (noting that “50% of our active users log on to Facebook in any given day”).

²⁹ Newspaper headlines have become commonplace. See, e.g., *High-Tech Toys Depriving Children of Much-Needed Sleep*, GREENSBORO-HIGHPOINT NEWS & REC., Aug. 23, 2010, at B9.

³⁰ See, e.g., Thomas J. Bruneau, *How Americans Use Silence and Silences to Communicate*, 4(2) CHINA MEDIA RES. 77 (2008).

particular—have arisen in the digital age, where responses tend to be instantaneous and unfiltered. The “strong silent types” of the 1950s westerns and film *noir* now pack an empty cell phone clip on their belts instead of a gun.

Consequently, if individualized, directed questions go unanswered, an intentionality of non-participation generally can be inferred. While this intentionality is certainly rebuttable—creating an inference and not a presumption—the Court in *Thompkins* missed an important inflection point when it essentially ignored the suspect’s prolonged post-*Miranda* silence in finding an implied waiver, leading to the conclusion that silence is not golden, and that a “course of conduct” in implying a waiver can be compressed into the incriminating statement itself. The similar compression of the prosecution’s “heavy burden” as described in *Miranda* also misses the mark; in an age of constant chatter, prolonged silence is not a nullity by any means, and the prosecution should be tasked with making some showing that prolonged silence by a suspect in the face of questioning was not a knowing³¹ rejection of dialogue altogether.³²

In this article I contend that the definitions of invocation and implied waiver of the Fifth Amendment right to silence advanced in *Thompkins* reconfigure the intent of *Miranda* in two ways. The Court improperly omits a closer contextual analysis of a person’s silence in general, especially regarding its duration, and further ignores the transformative Web-era construction of silence as non-participation, particularly as it relates to isolation³³ and the new framework of dialogue.

The article first describes some differing perspectives of

³¹ The idea of “knowingly” waiving rights can be seen in the Fourth Amendment analysis of searches, where a person who knowingly exposes something to the public has no subjective expectation of privacy. *Katz v. United States*, 389 U.S. 347, 351 (1967) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”).

³² Note that given Van *Thompkins* “mostly silent” behavior and his occasional responses, a prosecutor could have met a burden of showing that *Thompkins* was indeed a voluntary participant in the interrogation, especially as compared to someone who was entirely quiet and noncommunicative for more than two hours. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2259 (2010).

³³ Isolation is referring to a form of lack of connectedness as well as physical isolation.

rights and examines several of the major Supreme Court cases on the road from *Miranda* to *Berghuis*. The piece then explores the dialogical features of Web-era conventionality, particularly its constant connectivity, stimuli, immediacy and micro-duration. The article then discusses whether layering in this new conventionality to the invocation and waiver analysis suggests that an interrogation of a suspect for minutes without a response—and not hours—inferes that the suspect likely has invoked the right to remain silent, unless the state can meet a heavy burden to the contrary.

BACKGROUND

Rights, Burdens and the Waiver of Rights

There are differing conceptualizations of rights that affect their application, including cross-cultural,³⁴ relational,³⁵ economic and historical perspectives.³⁶ Rights can be viewed as protecting both collective and individual interests. The Fifth Amendment right to silence, for example, not only describes a relationship between the state and individual, but also a protective shield rooted in self-preservation.³⁷ Rights also can be perceived less as a reflection of society and more as a set of sustaining policies, serving as a regulatory deterrence to

³⁴ See, e.g., South Africa and human dignity, particularly with respect to the Truth and Reconciliation Commission, where confessions are a part of restorative justice.

³⁵ See, e.g., Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUD. 1 (1993); *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (constitutional case involving the rights of enemy combatants) (O'Connor, J., for the majority) (“[In] striking the proper constitutional balance . . . it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship.”).

³⁶ A society based on positivist laws places rights squarely within judicial interpretation and not a higher order of natural law.

³⁷ Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CAL. L. REV. 601, 627-30 (2009); see also Judith Resnik, *Detention, The War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579 (2010). Cross-cultural understandings can impact the applications and understandings of rights. For example, within the concept of Ubuntu, each individual's humanity is ideally expressed through his or her relationship with others and theirs in turn through recognition of the individual's humanity. Ubuntu means that people are human through other people. It also acknowledges both the rights and responsibilities of every citizen on promoting individual and societal well-being.

government.³⁸ The Fifth Amendment, for example, can be seen as setting uniform boundaries on police practices as much as protecting the individual.

Rights also reflect a basic underlying tension between the government and individual, described as the right to security versus the right to freedom of action.³⁹ This tension is especially prevalent in the context of interrogation, where there is great pressure on the police to solve criminal cases,⁴⁰ while at the same time upholding a duty to protect the rights of the innocent. Deceptive practices often have been warranted by the belief that the ends justify the means. Suspects are probably guilty of some offense, the thinking goes, if not the one being investigated.⁴¹

The existence of a constitutional right is important, but so are the allocation of burdens of proof and the setting of a default position—determining which party wins if no additional evidence is adduced. The burdens of proof set and reflect societal expectations and can be seen as either dictating or echoing the prevailing conventionality, those reasonable expectations of experience. In a criminal case, for example, it

³⁸ See, e.g., Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 362-72 (1974) (discussing atomistic versus regulatory perspective of the Fourth Amendment and standing issues).

³⁹ This basic tension frames a wide variety of relationships between government power and individual protections.

⁴⁰ There is considerable literature documenting police interrogation techniques. See, e.g., FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* (Jones & Bartlett 4th ed. 2004) (1962). Improper pressures have come to bear not only on the accused, but also on witnesses as well. Peter Neufeld, the co-founder of the Innocence Project, notes:

The primary cause [of wrongful convictions] is mistaken identification. Actually, I wouldn't call it mistaken identification; I'd call it misidentification, because you often find that there was some sort of misconduct by the police. In a lot of cases, the victim initially wasn't so sure. And then the police say, "Oh, no, you got the right guy. In fact, we think he's done two others that we just couldn't get him for." Or: "Yup, that's who we thought it was all along, great call."

Kathryn Schulz, *Reasonable Doubt: Innocence Project Co-Founder Peter Neufeld on Being Wrong*, SLATE MAGAZINE, Aug. 17, 2010, available at: <http://www.slate.com/blogs/blogs/thewrongstuff/archive/2010/08/17/reasonable-doubt-innocence-project-co-founder-peter-neufeld-on-being-wrong.aspx> (last visited Feb. 23, 2011).

⁴¹ This is a common view of interrogators. See generally INBAU ET AL., *supra* note 40, at 239.

makes sense that the requirements of due process of law mandate that the prosecution has the burden of proof to a very high standard, beyond a reasonable doubt, especially given what is at stake.

The waiver of rights is often a highly illuminated and dissected mechanism. When a criminal defendant waives various rights expressly by pleading guilty, for example, a plea colloquy on the record generally takes place between the accused and the judge.⁴² When such rights can be waived impliedly, context becomes more important—and less clarity often results. In *Miranda*, for example, several key features of coercive interrogations were discussed by the Court—intimidation, isolation and duration. This piece advocates paying closer attention to these factors in an interrogation highlighted by a suspect's silence.

While constitutional rights can be waived, the burden of showing an implied waiver is placed squarely on the government and is a high one as well. The leading case describing the standard for waiver is *Johnson v. Zerbst*.⁴³ In *Zerbst*, the Supreme Court mandated that the waiver of constitutional rights must occur with intentionality.⁴⁴ *Zerbst* reflected the expectation that constitutional rights were valued highly and consequently could be waived only if the subject did so knowingly, intelligently and voluntarily—an intentionality that greatly exceeds inadvertence or the like.

INTERROGATION, RIGHTS AND WAIVER

Confess, and all will be forgiven . . . Not in so many words, but the message is there—in the tone of [the officer's] voice, in the proffered kindness of a cigarette or cup of coffee—and in truth the suspect will be forgiven by the cop, whose only real requirement for achieving [Sartre's] harmony [of minds] is the confession. For the higher authority, however, . . . retribution must be served.⁴⁵

⁴² See, e.g., *United States v. Gonzalez*, 120 F.3d 269 (9th Cir. 1997).

⁴³ 304 U.S. 458 (1938).

⁴⁴ *Id.* at 464

⁴⁵ GARY L. STUART, *MIRANDA: THE STORY OF AMERICA'S RIGHT TO REMAIN SILENT* xv (2004).

1. Interrogation

Incriminating statements of a person accused of a crime have been permitted as evidence against them for centuries.⁴⁶ The import of interrogation is observed with this bedrock principle: “Many criminal cases, even when investigated by the best qualified police departments, are capable of solution only by means of an admission or confession from the guilty individual or upon the basis of information obtained from the questioning of other criminal suspects.”⁴⁷

Investigative methods for extracting incriminating statements have been just as old and widespread. Methods have ranged from physical coercion and torture to more subtle forms of persuasion.⁴⁸ Why should the police departments interrogate with a variety of methods that are constantly being refined and improved, but often feature isolation, duration and subtle influencing? The premise for such methods is that: “Criminal offenders, except those caught in the commission of their crimes, ordinarily will not admit their guilt unless questioned under conditions of privacy and for a period of perhaps several hours.”⁴⁹

Such methods were articulated and discussed in police training manuals and refined by experience. Methods included the Reid Technique,⁵⁰ for example, which alone has been used to solve thousands of crimes. That technique included three stages: (1) gathering and analysis of existing facts; (2) a structured “Behavior Analysis” interview with possible suspects; and, depending on the perceived truthfulness of responses in part 2, (3) an accusatory interrogation.⁵¹

Many interrogation methods escaped legal scrutiny for years. Only in the past century or so have extreme and offensive methods received judicial disapproval. In *Bram v.*

⁴⁶ This idea goes back to the Bible and beyond.

⁴⁷ FRED E. INBAU ET AL., *supra* note 40, at xii.

⁴⁸ *See, e.g., id.* at 1.

⁴⁹ *Id.* at xiv.

⁵⁰ The method was developed by John T. Reid in 1947 in Chicago, Illinois. Brian C. Jayne & Joseph P. Buckley, *The Reid Technique of Interrogation*, available at www.reid.com/educational_info/canada.html (last visited Feb. 23, 2011).

⁵¹ *Id.*

United States,⁵² for example, decided in 1897, the defendant was in the process of having his clothing stripped when he was interrogated. During the interrogation, Bram was informed that another suspect had fingered Bram as the culprit, and “the result . . . produce[d] upon his mind the fear that, if he remained silent, it would be . . . an admission of guilt . . . and . . . by denying, there was a hope of removing the suspicion from himself.”⁵³ The Court ruled that placing a suspect in such circumstances “yields a confession that cannot truly be considered free of coercion.”⁵⁴ The Court, deriving its principles from a lineage of English common law, required confessions to be voluntary under the Fifth Amendment.⁵⁵ The Court described the allocation of burdens, saying, “[a]ny doubt as to whether the confession was voluntary must be determined in favor of the accused”⁵⁶ Based on the facts of the case, the Court in *Bram* found that the confession was involuntary and held that its admission in evidence by the trial court was in error.⁵⁷

2. *Miranda v. Arizona*⁵⁸

Miranda was the culmination of decades⁵⁹ of physically and mentally coercive police interrogations producing incriminating statements by suspects and led to the firm establishment of the Fifth Amendment rights of interrogated suspects outside the courtroom.⁶⁰ The rights included the right to remain silent. It represented a seismic shift in the underlying assumptions about how police ought to interact

⁵² 168 U.S. 532, 538 (1897).

⁵³ *Id.* at 562.

⁵⁴ M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL’Y 319, 326 (2003).

⁵⁵ *Bram*, 168 U.S. at 548.

⁵⁶ *Id.* at 565.

⁵⁷ *Id.* at 565.

⁵⁸ 384 U.S. 436 (1966).

⁵⁹ There were many cases that preceded *Miranda* in confronting interrogation practices and the admissibility of coerced confessions. A major case, for example, was *Bram v. United States*, 168 U.S. 532 (1897). After *Bram* had been isolated and while in the process of being stripped of his clothes, he was interrogated. *Id.* at 538.

⁶⁰ A different and very topical issue is the impact of 9/11 and terrorism on the Fifth Amendment protections afforded by *Miranda*. See, e.g., Darmer, *supra* note 54.

with suspects, and changed the accepted standards of such interactions outside of the courtroom.⁶¹ The case gave rise to a formalistic requirement that suspects subject to custodial interrogation must first be given a set of warnings and shown to understand those warnings.⁶² In addition to dictating what evidence would no longer be competently received in criminal trials, *Miranda* recreated the relationship between police and suspects, as well as between the government and individuals.

The initial prosecution of Ernesto Miranda stemmed from a series of events occurring in the winter of 1962 in the Phoenix, Arizona area. On the night of November 27, 1962, a young female bank teller was getting into her car in a parking lot at the branch of the bank where she had worked when she was kidnapped at knife point, driven away and robbed of \$8 in her purse.⁶³ A similar attack occurred several months later and a third attack occurred soon thereafter.⁶⁴ In this last attack, the victim was forced into the perpetrator's car.⁶⁵ The

⁶¹ *Miranda* does not cover or protect from admissibility all statements by suspects. For example, the "physical fruits of the suspect's unwarned but voluntary statements" are admissible. *United States v. Patane*, 542 U.S. 630, 634 (2004). In *Patane*, Justice Thomas stated that "a mere failure to give *Miranda* warnings does not, by itself, violate . . . constitutional rights"—it was the use at trial that constituted the violation. *Id.* at 641. Because of this analysis, Justice Thomas concluded "police do not violate a suspect's constitutional rights . . . by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*." *Id.*

⁶² The warnings given to Van Thompkins, the respondent in *Berghuis v. Thompkins*, are representative:

"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."

130 S. Ct. 2250, 2256 (2010) (quoting Brief for Petitioner at 60, No. 08-1470) (some capitalization omitted in original).

⁶³ STUART, *supra* note 45, at 7.

⁶⁴ *Id.*

⁶⁵ *State v. Miranda*, 401 P.2d 721, 722-23 (Ariz. 1965).

assailant drove off and parked in an isolated place, where he raped the victim and let her go.⁶⁶ The physical descriptions matched in all three of the crimes.⁶⁷ The investigation turned toward Ernesto Arthur Miranda, although it was initially tied to him only by the similarity of the car used in the last assault—an old Packard sedan.⁶⁸ After Miranda voluntarily appeared in a line-up and was identified only as a person who looked like the assailant,⁶⁹ the investigating officer, Detective Carroll Cooley, was asked by Miranda whether they had identified him and the officer deceptively replied that the victims did.⁷⁰ Miranda then replied, “I guess I’d better tell you about it then.”⁷¹

Miranda, twenty-three years old and with an eighth grade education, wrote out a confession on a police form.⁷² The confession included the following:

Seen a girl walking up street stopped . . . walked towards her grabbed her by the arm and asked to get in car Drove away for a few mile. Stopped asked to take clothes off. Did not, asked me to take her back home. I started to take clothes off her without any force and with cooperation Could not get penis into vagina got about ½ (half) inch in. Told her to get clothes back on. Drove her home. I couldn’t say I was sorry for what I had done but asked her to pray for me.⁷³

Miranda signed his statement underneath the pre-printed language on the form, which stated, “I have read and understand the foregoing statement and hereby swear to its truthfulness.”⁷⁴

The United States Supreme Court took the *Miranda* case to clarify and elaborate on a prior case, *Escobedo v. Illinois*,⁷⁵ which discussed a suspect’s rights within the domain of the

⁶⁶ *Id.* at 723.

⁶⁷ STUART, *supra* note 45, at 4.

⁶⁸ *Id.* at 4-5.

⁶⁹ *Id.* at 6.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 7.

⁷³ *Id.* (quoting *State v. Miranda*, 401 P.2d 721, 727 (Ariz. 1965)).

⁷⁴ *Id.* The two investigating police officers signed the form as well. *Id.*

⁷⁵ 378 U.S. 478 (1964).

Sixth Amendment.⁷⁶ The *Miranda* decision dealt with coercive police techniques leading to involuntary statements.⁷⁷ The long history of abusive interrogation techniques was documented in the case:

The maxim ‘*Nemo tenetur seipsum accusare*,’ had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which [have] long obtained in the continental system, and . . . [were] not uncommon even in England. . . . The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.⁷⁸

The Court noted that police officers are told by a variety of manuals that the “principal psychological factor contributing to a successful interrogation is privacy—being alone with the person under interrogation.”⁷⁹ The Court thus was breaking down distinctions between physical coercion and more subtle kinds of influence. Added the Court:

From these representative samples of interrogation techniques, the setting prescribed by the manuals and

⁷⁶ *Id.* The Sixth Amendment states: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI. The Court in *Escobedo* used the Sixth Amendment to overturn an issue that arose during a suspect’s interrogation prior to the suspect being formally charged with a crime. *Escobedo*, 378 U.S. at 496 (White, J, dissenting). The suspect had requested counsel and the police denied that request. *Id.* at 479 (majority opinion). The dissent strongly objected to the use of the Sixth Amendment in the pre-indictment context. *Id.* at 496 (White, J., dissenting).

⁷⁷ *Miranda v. Arizona*, 384 U.S. 436, 439 (1966).

⁷⁸ *Id.* at 442 (citing *Brown v. Walker*, 161 U.S. 591, 596-97 (1896)).

⁷⁹ *Id.* at 449.

observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support.

. . . .

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.”⁸⁰

The Court further observed the following:

[A] defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.⁸¹

While this pronouncement was firm, it left many questions,⁸² such as what happens if a suspect chooses to speak

⁸⁰ *Id.* at 455-57. *Miranda* was considered a boon to criminal defendants, but there also was a downside. If it was a bane at all, it sowed the seeds for the implied waiver of Fifth Amendment rights. Yet, of course, it created a formalism much greater than in some other rights contexts, such as the Fourth Amendment arena, where the right to refuse requests to search need not be accompanied by any warnings at all. *See, e.g.,* *Schneckloth v. Bustamonte*, 412 U.S. 218, 221 (1973) (stating that an informal, voluntary search of a vehicle with no warning of the party’s rights was constitutional). The consequences are likely large and practical — many more people undoubtedly consent to such requests without a reading and understanding of one’s right to refuse such a search. *See, e.g.,* JOSHUA DRESSLER & GEORGE C. THOMAS III, *CRIMINAL PROCEDURE: INVESTIGATING CRIME* 314-15 n.1 (1st ed. 2003) (indicating that at least one study reported that two of the most common warrant “exceptions” are consent and searches incident to a lawful arrest (citing RICHARD VAN DUIZEND ET AL., *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES* 21 (1984))).

⁸¹ *Miranda*, 384 U.S. at 444-45.

⁸² One question was whether the police must supply a suspect with sufficient information for the suspect to decide whether to speak. *See, e.g.,* *Moran v. Burbine*, 475 U.S. 412, 422 (1986) (answering this question in the negative by stating that “we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights”).

selectively? On this question, at least, later federal circuit court cases suggested that the right can still attach.⁸³

3. *North Carolina v. Butler*⁸⁴

The case of *North Carolina v. Butler* presented the Supreme Court with the opportunity to explore what was required for the waiver of the Fifth Amendment right to counsel and whether that waiver needed to be express.⁸⁵ In *Butler*, the North Carolina Supreme Court held that an explicit statement of waiver was required for it to be recognized.⁸⁶ The Supreme Court, in an opinion written by Justice Stewart, declared that no such explicit waiver was necessary.⁸⁷

Justice Stewart recognized that an explicit oral or written statement indicating waiver was “strong proof” that a valid waiver had occurred, but was not in itself always “necessary or

⁸³ The Ninth Circuit has decided that established law allows a suspect to refuse to be interviewed in a particular manner even if he has already waived that right with respect to the subject matter of the interrogation. *See* *Arnold v. Runnels*, 421 F.3d 859, 866 (9th Cir. 2005) (holding that a suspect may refuse to be interviewed on tape when he had already waived his right to silence). Other circuits agree. *See, e.g.*, *United States v. Johnson*, 816 F.2d 918, 921-22 n.4 (3d Cir. 1987) (discussing a suspect’s right to remain silent after submitting to a polygraph); *United States v. Amaro*, 816 F.2d 284, 286 (7th Cir. 1987) (discussing a suspect’s right to refuse to speak to FBI agents while waiving his right and speaking to prison officials). Other circuits also agree that the Constitution allows a suspect to remain silent selectively. *See* *United States v. May*, 52 F.3d 885, 890 (10th Cir. 1995) (holding that clearly established law allows a defendant to remain “partially silent” by answering some questions and refusing to answer others” (quoting *United States v. Canterbury*, 985 F.2d 483, 486 (10th Cir. 1993)); *United States v. Scott*, 47 F.3d 904, 907 (7th Cir. 1995) (holding that “a suspect may . . . refuse to answer certain questions, and still be confident that *Doyle* will prevent the prosecution from using his silence against him”) (citing *Canterbury*, 985 F.2d at 486); *Hurd v. Terhune*, 619 F.3d 1080 (9th Cir. 2010).

⁸⁴ 441 U.S. 369 (1979).

⁸⁵ *Id.* at 372.

⁸⁶ *State v. Butler*, 244 S.E.2d 410 (N.C. 1978).

⁸⁷ *Butler*, 441 U.S. at 375-76. Justice Stewart also pointed out that North Carolina was not the trend-setter in interpreting the waiver requirement:

In evident conflict with the present view of every other court that has considered the issue, the North Carolina Supreme Court has held that *Miranda v. Arizona* requires that no statement of a person under custodial interrogation may be admitted in evidence against him unless, at the time the statement was made, he explicitly waived the right to the presence of a lawyer.

Id. at 370 (citation omitted).

sufficient” for the waiver analysis.⁸⁸

Justice Stewart then carved out the test for an area where waiver could be implied: “As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant’s silence, coupled with an understanding of his rights and a *course of conduct indicating waiver*, may never support a conclusion that a defendant has waived his rights.”⁸⁹

Thus, Justice Stewart seemed to distinguish between a course of conduct and the inculpatory statements themselves. This approach appears similar to the use of statements to establish a conspiracy under the Federal Rules of Evidence—the statements can be considered, but independent evidence is required as well.⁹⁰

Of equal significance is how the Court characterized the burdens associated with the waiver analysis. Justice Stewart stated, “The courts must presume that a defendant did not waive his rights; the prosecution’s burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.”⁹¹ The Court here affirmed the idea of implied waiver, but noted that such a waiver must have clarity; equivocal or ambiguous actions will not suffice.⁹²

4. *Berghuis v. Thompkins*⁹³

In *Berghuis v. Thompkins*, Van Thompkins was interrogated as a suspect in a shooting that killed a person.⁹⁴ As the Court described it, “The interrogation was conducted in a room that was 8 by 10 feet, and Thompkins sat in a chair that resembled a school desk (it had an arm on it that swings around to provide a surface to write on).”⁹⁵

After a detective read Thompkins his rights pursuant to *Miranda*, and Thompkins stated he understood those rights,

⁸⁸ *Id.* at 373.

⁸⁹ *Id.* (emphasis added).

⁹⁰ See FED. R. EVID. 801(d)(2)(e).

⁹¹ *Butler*, 441 U.S. at 373.

⁹² *Id.* at 375-76.

⁹³ 130 S. Ct. 2250 (2010).

⁹⁴ *Id.* at 2256.

⁹⁵ *Id.*

the detective proceeded to ask him questions for two hours and forty-five minutes.⁹⁶ Stated the Court:

About 2 hours and 45 minutes into the interrogation, Helgert asked Thompkins, “Do you believe in God?” Thompkins made eye contact with Helgert and said “Yes,” as his eyes “well[ed] up with tears.” Helgert asked, “Do you pray to God?” Thompkins said “Yes.” Helgert asked, “Do you pray to God to forgive you for shooting that boy down?” Thompkins answered “Yes” and looked away. Thompkins refused to make a written confession, and the interrogation ended about 15 minutes later.⁹⁷

Thompkins was for the most part—but not entirely—silent during that entire three-hour interrogation.⁹⁸ The Court described the following situation:

Thompkins was “[l]argely” silent during the interrogation, which lasted about three hours. He did give a few limited verbal responses, however, such as “yeah,” “no,” or “I don’t know.” And on occasion he communicated by nodding his head. Thompkins also said that he “didn’t want a peppermint” that was offered to him by the police and that the chair he was “sitting in was hard.”⁹⁹

In a 5-4 decision with Justice Kennedy writing the opinion for the Court, the Court stated that “[t]he main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel.”¹⁰⁰ Thus, the focus of the inquiry is whether there is evidence that the formal warnings are given to the suspect and that he understood them.¹⁰¹ Here, the Court found that this prosecutorial burden was met when the warnings were given to the suspect Thompkins in writing and the police had him read out loud in English to ensure that he understood his *Miranda*

⁹⁶ *Id.* at 2256-57.

⁹⁷ *Id.* at 2257 (citations omitted).

⁹⁸ *Id.* at 2256-57.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 2261.

¹⁰¹ *Id.*

rights—and could knowingly waive them.¹⁰²

The Court further fleshed out the framework of analysis for the right to remain silent in a crisp statement: “[A] suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police.”¹⁰³

This framework thus shows that unless the suspect actively invokes the right to remain silent—which does not include remaining silent—interrogation can continue.¹⁰⁴ There is no time limit to the interrogation, since the right to remain silent could be interposed “at any time.”¹⁰⁵

Finally, even without a suspect’s invocation of the right to remain silent by equivocal conduct or simply silence, a waiver analysis still occurs to ensure that the waiver is valid and uncoerced. That analysis still is derived from *Butler’s* “course of conduct” analysis, but “the course of conduct” can be shown by a single uncoerced word or statement.¹⁰⁶ Here, the statement, despite occurring after two hours and forty-five minutes of silence in the face of police interrogation, constituted both the course of conduct supporting waiver of the Fifth Amendment right to remain silent and the suspect’s confession.¹⁰⁷ Justice Kennedy stated:

Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his “right to cut off questioning.” Here he did neither, so he did not invoke his right to remain silent.¹⁰⁸

The court stated, “As 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

¹⁰² *Id.* at 2256

¹⁰³ *Id.* at 2264.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

¹⁰⁷ *Thompkins*, 130 S. Ct. at 2263.

¹⁰⁸ *Id.* at 2260 (quoting *Michigan v. Mosely*, 423 U.S. 96, 103 (1975) (quoting *Miranda v. Arizona*, 384 U.S. 436, 474 (1966))) (citations omitted).

protection those rights afford.”¹⁰⁹ The burden for waiver still remains on the prosecution. It can be met, however, if the prosecution can prove that the waiver was “voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation”¹¹⁰

As a corollary, the Court in *Thompkins* stated that “an accused who wants to invoke his or her right to remain silent . . . [needs to do so] unambiguously.”¹¹¹ Thus, *Thompkins* clearly carved out some ground where a suspect has neither invoked nor waived his rights, essentially by remaining silent or acting ambiguously. This ground is significant, because it effectively notes that without the invocation of rights, the default position is interrogation. “After giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived *Miranda* rights.”¹¹²

Thus, after *Thompkins*, it appears that there still is a right to remain silent, but suspects must affirmatively say or act like they want to invoke it. Acting silent is insufficient.¹¹³

THE NEW SILENCE—THE WEB-ERA CONVENTIONALITY

The digital era has transformed the way we relate, particularly the centuries-old conceptualization of the conversation or dialogue. While real-time conversation remains a basic form of relationship, it has been transformed by the

¹⁰⁹ *Id.* at 2262.

¹¹⁰ *Id.* at 2260 (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1987)).

¹¹¹ *Id.*

¹¹² *Id.* at 2254.

¹¹³ In a decision decided after *Thompkins*, the Ninth Circuit emphasized that even after a person has spoken with interrogators, subsequent chosen silence remains protected by the Fifth Amendment. *Hurd v. Terhune*, 619 F.3d 1080 (9th Cir. 2010). In *Hurd*, the Ninth Circuit Court of Appeals stated:

That silence may not require police to end their interrogation, but it also does not allow prosecutors to use silence as affirmative evidence of guilt at trial. *Thompkins* stands for the proposition that a voluntary confession should not be suppressed just because a defendant has refrained from answering other questions. It does not alter the fundamental principle that a suspect’s silence in the face of questioning cannot be used as evidence against him at trial, whether that silence would constitute a valid invocation of the “right to cut off questioning” or not.

Id. at 1088 (citation omitted).

peripatetic evolution of Web-era media and the advancement of electronic communications. As one commentator has noted, “[I]ncreasing speeds in human behavior and communication seem to parallel more contacts, more talk, more movement, more noisy conditions, and less and less silence.”¹¹⁴ Further, a dialogue in the digital era can be asynchronous, pseudo ominous, in short-hand or digital code, and reach thousands, if not millions of people, in seconds. Several new features dominate the post-digital evolution of dialogue and especially one of its corollaries, silence.

In the past, silence could mean many different things, although it was often a virtue.¹¹⁵ Today, silence in response to a question is still patently ambiguous, but within the new technology context, it is more of a signifier of withdrawal or nonparticipation than ever before, especially with a blurring of cultural and globalized understandings.¹¹⁶ In business, persons might be expected to respond to texts and other inquiries within twenty-four hours¹¹⁷ and email within forty-eight hours.¹¹⁸ With friends and family, the response time expectations often increase, leading to expectations of knowing where others are located at all times.¹¹⁹

¹¹⁴ Bruneau, *supra* note 3, at 77.

¹¹⁵ *See id.* More than 2000 years ago, Cyrus said, “Let a fool hold his tongue and he will pass for a sage.” *Id.*

¹¹⁶ *See generally*, Evgeny Morozov, *Texting Toward Utopia: Does the Internet Spread Democracy?*, BOSTON REV., Mar.-Apr. 2009, at 19 (“Regime change by text messaging may seem realistic in cyberspace, but no dictators have been toppled via *Second Life*”); DONNA REID & FRASIER REID, INSIGHTS INTO THE SOCIAL AND PSYCHOLOGICAL EFFECTS OF SMS TEXT MESSAGING (2004), *available at* <http://www.160characters.org/documents/SocialEffectsOfTextMessaging.pdf> (last visited Feb. 25, 2011).

¹¹⁷ There are many Web-sites dedicated to texting etiquette. *See, e.g.*, The Wireless Developer Network, *Top 10 list of SMS etiquette*, *available at* <http://www.wirelessdevnet.com/newswire-less/thefeature04.html> (last visited Feb. 8, 2011).

¹¹⁸ *See, e.g.*, Joe Porter, Social Media & Email Expected Response Time, *available at* <http://www.joeporter.me/social-media-expected-response-times> (last visited Feb. 8, 2011); *see also* Emailreplies.com, *available at* <http://www.emailreplies.com/> (last visited Feb. 8, 2011) (providing detailed instruction on email etiquette).

¹¹⁹ *See, e.g.*, William C. Rhoden, *Vince Young Has Gone From Stardom to the Shadows*, N.Y. TIMES, Nov. 24, 2008, *available at* <http://www.nytimes.com/2008/11/24/sports/football/24rhodensot.html>. In 2008, people thought NFL quarterback Vince Young was possibly suicidal when, after he left his cell phone at home, could not be reached by his mother and then his coach. *Id.*

For many, speech and silence are counterparts, necessarily intertwined,¹²⁰ giving each other reflected meaning.¹²¹ In light of the increasing cacophony and meanings of speech, silence also can be seen as possessing different layers and meanings upon a closer look.¹²² Silence can be differentiated from silences. Silence can be seen as an omission, a lack of speaking. Silences, however, can be distinguished as intermittent periods of quiet that can attach as a natural part of a conversation.¹²³ Silences, often brief, can reflect action through active listening and evaluation of sensory inputs. Further, deep silence has yet additional connotations, suggesting an exploration of one's inner self, occurring through meditation or other less-structured methods.¹²⁴

Consequently, sustained silence in the face of questioning more likely reveals an intentionality to disconnect and be silent when assessed in an era of impulsive, unreflective, unfiltered Internet discussions, than it did prior to the technological connections now available.¹²⁵ The proliferation, availability, and impact of these technologies cannot be ignored.

New Technologies

New technologies, providing different ways to communicate and stay connected, seem to be developed monthly, if not more often. Several of these mechanisms have swept across countries and cultures, including the vocabulary

¹²⁰ Kris Acheson, *Silence as Gesture: Rethinking the Nature of Communicative Silences*, 18 COMM. THEORY 535, 535 (2008).

¹²¹ The comparison can suggest speech and silence reside in harmony or conflict. For example, Jacques Derrida noted that: "Silence plays the irreducible role of that which bears and haunts language, outside and *against* which alone language can emerge—'against' here simultaneously designating the content from which form takes off by force, and the adversary against whom I assure and reassure myself by force." *Id.* at 536 (quoting JACQUES DERRIDA, *WRITING AND DIFFERENCE* 54 (Alan Bass trans., Univ. of Chicago Press 1980) (1967)) (emphasis in original).

¹²² *Id.* at 549.

¹²³ *See, e.g.*, Bruneau, *supra* note 3, at 77-78.

¹²⁴ This concept of enlightened silence still remains. People who retreat into the wilderness or go on prolonged meditation retreats or take vows of silence for religious reasons all engage in deep silence. *Id.* at 77.

¹²⁵ Further, the visibility the technology now offered provides an important safeguard to minimize coercion.

that describes them, such as “going viral.” Some of the more significant technologies to emerge, impacting the traditional dialogical conversation and the concept of connectedness, are described below.

Mobile phone networks, for wireless cellular phones, were developed in the 1970s, initially as an effort to create radiophones or two-way radios.¹²⁶ These phones were run on digital signal processors (DSP), a single chip, capable of more than five million operations a second.¹²⁷ The second generation of wireless cellular phones, sometimes denoted as “2G,” really launched widespread usage of such phones around the turn of the millennium, with thousands of new users a day.

Electronic games, such as video games, are based on platforms and derive from the development of computers by research scientists and computer programmers. A scientist named William Higinbotham at the Brookhaven National Laboratory developed a video tennis game in the 1960s to entertain visitors.¹²⁸ As has been noted, “Over the past 30 years, video games have become an integral part of our culture, and the video game industry has become a multi-billion dollar behemoth.”¹²⁹

Video games can be accessed on cellular phones, computers and other electronic sources. They can be used at any time of day or night—making entertainment just a fingertip away.

Internet blogging, or micro-broadcasting, allows everyone to become a journalist and to blast their opinions to others world-wide and instantaneously. Blogs can be focused on a

¹²⁶ *History of Cellular Mobile Communications*, MOBILE OPERATORS ASSOCIATION, available at <http://www.mobilemastinfo.com/history-of-mobile-cellular-communication/history-of-cellular-mobile-communications.html> (last visited Feb. 25, 2011). For example, in 2008 there was an estimated eighty million mobile connections in the United Kingdom, with more than four million customers. *Id.*

¹²⁷ Tom Farley, *Mobile Telephone History*, PRIVATE LINE, available at <http://www.privateline.com/PCS/history9.htm> (last visited Feb. 25, 2011).

¹²⁸ Allen Butler, *The Origins and History of Video Games*, ASSOCIATED CONTENT, Aug. 26, 2005, available at http://www.associatedcontent.com/article/9136/the_origins_and_history_of_video_games.html (last visited Feb. 25, 2011).

¹²⁹ *History of Gaming: A Look at How It All Began*, PBS, available at <http://www.pbs.org/kcts/videogamerevolution/history/index.html> (last visited Feb. 25, 2011).

single subject or on a wide variety of topics. These blogs can be the equivalent of the age-old private journal, just shared publically with others, or an interplay between several “columnists.”

Instant messaging and texting are two phenomena currently sweeping across cultures and geographical boundaries, although localizing generationally more in younger groups, such as teenagers. These forms of communications, primarily occurring on cellular phones and computers, allow for real-time, instantaneous, and efficient conversations.

Perhaps the most impactful area of new technologies involves social media sites. One of the most significant to date is Twitter. Twitter is an on-line individual communication service that is a cross between a social networking platform and a news outlet on an individual scale. Twitter allows everyone to become a member of the media, to become a micro-blogger, if only to answer the question, “What am I doing now?” Twitter has had a broad-ranging impact. Jurors and parties to lawsuits have used Twitter with the effect of disrupting trials. Others have used the site for positive outcomes, sending out distress calls or seeking creative and prompt responses to emergency situations. Celebrities, such as Shaquille O’Neal, have used the site to cultivate a following and stay in the limelight.¹³⁰

Facebook is the most popular of a wide variety of social media sites, including MySpace, and others.¹³¹ People post pictures and comments to interact on a daily basis with their on-line friends. “Friending” others on the site provides access and a glimpse into the lives of others, changing the definition of “friends” into a remote yet still potentially intimate interface.

¹³⁰ See, e.g., *THE_REAL_SHAQ*, TWITTER, available at http://twitter.com/the_real_shaq (last visited Feb. 25, 2011) (“Get short, timely messages from THE_REAL_SHAQ. Twitter is a rich source of instantly updated information. It’s easy to stay updated on an incredibly wide variety of topics. Join today and follow @THE_REAL_SHAQ.”).

¹³¹ See *The 1000 Most-Visited Sites on the Web*, GOOGLE, available at <http://www.google.com/adplanner/static/top1000> (last visited Feb. 25, 2011); see also FACEBOOK, <http://www.facebook.com> (last visited Feb. 25, 2011).

Transformation of Relationships

These technologies are more than just occupiers of time, but instead affect how we conduct our communicative relationships with others. The impact has the potential to be generational, cultural and psychological. Dr. Adam Cox, a psychologist who regularly works with adolescents, has observed:

As the synaptic mindscape of daily life becomes increasingly marked by peaks and the disappearance of valleys, we might reasonably expect to see some signs of distress among the hyper-stimulated. But that doesn't seem to be the case. Instead, we are witnessing an adaptation so massive and rapid that it raises the question of where disorder really lies: when the Centers for Disease Control and Prevention estimate that many millions of Americans meet the diagnostic criteria for Attention-Deficit/Hyperactivity Disorder, this putative disorder is arguably no longer a disorder at all—it's just the way we are.¹³²

Dr. Cox further noted, "Fifty years ago, the onset of boredom might have followed a two-hour stretch of nothing to do. In contrast, boys today can feel bored after thirty seconds with nothing specific to do."¹³³

Constant Connectedness ("24-7")

People can be connected to others twenty-four hours a day, seven days a week, whether hiking in the wilderness, driving to a store, or engaged in several other endeavors, such as studying, watching a sporting or cultural event, or eating a meal. Signs saying "please turn off cell phones" permeate society; a commonplace accessory is the cell phone case worn on the belt.

As a result of the opportunity to connect, true silence—or lack of a connection—is becoming the exception, not the norm. People walking in a city in a crowd of strangers can be having a

¹³² Adam J. Cox, *The Case for Boredom: Stimulation, Civility, and Modern Boyhood*, 27 NEW ATLANTIS 122, 124 (2010), available at <http://www.thenewatlantis.com/publications/the-case-for-boredom> (last visited Feb. 25, 2011).

¹³³ *Id.* at 123.

conversation with friends or family; those watching a film can receive and send text messages throughout; and people can blast progress reports or current thoughts to thousands of people following them on Twitter. A significant corollary or by-product of the ability to maintain constant connections and be assuaged by multiple stimuli is the notion of multi-tasking—doing several things at once.¹³⁴

Immediacy

The use of texting and instant messaging has created a new vocabulary (“lol”) and new forms of real-time communications. By pressing the send button, people can without deliberation create a lasting statement to others in a way they could not through other forms of non face-to-face communications like letter writing. Emoticons, like the common “smiley” face, can be sent as an entire message, and people write in a shorthand particularly suited to the era of almost-real-time conversations that are technically asynchronous. With smartphones having keyboards built in or instantly accessible, expectations for a quick or immediate answer have become commonplace.

Cross-Cultural Connections

As a result of the Internet and instantaneous connections around the world, such as through the site, Skype, which permits real-time video communication globally, different realities are becoming shared and cross-cultural lines blurred.¹³⁵ Individuals can see, feel, and learn about faraway places from their own living rooms, receiving a steady diet of

¹³⁴ At least one study shows, reflecting intuition, that dividing one’s attention in multiple ways diminishes the competency with which people attend to each task. See A. Gorlick, *Media Multitaskers Pay Mental Price, Stanford Study Shows*, STANFORD REPORT (August 24, 2009) <http://news.stanford.edu/news/2009/august24/multitask-research-study-082409.html>.

¹³⁵ The cultural anthropologist, Clifford Geertz, wrote that law is “a distinctive way of imagining the real.” Clifford Geertz, *Fact and Law in Comparative Perspective*, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167, 173 (3d ed. Basic Books 2000). The opportunity to connect with, observe and even participate in differing cultures and social organizations provides numerous additional ways of “imagining the real.”

information that in recent decades would have been available only at great time and expense. This has had significant cultural implications, creating and transposing existing cultures because of connections that would not have arisen due to geographic, relational, and other boundaries.¹³⁶

THE NEW SILENCE AND THE IMPLIED INVOCATION AND WAIVER
OF THE FIFTH AMENDMENT RIGHT TO REMAIN SILENT

The implications of the new technologies are many, but at a minimum, have forced a reconstructed understanding of silence in a way not taken into account by the Supreme Court in the *Thompkins* case.¹³⁷ In short, these technologies transform the traditional context of incommunicado interrogation as discussed in *Miranda* and the meaning of a suspect's silence in the face of interrogation. This section advocates both an invocation and waiver analysis of the Fifth Amendment right to remain silent that considers silence as a presumptive refusal to participate in a dialogue with the interrogators, generally the police, within a reasonable time after the commencement of the interrogation. This reasonable time should be measured in minutes, not hours, and understand the modern contexts of conventionality in dialogue and Web-era connectivity. Further, the burden carried by the prosecution to show waiver should be substantial, and not require an unambiguous statement of cease and desist as indicated by Justice Kennedy: "Thompkins did not say that he wanted to remain silent or that he did not want to talk to police. Had he made either of these simple, unambiguous statements, he would have invoked his 'right to cut off

¹³⁶ For example, a wide variety of political groups have been sustained because of the Internet, allowing for quick and efficient connections between people who otherwise would not have had such relationships.

¹³⁷ Comparatively, because of the proliferation of information from these technologies is a widespread knowledge about the Fifth Amendment right to remain silent. There are numerous police television dramas, police reality shows, *Court TV* shows, and Web sites that talk about the right to remain silent. While individuals know more about the right, there is no indication they know that invocation of the right requires an affirmative act—or that waiver can occur from their own statements.

questioning.”¹³⁸ Thus, silence should carry inferential weight, and not be considered as it was in *Thompkins*, merely a neutral placeholder.¹³⁹

Context

Context matters to the implied waiver of rights. Context in interrogation includes the layout and size of the room, the number and experience of interrogators, the nature of the crime, the background of the suspect, the duration of the interrogation and more.

With the existence of a waiver by implication, the default position for a waiver becomes all the more important.¹⁴⁰ The default position, meaning the position that is minimally sufficient to trigger a change in outcome, such as more than fifty percent for the preponderance of evidence standard, is especially critical with the invocation and waiver of constitutional rights. The default position sets the status quo, reflects settled expectations, and sets boundaries for the relationship between the government and individuals.

For example, the Court in *Thompkins*, appeared to use the same default position for waiver regardless of the length of the questioning or the physical space in which it occurred, among many other factors. The context of incommunicado questioning, while permissible, should be looked at closely and the course of conduct language of *Butler* taken seriously. In today's day and age, videotape, audiotape, and other confirmations¹⁴¹ of context can be readily made and

¹³⁸ *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (quoting *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)).

¹³⁹ While this inference might not have changed the outcome in *Thompkins*, since he did apparently participate in the discussion periodically, it would require a closer examination of the context and to at least give some value to his silence.

¹⁴⁰ The concept of waiver is different than an exception, where the right does not attach under particular circumstances, such as in a grand jury proceeding, impeaching a testifying accused. *See, e.g.*, *Harris v. New York*, 401 U.S. 222 (1971); or public safety, *see, e.g.*, *New York v. Quarles*, 467 U.S. 649 (1984).

¹⁴¹ While a requirement of corroboration can be onerous, the concept of “instant replay” and transparency are rising throughout society, from sports replays to traffic light intersections supported by cameras.

preserved.¹⁴² While the result of the *Thompkins* case might still be the same after a serious consideration of context, it would at least be reached after a rigorous sifting of the relevant contexts.

Implications of the Context of a New Silence

Silence can and should have implications in our society, at least within the contours of the Fifth Amendment. The notion of silence is the right not to implicate oneself, but it is more than that. In a legal framework that values critical thinking, silence provides the opportunity to desist from impulsive, unfiltered thinking and instead engage in deliberative, reflective analysis.¹⁴³ The importance of this concept is paralleled in the jury's job to consider all of the evidence before rendering a verdict. Further, in an era of constant connectedness, it is reasonable to infer that sustained silence in the face of interrogation is a "knowing" silence that indicates an intention to not participate in the dialogue. While falling within Fourth Amendment analysis, *Katz v. United States* is instructive when it states, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."¹⁴⁴

In viewing boredom for today's youth as a positive thing, the psychologist, Dr. Cox, said: "But the occurrence of boredom in young minds would be a welcome sign in one respect—it would suggest the presence of available resources for thought, reflection, and civil behavior."¹⁴⁵ This conceptualization corroborates the idea of free will and noncoercion reflected in *Miranda* and forsaken in *Thompkins*. Given the impulsivity of

¹⁴² See, e.g., S. Kossin, S. Appleby, & J. Perillo, *Interviewing Suspects: Practice, Science and Future Directions*, 15 LEGAL AND CRIMINOLOGICAL PSYCHOLOGY 39 (2010 British Psychological Society). cf. G. D. Lassiter, S. Diamond, H. Schmidt, and J. Elek, "Evaluating Videotaped Confessions: Expertise Provides No Defense Against the Camera-Perspective Effect," 18 Psychological Science 224 (2007 Association for Psychological Science).

¹⁴³ See, e.g., HENRY DAVID THOREAU, WALDEN; OR, LIFE IN THE WOODS (1854). Observe the functional equivalency of silence in Thoreau's choice to retreat from society and live at Walden Pond by himself. *Id.* Thoreau wanted to live in the woods and think deliberatively.

¹⁴⁴ 389 U.S. 347, 351 (1967).

¹⁴⁵ Cox, *supra* note 132, at 124.

speech evidenced in today's world by a variety of notorious Twitter statements alone,¹⁴⁶ at least an inference can be drawn that someone born digital who is engaged in a course of sustained silence likely intends that silence and is not merely waiting to pick a point to participate in the conversation.

Thompkins did not stay true to *Butler's* course of conduct standard, which takes into account action over time. In *Thompkins*, the applicable time was only at the point the suspect spoke—not the entire conduct taken as a whole from the giving of *Miranda* warnings onward. If that was done, a different narrative likely would have resulted. How many people, isolated from friends, family and trusted connections like cell phones, would have remained silent after more than two hours of incommunicado questioning by police, let alone two questions? How many people would have been able to sit still for more than two hours? This lack of participation in today's digital era must count for something in the constitutional evaluation of whether the right to remain silent was first invoked, and then waived.

A Right One Must Sign-Up For

Further, *Thompkins* changed the right to silence insofar it effectively required one to “sign-up” for it, much like a subscription to a magazine or to access the content of an on-line Web site.¹⁴⁷ The warning about the right to remain silent thus lies outside of the new conventionality, in that it misleads the recipient into believing they have such a right—without articulating that it must be affirmatively asserted, such as texting, “I accept.” If the *Thompkins* interpretation prevails,

¹⁴⁶ For example, the lawsuit brought against Courtney Love for defamation for statements she made on Twitter about designer Dawn Simorangkir. J. Luerssen, “Courtney Love's Twitter Defamation Lawsuit Costs Her \$430,000.” www.spinner.com (March 4, 2011); *see also*, “Can't say no one makes money from Twitter now. The NBA does.” Twitter statement by Mark Cuban, owner of the Dallas Mavericks basketball team, after being fined \$25,000 by the NBA for statements he made on Twitter about officiating.

¹⁴⁷ While this right is leveraged more than the Fourth Amendment waiver of the right to unreasonable searches or seizures, which can be effectively waived without knowing there is a right to say no, if the orthodoxy of values places the right to remain silent with the most significant of rights, the Court will go further to protect it.

the warnings should change to, “You have the right to remain silent, but only if you assert it.” This modification conforms at least with the intent of *Miranda* to place a heavy burden on the prosecution to show a waiver occurred.

CONCLUSION

Post-*Miranda* silence in a digital age of constant stimuli and connectivity has a new conventionality and meaning. This is an era of rapidly changing communication norms, where incommunicado questioning for prolonged periods has especially pernicious, if not subtle, tendencies toward coercion. The Court in *Thompkins* ignored the implications of context for the invocation and implied waiver of constitutional rights, particularly the specific factors involving the duration of the interrogation and the new normal of asynchronous, immediate and impulsive, unfiltered communication. The Court should reexamine its approach before it obliterates the sounds of silence.