MIRANDA'S HIDDEN RIGHT

Laurent Sacharoff *

ABSTRACT

When the Court in Miranda v. Arizona *applied the Fifth Amendment "right to remain silent" to the stationhouse, it also created an inherent contradiction that has bedeviled* Miranda *cases since. That is, the Court in* Miranda *said that a suspect can waive her right to remain silent but also that she must invoke it. Numerous courts have repeated this incantation, including most recently last summer in* Berghuis v. Thompkins. *But how can both be true about the same right? Either the suspect has the right and can waive it or does not yet enjoy it and must therefore invoke it.*

This Article argues that the Miranda *"right to remain silent" actually contains two sub-rights: the right not to speak and the right to cut off police questioning. The Court has never distinguished these as two separate rights—instead usually using the term "right to remain silent" for both—and has thus created confusion over what can be waived and what must be invoked. But when we separate the two sub-rights, we see that a suspect can waive the right not to speak but must invoke the right to cut off questioning—a premise implicitly confirmed by both the majority and the dissent in* Berghuis v. Thompkins.

By separating the two sub-rights, we also discover an important tool for analyzing new problems that arise under Miranda*'s "right to remain silent." For example, why must suspects invoke—unambiguously—the right to cut off questioning when police almost never warn them they have such a right? As for waiver of the right not to speak,* Miranda *required a showing of waiver but also precluded waiver by insisting that a suspect who speaks may stop and "remain silent" at any time. This Article suggests that the entire concept of "waiver" confuses rather than clarifies any right we think a suspect should enjoy.*

* Assistant Professor of Law, University of Arkansas School of Law in Fayetteville; J.D., Columbia Law School; B.A., Princeton University. The author wishes to thank Charles Weisselberg, Yale Kamisar, Richard Greenstein, and Don Judges.

INTRODUCTION

In *Miranda v. Arizona*,[1] the Court produced so many new and controversial holdings that one of its most important pronouncements has remained obscured for decades. The Court of course held that the Fifth Amendment applies not only at trial but also in the police stationhouse;[2] it held that police questioning is "inherently compelling" under the Fifth Amendment;[3] and finally and most famously, it required the police, before interrogation, to warn any suspect in custody that she has the right to remain silent, among other rights, in order to help vitiate this inherently compelling atmosphere.[4] Since *Miranda*, scholars and the Court have focused on whether the *Miranda* holding was good policy;[5] whether its holding was rooted directly in the Constitution or was merely a prophylactic measure;[6] and whether *Miranda* should be broadened or limited.[7]

But beyond these well-known holdings and partisan debates, the Court also made a little-noticed ruling about the "right to remain silent" that contained an inherent contradiction that has bedeviled *Miranda* cases since.

In particular, the Court in *Miranda* said that a suspect can waive her right to remain silent but also that she must invoke it. It held that if a suspect "invokes" the privilege, any statement taken afterwards as the result of police questioning must be excluded as compelled.[8] Yet, if the government wishes to introduce any statement the suspect makes during

1. 384 U.S. 436 (1966).

2. *Id.* at 467.

3. *Id.*

4. *Id.*

5. Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417 (1985); Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996); Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996); Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435 (1987); Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519 (2008); Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109 (1998); *see also* United States v. Dickerson, 166 F.3d 667, 687 (4th Cir. 1999) (collecting scholarship), *overruled by* Dickerson v. United States, 530 U.S. 428 (2000).

6. United States v. Patane, 542 U.S. 630, 639 (2004) (plurality of three) (prophylactic); Dickerson v. United States, 530 U.S. 428 (2000) (collecting cases) (constitutional); *Id.* (Scalia, J., dissenting) (prophylactic); Michigan v. Tucker, 417 U.S. 433 (1974) (prophylactic); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985); Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); Lawrence Rosenthal, *Against Orthodoxy:* Miranda *is Not Prophylactic and the Constitution is Not Perfect*, 10 CHAP. L. REV. 579 (2007); George C. Thomas III, *Separated at Birth but Siblings Nonetheless:* Miranda *and the Due Process Notice Cases*, 99 MICH. L. REV. 1081 (2001).

7. New York v. Quarles, 467 U.S. 649 (1984) (limited); Harris v. New York, 401 U.S. 222 (1971) (limited); Orozco v. Texas, 394 U.S. 324 (1969) (expanding *Miranda* to a suspect's home); *Id.* (White, J., dissenting) (strenuously objecting to expansion of *Miranda* beyond the stationhouse).

8. *Miranda*, 384 U.S. at 474 ("[A]ny statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.").

interrogation, the government must show that the suspect "waived" the privilege.[9] Subsequent *Miranda* cases have similarly used "waive" and "invoke" with respect to a single right.[10] For example, last summer, the Court in *Berghuis v. Thompkins*, wrote: "Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective."[11]

How can a suspect have the power to waive the right to remain silent and yet be required to invoke it? Surely a suspect either already enjoys the right and it is hers to waive, or the right has not yet been triggered and she must assert it; but it cannot be both.

The problem in *Miranda* and later cases[12] is that the Court uses the same phrase, "right to remain silent," to describe what are really two distinct sub-rights: (i) the right literally not to speak and (ii) the right to cut off police questioning. Indeed, perhaps *Miranda*'s most practical contribution was to provide suspects with the power to end police questioning with this new "right to cut off questioning."[13] Courts and scholars have never distinguished these as two separate rights[14] and thus have created confusion over what can be waived and what must be invoked. But when we separate the two sub-rights, we see that a suspect can waive the right not to speak but must invoke the right to cut off questioning—a conclusion implicitly confirmed by both the majority and the dissent in *Berghuis v. Thompkins*.[15]

9. *Id.* at 475 ("If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination . . . .").

10. *E.g.*, Fare v. Michael C., 442 U.S. 707, 724, 727 (1979) (juvenile's request was not an "invocation of [his] Fifth Amendment right" and he "waived his Fifth Amendment rights"); United States v. Plugh, 648 F.3d 118, 127 (2d Cir. 2011) ("Plugh did not unambiguously invoke his right to remain silent . . . . Plugh knowingly and voluntarily waived his rights to remain silent . . . ."); Hurd v. Terhune, 619 F.3d 1080, 1087 (9th Cir. 2010); Simpson v. Jackson, 615 F.3d 421, 430 (6th Cir. 2010) (The defendant did "not clearly invoke his right to remain silent," and the suspect consented "to waive his *Miranda* rights."); United States v. Washington, 462 F.3d 1124, 1134 (9th Cir. 2006) ("A person waives the right to remain silent if, after being informed of that right, the person does not invoke that right."); United States v. Cardwell, 433 F.3d 378, 389 (4th Cir. 2005) (rejecting argument that defendant "did not voluntarily waive his *Miranda* rights," and noting that he "did not . . . invoke those rights"). As noted below, several of these courts recognize that invocation and waiver have different consequences even though those same courts do not distinguish clearly the rights at issue.

11. Berghuis v. Thompkins, 130 S. Ct. 2250, 2264 (2010).

12. *See supra* note 10 collecting cases.

13. *Miranda*, 384 U.S. at 474.

14. The Court on occasion does use the phrase "right to cut off questioning," *see, e.g.*, Michigan v. Mosley, 423 U.S. 96, 103 (1975); *Miranda*, 384 U.S. at 474, but it has never said that the right to remain silent actually contains two rights, one of which is the right to cut off questioning. In light of *Thompkins*, some Circuit Courts of Appeal have begun to recognize that invocation and waiver result in different consequences without actually identifying that each act applies to different rights. *E.g.*, *Plugh*, 648 F.3d at 124–28.

15. *Thompkins*, 130 S. Ct. at 2264, 2266.

Thus, if the police read a suspect her rights and she says nothing, she is exercising her right not to speak, but she has not invoked her right to cut off police questioning. In such a circumstance, the police may question the suspect. But if she does make a statement, the government must show that she waived the right not to speak before the statement will be admissible. These were the facts of *Thompkins*, which showed that invocation is not simply a retraction of an earlier waiver; rather, invocation and waiver operate on separate sub-rights.

Though the Court has never expressly identified these two sub-rights, Justice Brennan did so privately in an internal letter he sent to Chief Justice Warren a month before the *Miranda* decision was announced.[16] He noted that the draft opinion appeared to create a right not only to refuse to answer questions but also to end the interrogation. He also identified a problem in this regime: if the Court has created a separate right to cut off police questioning, shouldn't the police warn the suspect he has this power?[17] Below, I examine the papers of Chief Justice Warren, including memos from his clerks and drafts of the *Miranda* opinion, to sketch the evolution of the "right to cut off questioning"—a phrase that did not appear in early drafts. These papers uncover the conflict that has always lurked within *Miranda*'s language.

This Article for the first time separates these two sub-rights—the right literally not to speak and the right to cut off questioning—and provides the analytical concepts and language to understand how they function. In particular, it takes the right to cut off questioning out of the shadows and shows the importance of this separate sub-right. Though the Court in *Thompkins* treated each right separately, it still largely clung to the single term, "right to remain silent."

When we separate these rights, we uncover two new problems with the *Miranda* regime. First, the Court requires that a suspect invoke, and invoke unambiguously,[18] the right to remain silent, meaning the right to cut off police questioning, and yet police almost never warn a suspect she has this right. But it is only when we call the right by its proper name, rather than simply the "right to remain silent," that we even see that the police do not warn suspects about this right.

Second, *Miranda* created a contradictory framework for waiver. On the one hand it required a showing that the suspect waived her right to remain silent; on the other, it said a suspect *cannot* waive that right because a suspect who speaks may stop and "remain silent" at any time. This Article

16. Letter from William J. Brennan, Justice, Supreme Court of the United States, to Earl Warren, Chief Justice, Supreme Court of the United States (May 11, 1966) [hereinafter Brennan Letter] (on file with author and the Library of Congress).

17. *Id.* at 13.

18. *Thompkins*, 130 S. Ct. at 2260.

suggests that the entire concept of "waiver" confuses rather than clarifies any right we think a suspect should enjoy and discusses what interests the "waiver" concept actually protects.

The foregoing fits into a much larger picture. *Miranda*'s two sub-rights parallel analogous sub-rights within the Fifth Amendment itself, and indeed, they are simply an example of how most rights, legal and moral, function. Jeremy Bentham, Wesley Hohfeld,[19] and H.L.A. Hart,[20] among others,[21] have shown how to disaggregate legal rights, including fundamental rights, into their functional sub-parts, in order to understand what a right is. We can use their insights to illuminate the mechanism of both the Fifth Amendment right and the *Miranda* protections.

Part I of this Article therefore unbundles the components of the Fifth Amendment into their Hohfeldian[22] parts. At the core of the Fifth Amendment lies a Hohfeldian "liberty," the liberty not to speak. On the perimeter,[23] protecting the liberty like soldiers, stand several Hohfeldian "claims."[24] For example, a suspect has a claim not to be tortured and the police have a correlative duty not to torture the suspect. This claim protects her liberty not to speak.

Part II applies these general principles to *Miranda* and discusses the two sub-rights that lie beneath the *Miranda* right to remain silent. It traces the evolution of the often-ignored right *Miranda* created: "the right to cut off questioning."[25] This Hohfeldian "claim,"[26] once invoked, imposes upon the police a duty not to question the suspect and protects the suspect's liberty not to speak; without it, any continued questioning might undermine his resolve to remain silent. Thus, *Miranda* created a liberty not to speak protected by a claim to cut off police questioning.

Part III.A portrays a history of confusion. It shows how *Miranda* and subsequent cases have used the term "right to remain silent" indiscriminately to denote either sub-right, obscuring which sub-right must

19. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

20. H.L.A. HART, ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY (1982).

21. JOSEPH RAZ, THE MORALITY OF FREEDOM (1986); L. W. SUMNER, THE MORAL FOUNDATION OF RIGHTS (1987); CARL WELLMAN, A THEORY OF RIGHTS: PERSONS UNDER LAWS, INSTITUTIONS, AND MORALS (1985).

22. As I discuss in Part I *infra*, Hohfeld broke rights down into functional components such as a claim that correlates to a reciprocal duty.

23. HART, *supra* note 20, at 171.

24. Hohfeld used the terms "right" and "privilege," but this Article will use the more modern terms "claim" and "liberty." Hohfeld, *supra* note 19; SUMNER, *supra* note 21.

25. Miranda v. Arizona, 384 U.S. 436, 474 (1966).

26. Further investigation in Part IV.B shows an even more complicated picture, that the claim not to be questioned is really a Hohfeldian liability. But as I conclude in that section, calling it a claim not to be questioned is a suitable and more useful shorthand.

be waived and which must be invoked.[27] Part III.B then eliminates the confusion. When we identify the precise sub-right at issue—the right not to speak or the right to cut off police questioning—we unlock the puzzle of many of the cases, especially *Berghuis v. Thompkins*.

Part IV examines *Thompkins* closely because that case made new and controversial law with respect to both sub-rights. With respect to waiver, the Court essentially said that if a suspect talks after receiving and understanding the *Miranda* warnings, she has waived.[28] Is this holding sound? We cannot tell based upon the Court's reasoning because the Court never identified precisely *what* right is being waived. Simply saying that a suspect waives the "right to remain silent" tells us little. Once we identify the sub-right and its *type*—a liberty—we can determine what it means to waive such a right. I conclude below that *Thompkins*' ruling regarding waiver makes sense, though for reasons different from those provided by the Court. In doing so, this Part also examines more generally the *Miranda* waiver requirement and what it really means.

With respect to invocation, *Thompkins* required that a suspect invoke the right to cut off questioning.[29] This ruling was wrong, but we can only understand why when we treat the sub-right separately. *Thompkins* was wrong to require that a suspect invoke the right to cut off questioning unambiguously because police never warn suspects they even have such a right. The Court in *Thompkins* could justify its holding only by relying on the more general phrase "right to remain silent" and by ignoring the actual sub-right at issue—the right to cut off questioning.

The problems wrought by treating the two sub-rights as one under the banner "right to remain silent" will appear increasingly in the future. As more and more police departments tape record or videotape interrogations,[30] courts will confront a far more nuanced record of suspects invoking or waiving, and doing so selectively for some questions and not others.[31] To properly sort through these more subtle waivers and

27. *See* cases cited *supra* note 10. More recent cases do recognize that waiver and invocation have different consequences, and that invocation requires the police stop the interrogation, but the cases still treat waiver and invocation as operating on the same right. *E.g.*, United States v. Plugh, 648 F.3d 118, 124–28 (2d Cir. 2011).

28. Berghuis v. Thompkins, 130 S. Ct. 2250, 2264 (2010).

29. *Id.*

30. Several states require the police to record interrogations electronically. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 26 (2010) (identifying nine states that require recording of interrogations in some circumstances); Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 528 (2006). In many other jurisdictions, police departments voluntarily record interviews and interrogations in major felony investigations. Thomas P. Sullivan et al., *The Case for Recording Police Interrogation*, LITIG., Spring 2008, at 1–8.

31. Hurd v. Terhune, 619 F.3d 1080, 1088 (9th Cir. 2010) (defendant selectively "invoked" the "right to silence" during his interrogation).

invocations, courts will need to keep straight the difference between waiving the liberty not to speak and invoking the right to cut off questioning—and use language that suitably reflects that distinction.

I. A LIBERTY, A CLAIM, AND THE FIFTH AMENDMENT

A. Elements of a Legal Right

1. Hohfeld Summary

In *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, Wesley Hohfeld observed that courts use the notion and term legal "right" broadly to embrace numerous incidents—so broadly as to obscure important differences in the way the different rights actually function.[32] He proposed to limit the term "right" and to use other terms to describe other incidents often described as rights. He set forth four terms—right, power, privilege, and immunity—to describe four incidents or legal advantages.[33] The contemporary literature often uses the term "claim" instead of right and "liberty" instead of privilege.[34] I will likewise use that terminology for a few reasons. First, if I use "claim" for the narrow version of "right," I can then continue to use the term "right" in a general and non-technical sense to embrace some arbitrary bundle of Hohfeldian incidents. Second, in using "liberty," I avoid any confusion with the "*privilege* against self-incrimination."

Hohfeld defined the four incidents through contrasts, through what he called correlatives, and through examples.[35] Thus, a claim is the correlative of a duty: one person has a claim if another person has a correlative duty. For example, I have a claim that others not assault me. With respect to you in particular, I have a claim that you not assault me, and you have a correlative duty not to assault me. If I own land, I have a claim that you not enter it. Hohfeld made clear that every claim has a correlative duty, and every person who has a claim has a claim in relation to another person who has a duty.[36]

It is crucial to understand that the term "claim" as used in this Article *does not mean cause of action*; rather, it retains the flavor of "right" and simply describes the advantage the holder of the claim enjoys vis-à-vis the person who has a correlative duty. For example, I have claim that you not

32. Hohfeld, *supra* note 19, at 28–29.
33. *Id.* at 30.
34. SUMNER, *supra* note 21, at 25.
35. Hohfeld, *supra* note 19, at 30.
36. *Id.* at 31.

assault me even if you never violate that claim with an assault. If you did assault me, I would then have a cause of action for violation of my claim that you not assault me. Thus, a claim is a right I have in the world; a cause of action describes my assertion in court.

The opposite of a claim is no claim (what Hohfeld called a "no-right").[37] I have no claim that that you make me breakfast, and correspondingly, you have no duty to make me breakfast.

A liberty is the opposite of a duty and therefore means that a person with a liberty has no duty not to engage in that activity.[38] I have a liberty to walk down the street, and I have no duty to refrain from walking down the street. Those are opposites. The correlative of liberty is no claim. I have a liberty to walk down the street, and you have no claim that I not walk down the street. This means you have no legal claim. You likely also have no *moral* claim that I not walk down the street, but that is a different issue. This discussion deals with legal claims and liberties.

When assessing claims and liberties, it is important to note whose conduct is the subject of the claim or liberty. If I have a claim, my claim refers not to *my* conduct but to the conduct of the other person who has the correlative duty.[39] Thus, if I have a claim that you not assault me, the conduct at issue is yours, the duty-holder, not mine. The reverse is true for liberties: if I have a liberty to walk down the street, that liberty refers to my conduct.[40] This liberty means you have no claim that I not walk down the street, and again, your no-claim refers not to your conduct but to mine.

Just because I have a liberty to walk down the street does not prevent you from *physically* interfering with me.[41] Even though you have no legal *claim* that I not walk down the street, you can still try to stop me (that is, as far as my liberty is concerned). I therefore need an incident in addition to a mere liberty to make my liberty exercisable as a practical matter. I need to have a *claim* that you not prevent me from walking down the street. Since my claim *does* refer to your conduct, my claim says that you have a duty not to prevent me from walking down the street.[42]

Usually a liberty and a claim such as these will go together. I have a liberty to walk down the street because I have no duty not to, but I also

37. *Id.* at 32.

38. *Id.* at 32–33.

39. SUMNER, *supra* note 21, at 25.

40. *Id.* at 26.

41. Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 987–89 (1982) (noting that Hohfeld's contribution was to show that liberties were distinct from claims).

42. Of course, even if you have a duty not to prevent me from walking down the street, you still may do so, violating that duty. I would only truly and physically be free to walk down the street if there were no physical impediments; if I were on a desert island (with streets), I would be free to walk down the street in a full physical sense.

have a claim that you not interfere with me walking down the street by, say, assaulting me. My claim that you not assault me (and your correlative duty not to assault me) make my liberty to walk down the street *effective*. As H.L.A. Hart puts it, someone may enjoy a right that is at its core a liberty but has a "protective perimeter" of a claim.[43]

A counterexample may make this more clear, one in which the liberty does not come accompanied by a claim. Under the rules of football, if I have the ball, I have a liberty to run with it. The rules impose no duty on me to stand still (as they do in Ultimate Frisbee, for example). If you are on the other team, you have no claim that I not run with the ball. But my liberty comes with no claim. The rules of football give me no claim that you not interfere with my running; quite the contrary, you have a liberty to tackle me and no duty not to do so.[44] Thus, I have a liberty but not a claim, no protective perimeter to help make the liberty more effective.[45] Only if I am tough, undeterred, and fast enough, will my liberty remain effective.[46]

Hart points out that many liberties naturally have claims that protect them on the perimeter, even though those claims are not targeted specifically at protecting that liberty.[47] Thus, I have a claim not to be assaulted, and this claim protects my liberty to walk down the street. This is true even though my claim against being assaulted protects many other liberties as well, and my liberty to walk down the street might not be fully protected by my claim that others not assault me. The liberty and the protective claims are not congruent.

But the liberty enshrined in a fundamental constitutional right is often protected by claims specifically targeted to protect that liberty. As Hart wrote of these fundamental liberties, "great importance may be attached to their unimpeded exercise and in such cases the law may protect the liberty by a strictly correlative obligation not to interfere by any means with a specific form of activity."[48]

Claims and liberties are first-order incidents because they govern human conduct.[49] But a "power" in the Hohfeld constellation refers to a

43. HART, *supra* note 20, at 171.

44. In fact, you have some kind of duty *to* tackle me.

45. This is not entirely accurate. I have a claim that you not tackle me by pulling on my facemask, for example, and this claim makes my liberty to run somewhat more effective.

46. My liberty remaining "effective" could mean two things. If I am so frightened by the prospect of being tackled that I refuse to run with the ball, then my liberty is not effective; conversely, if the prospect of being tackled does not so frighten me, and I do run (or if I don't, it's for another reason), then my liberty is effective. But a second problem is this: if I do run and am tackled, my liberty thereafter is not effective in a different way. The first is psychological and the second physical. The same problems apply to police coercion, since it can be psychological or physical.

47. HART, *supra* note 20, at 172.

48. *Id.*

49. SUMNER, *supra* note 21, at 27, 29.

second-order incident. That is because we use a power to *change* a legal relationship—that is, to change Hohfeldian incidents.[50] For example, if I own a tract of land, I have the first-order claim that you not enter it. I also have the second-order power to alienate that land. If I *exercise* that power and grant the land to you, I have changed my rights (used broadly) with respect to the land as well as yours. Before I granted you the land, I had the claim that you not come onto the land. After I grant you the land, you have the claim to exclude me, and I no longer have that claim. Or, to use another example, if I make you an offer to buy your car, you now have a power—the power to accept. I also have a "liability" that correlates to your power—a liability that you may accept. If you do accept, my liability becomes a duty to pay you money. In accepting, you have changed our legal relationship.

Finally, an "immunity" protects a person against another changing his legal relations.[51] Thus, federal law provides a defendant the right to a jury trial through various statutes; Congress could not eliminate the right created by those statutes because the Sixth Amendment provides the defendant an immunity from such change.[52] A defendant's immunity correlates with Congress's lack of a power to change those legal relations.

As relevant here, a suspect enjoys a liberty not to speak to the police, and the Fifth Amendment guarantees that the legislature cannot change that liberty. The legislature cannot impose on suspects (or anyone) a duty to confess to the police because this would change a person's legal relationship to the police. The immunity means the legislature lacks this power.

2. The Nature of Rights

We can think of the above Hohfeldian advantages—a claim, a liberty, a power, and an immunity—as atoms we combine into a molecule,[53] or a complex,[54] that is a "right." I have a right to walk down the street not simply because I have no duty not to but also because I enjoy a claim against assault on the perimeter protecting that liberty and making it effective. Together the liberty and the claim combine to create what we would call a right. In this case, my liberty to walk down the street lies at the core of the right.

50. Hohfeld, *supra* note 19, at 44.
51. *Id.* at 55.
52. U.S. CONST. amend VI.
53. Leif Wenar, *The Nature of Rights*, 33 PHIL. & PUB. AFF. 223, 225 (2005).
54. WELLMAN, *supra* note 21, at 81.

Hart argued that all rights are really liberties at the core with other Hohfeldian elements such as claims on the perimeter.[55] In his view, the central *notion* of a right is that it protects and facilitates the choice of the individual to do or not to do the conduct governed by the liberty. He thinks of a right as mainly embracing a liberty because it facilitates choice, not because it benefits the liberty-holder.[56]

In Hart's view, a right protects the right-holder's choice in a few key ways. First, it protects the core liberty, which will almost always be a "bilateral" liberty.[57] Thus, I have a bilateral liberty to walk down the street because I have a liberty to walk down the street and a liberty *not* to walk down the street—hence the choice.[58] Second, a right-holder enjoys the choice to *waive* protective claims.[59] Thus, I may waive the claim that you not assault me so that we may box, at least in some jurisdictions,[60] or wrestle. I may waive the claim that you perform a contract in exchange for something better. For Hart, a person enjoys a right only if he can waive it; he becomes a "small-scale sovereign" over another's duties.[61]

Carl Wellman and others expanded upon Hart[62] but retained his central insights. Wellman portrayed a right as a complex of Hohfeldian elements. Often a liberty lies at the core, but he argued that a claim can as easily lie at the core, such as the claim to be repaid a debt.[63] True, a person has the power to waive this claim, and the power to waive is part of what makes the complex of claim and power add up to a right. But a claim lies at its core because what the right-holder largely cares about is getting his money, not the power to waive the claim.[64]

55. HART, *supra* note 20, at 188–89. He notes one exception—Hohfeldian immunities. As Wellman has noted, however, even immunities seems to fit into a choice-theory in which liberties play the central role. WELLLMAN, *supra* note 21, at 77.

56. HART, *supra* note 22, at 188–89.

57. *Id.* at 188.

58. *Id.*

59. *Id.* He identifies three levels of waiver: (i) a person may waive the duty initially, as a boxer waives his claim against battery; (ii) after breach of that duty, he may choose not to sue to enforce it; and (iii) after winning judgment, he may choose not to collect. *Id.* at 184. Along with the underlying liberty, these three types of waiver contribute to what Hart believes it means to enjoy a "right."

60. Even if boxing is a crime, the RESTATEMENT (SECOND) OF TORTS § 892(c) (1979), endorses the minority view that a person may waive a tort claim for battery in order to box.

61. But we must understand what Hart is and is not saying. His mission is to develop the best concept of a "right." For him a right must protect choices and therefore be waivable. But there may be duties that do not correspond to rights. Thus, he would say that George has a duty not to murder Frank, but Frank does not have a "right" that George not murder him simply because Frank cannot waive that right. Thus, to identify "rights" does not exhaust the protections a person enjoys. HART, *supra* note 20, at 183. Raz makes a similar point. RAZ, *supra* note 21, at 193.

62. Wellman argued that a right protects the right-holder's control or dominion and gives him an advantage over another in a possible future legal conflict. WELLMAN, *supra* note 21, at 81, 85.

63. *Id.* at 81.

64. Hart, Wellman, and others represent one major school of thought concerning the nature of rights—the will theory of rights. The main alternative school argues that rights chiefly protect the

B. The Fifth Amendment

Using the foregoing terminology, we can frame the Fifth Amendment as (i) a liberty not to speak at its core protected by (ii) claims such as the claim against torture, as well as (iii) an immunity that ensures the legislature cannot curtail its core liberty and attendant claims.

Throughout this Article, I will use certain shorthand. I use the word "speak" in the phrase "liberty not to speak" and elsewhere as shorthand. In using "speak," I assume the subject matter spoken would tend to incriminate—the Fifth Amendment only protects against self-incrimination. When we deal with suspects in police custody, self-incrimination is assumed—except for questions about pedigree information.[65] In addition, "speak" includes any type of intentional communication, such as writing or gestures such as nodding one's head.

As for the Fifth Amendment liberty, what I previously called the right not to speak is more precisely called a liberty not to speak.[66] A criminal defendant has a liberty not to speak at trial because she has no legal duty to speak at trial. A suspect in police custody likewise has a liberty not to speak and equivalently has no duty to speak. Similarly, the police have no claim that she speak. In addition, this liberty concerning speaking is a "full liberty"[67] or a "bilateral liberty."[68] That is, the suspect also has the liberty *to* speak. She may testify at trial or speak to the police. She has a choice. As with any liberty, the liberty not to speak refers to the suspect's conduct since she holds the liberty.[69]

On the perimeter stand certain claims protecting this liberty, such as the claim that the police not torture a suspect.[70] These claims protect the liberty not to speak just as my assault claim against others helps to protect my

interests of the right holder and is called the interest or benefit theory of rights. HART, *supra* note 20, at 162 (identifying the two schools and putting himself in the will theory camp and Bentham in the interest theory camp); RAZ, *supra* note 21, at 165–66 (noting that a right rests upon the interests of the right-holder).

65. Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177, 190–91 (2004); Pennsylvania v. Muniz, 496 U.S. 582, 601–02 (1990).

66. Yale Kamisar once called this "a suspect's freedom to speak or not to speak." Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, *in* CRIMINAL JUSTICE IN OUR TIME 1, 10 (A.E. Dick Howard ed., 1965).

67. SUMNER, *supra* note 21, at 26, 33–34.

68. HART, *supra* note 20, at 173.

69. Hart and Wellman do not address the Fifth Amendment specifically, but the foregoing description closely parallels their break down of the First Amendment. HART, *supra* note 20, at 190–91; WELLMAN *supra* note 21, at 78–79. Leif Wenar has analyzed the Fifth Amendment in these same terms. Wenar, *supra* note 54, at 229–30.

70. This right against the use of evidence obtained through torture arose historically from the Due Process Clause, Brown v. Mississippi, 297 U.S. 278, 285–86 (1936), but *Miranda* held that the Fifth Amendment right to remain silent also protects against police torture and abuse of a suspect. Miranda v. Arizona, 384 U.S. 436, 512 (1966) (Harlan, J., dissenting).

liberty to walk down the street. As discussed above, a pure liberty, unprotected by any claim imposing a duty on others, will provide little protection without some constraints on the behavior of government officials. A pure liberty simply means that a suspect or defendant does not have a legal duty to speak but says nothing about what others may do physically to coerce such speech. In other words, even if a suspect has no legal duty to speak, the police might torture him in order to make speaking the more attractive option. If a suspect had no claim, he would be in the position of a football player, who has a liberty to run with the ball but no claim that the other team not tackle him. The claims provide that needed protection.

These Fifth Amendment claims are congruent to the liberty they protect because the claims are targeted specifically at the liberty not to speak. That is, the Fifth Amendment claims do not protect liberties other than the liberty not to speak and they do fully protect the liberty not to speak (again, on incriminating matters). Contrast this right with the claim against assault—the claim against assault protects my liberty to walk down the street, but not entirely, and not only that liberty.

The Fifth Amendment liberty not to speak also enjoys protections from the Fifth Amendment as a Hohfeldian "immunity." This Fifth Amendment immunity prevents any legislature, state or federal, from eliminating the liberty not to speak; thus, no legislature could impose upon a suspect a duty to speak to the police or testify in court. In addition, the immunity prevents a legislature from eliminating the claim aspect of the Fifth Amendment—no legislature could grant a liberty to police to torture or abuse a suspect or permit the police to question a suspect who has invoked his right to cut off police questioning. As with other fundamental constitutional rights, the Fifth Amendment *entrenches* rights against democratic majorities by granting an immunity on those who benefit from them—in this case suspects, defendants, and in certain circumstances, other witnesses.

The Fifth Amendment immunity thus plays a background role. The liberty not to speak primarily represents the *absence* of any law imposing such a duty.[71] No state or federal law requires a defendant to testify at his own trial, for example, and the absence of any such legal duty equals the defendant's liberty not to testify. The Fifth Amendment immunity, in turn, ensures that no law will ever impose such a duty.

71. The Supreme Court of Canada made a similar point about the common law right to silence, which "simply reflects the general principle that, absent statutory or other legal compulsion, no one is obligated to provide information to the police or respond to questioning." R. v. Singh, [2007] 3 S.C.R. 405 (Can.). It continued to say that a suspect's right to remain silent "is merely the exercise by him of the general right enjoyed in this country by anyone to do whatever one pleases, saying what one pleases or choosing not to say certain things, unless obliged to do otherwise by law." *Id.* (quoting R. v. Rothman, [1981] 1 S.C.R. 640 (Can.)).

We disassemble the Fifth Amendment into a liberty protected by certain claims and an immunity in order to see its moving parts and to understand the mechanism. But it remains a single right—the right to remain silent. It is a single right in the sense that its pieces work together to further the same goal: the liberty not to speak. But since its pieces also work separately, since the claim *operates* and protects the liberty, we must view them separately to understand their practical effect. To understand waiver and invocation, to understand the duties of the police and the particular, operational rights of the suspect, we must see how each individual part functions alone, though always keeping in mind its purpose to further the unified right.

II. *MIRANDA*'S TWO RIGHTS

A. The Liberty Not to Speak

Like the Fifth Amendment more generally, the *Miranda* right to remain silent contains a liberty not to speak at its core protected by a claim against police questioning. The liberty not to speak also enjoys protection from the suspect's claim to *information*, namely, the *Miranda* warnings themselves.[72] In other words, the police have a duty to warn suspects.

This liberty to remain silent in the face of police questioning pre-dates *Miranda* and lies inherent in the Fifth Amendment itself—again with respect to matters that tend to incriminate. After all, the *Miranda* right to remain silent is simply a subset of the Fifth Amendment liberty. To say a person enjoys such a liberty means she has no duty to speak; to say she has no duty to speak means no law requires her to speak. Key late nineteenth century Fifth Amendment cases such as *Counselman v. Hitchcock*,[73] *Brown v. Walker*,[74] and *Boyd v. United States*[75] made clear that in the appropriate circumstances, a legal duty to speak brought under a subpoena to testify or produce evidence cannot apply to a person who may incriminate herself by speaking or producing those papers. Of course, an immunity statute narrows the liberty by requiring a person to disclose information as long as the government does not use that information in any subsequent prosecution.[76]

The immunity cases make clear that likewise in the police stationhouse, no statute could require a suspect speak when those answers would tend to

72. I thank Robert Leflar for this observation.

73. 142 U.S. 547 (1892), *overruled in part by* Kastigar v. United States, 406 U.S. 441 (1972).

74. 161 U.S. 591 (1896).

75. 116 U.S. 616 (1886), *overruled by* Warden v. Hayden, 387 U.S. 294 (1967), *and* Fisher v. United States, 425 U.S. 391 (1976).

76. *Kastigar*, 406 U.S. at 453.

incriminate him since the police generally cannot grant immunity. And by 1965, the Court in *Escobedo v. Illinois* recognized that a suspect in police custody has an "absolute right to remain silent."[77] That is, the Court will assume that *any* answer he gives while in police custody would tend to incriminate. Thus, even before *Miranda*, a suspect in police custody enjoyed a liberty not to speak at all.

B. The Right to Cut Off Police Questioning—Before Miranda

1. Escobedo v. Illinois*—The Seeds of the Right*

Before *Miranda*, suspects could remain silent but had no right to end questioning and no claim that the police leave them alone. But in 1964, two years before *Miranda*, some inchoate form of the right began to develop in *Escobedo v. Illinois*.[78] There, the Court stated that under certain circumstances, if a suspect requests a lawyer and the police fail to provide one, any statement he makes during the interrogation is not admissible.[79] When stated this simply, one can discern the seeds of a right to cut off questioning, since a suspect who requests counsel does, in effect, require an end to the interrogation in the sense that any statement taken thereafter would be inadmissible.

But the complex circumstances that trigger the *Escobedo* right to counsel obscure any concept of a right to cut off questioning. Those circumstances include several events: the police focus their inquiry onto a particular suspect, take him into custody, interrogate him, he asks for a lawyer, they fail to provide him one, they fail to warn him of his right to remain silent, and he makes a statement during that interrogation. Only when each of these events has occurred is the statement inadmissible.[80] But in no sense did *Escobedo* create a differentiated right to cut off questioning; indeed, since it premised the right upon the right to counsel, the right focused more upon providing counsel than ending the interrogation.

Aside from the right to cut off questioning, *Escobedo* created many new problems, and in the following term, the Justices identified hundreds of "*Escobedo*" cases from which they might grant certiorari to resolve

77. 378 U.S. 478, 485 (1964). Before *Escobedo*, the Fifth Amendment may have protected only a suspect's liberty not to make incriminating answers as opposed to any answers. Kamisar, *supra* note 66, at 14 n.34.

78. 378 U.S. 478 (1964).

79. *Id.* at 490–91.

80. *Id.*

those problems.[81] They met on November 22, 1965 to discuss 101 such cases and granted certiorari on four that became consolidated into the *Miranda* case.[82] In light of *Escobedo*, the parties argued *Miranda* as a Sixth Amendment right-to-counsel case, but it soon became a Fifth Amendment case.

2. The Drafting History of the Right

The right to cut off questioning did not appear in early drafts of Chief Justice Warren's *Miranda* opinion. On May 9, 1966, Warren circulated a draft to Justice Brennan only.[83] This draft did not include the phrase "right to cut off questioning." It did state that if a suspect indicates he wishes to remain silent, "the interrogation must cease."[84]

In response, Justice Brennan sent the Chief a twenty-one-page letter with suggested changes. He devoted a paragraph to the right to cut off questioning and began by making clear that the draft opinion does, in fact, create such a right.[85]

> Another problem which appears for the first time in this summary paragraph is whether "right to silence" means merely a right not to answer questions, or, additionally, a right to control the course of questioning, to the extent of being able to enforce a wish that interrogation cease.[86]

He then pointed out a problem, that the Court does not require suspects be told of this right. The Court creates the right and "yet . . . the accused must be told only that he need not answer . . . . Should he not be told of his full power?"[87]

In response, Chief Justice Warren's law clerks wrote the Chief a memo addressing Brennan's concerns. They acknowledged that the opinion would create a right to cut off police questioning but recommended against any requirement that police warn of such a right.[88] They said that to do so

81. BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT, A JUDICIAL BIOGRAPHY 590 (1983); SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 238 (2010); Weisselberg, *Saving* Miranda, *supra* note 6, at 118.

82. Weisselberg, *Saving* Miranda, *supra* note 6, at 117–18.

83. SCHWARTZ, *supra* note 81; STERN & WERMIEL, *supra* note 81.

84. Draft Opinion of Chief Justice Earl Warren at 31, Miranda v. Arizona, 384 U.S. 436 (May 9, 1966) (Nos. 584, 759–61) (unpublished draft opinion on file with author and the Library of Congress).

85. Brennan Letter, *supra* note 16, at 13.

86. *Id.*

87. *Id.*

88. Memorandum from Jim Hale et al., Law Clerks for Chief Justice Earl Warren, Supreme Court of the United States, to Chief Justice Earl Warren, Supreme Court of the United States (May 13, 1966) (on file with author and the Library of Congress).

would be to disapprove the then-current FBI practice, which did not provide such a warning:

> Further in point 10, [Justice Brennan's] memo suggests that the right is not really to remain silent, but the right to call off the interrogation. Although the individual has the right to call off the interrogation, we do not think that all FBI warnings should be found bad because they do not expressly state this.[89]

The clerks expressed an understanding solicitude for FBI practice: earlier in the opinion, the Court pointed to the long FBI practice of providing the *Miranda* warnings to suspects as a justification for requiring the states to do so under the Fifth Amendment.[90] For the opinion now to hold those warnings constitutionally deficient would have undermined its reliance on the FBI practice.

On the other hand, apparently in reaction to Brennan's letter, the Chief Justice added the phrase "right to cut off questioning" in a paragraph called "Insert 12":

> Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to over-come free choice in producing a statement after the privilege has been once invoked.[91]

This language for the first time gave the right a name and called it a "right." The Court subsequently used this terminology, particularly in *Michigan v. Mosley*[92] and *Berghuis v. Thompkins*,[93] and recognized its function in ending interrogations. But it never succeeded in clarifying the role it plays because it never separated this right from the "right to remain silent."[94]

C. The Right to Cut Off Police Questioning—Miranda

As noted in the Introduction, the final *Miranda* opinion focused on several important threshold questions. It found that the Fifth Amendment

89. *Id.*

90. *Id.*

91. Chief Justice Earl Warren, Insert 12, Draft Opinion of Miranda v. Arizona (undated) (unpublished draft opinion) (on file with author and the Library of Congress).

92. 423 U.S. 96, 103–04 (1975) ("The critical safeguard identified in the passage at issue is a person's 'right to cut off questioning.'" (quoting Miranda v. Arizona, 384 U.S. 436, 474 (1966))).

93. 130 S. Ct. 2250, 2259 ("right to cut off questioning" (quoting *Mosley*, 423 U.S. at 103 (quoting *Miranda*, 384 U.S. at 474))).

94. *Thompkins*, 130 S. Ct. at 2259–60 (using "right to cut off questioning" once in analysis section but using "right to remain silent" as the right at issue: "The Court has not yet stated whether an invocation of the right to remain silent can be ambiguous or equivocal . . . .")

applied to the stationhouse and that police questioning is "inherently compelling."[95] This second finding was central to the case.[96] The Court required the *Miranda* warnings to dispel the inherently compelling nature of the questioning. Much of the opinion discusses these threshold issues and only later, in a more summary fashion, does the opinion discuss the procedure that should *follow* the warnings. Indeed, many scholars have identified this weakness in *Miranda*: that it regulates the warnings and waiver, but once the suspect has waived and the police begin to question, they may use many of the same manipulative tactics *Miranda* excoriated.[97]

When the Court did turn to the procedure police must follow after the warnings, it asserted the right to cut off questioning expressly: "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."[98] The Court itself referred to this right as the "right to cut off questioning" and explained its purpose: to prevent the compulsion that arises from police questioning.[99] Without this right, the police may overwhelm him; with it, the suspect can, in theory, control the interrogation and if it gets too hot, end it. And even though the Court used the term "cut off" questioning, it made clear that a suspect may stop questioning before it even begins.[100]

The Court created this right as a compromise.[101] On the one hand, the Court itself viewed police interrogation with great suspicion. It spent numerous pages cataloguing police abuses, past and present, and highlighted interrogation techniques from police manuals designed to gain confessions, techniques the Court dubbed either improper or at least unfair. It concluded that police questioning was "inherently compelling."[102] On the other hand, it did not ban all in-custody police questioning. Rather, it permitted police to question but gave suspects the tools to counteract its more compelling effects.

1. Hohfeld and the Claim Not to Be Questioned

We can now analyze the *Miranda* protections in Hohfeldian terms. At its core lies the liberty not to speak. At the periphery lies the claim a

95. *Miranda*, 384 U.S. at 467; Schulhofer, *Reconsidering* Miranda, *supra* note 5, at 436.

96. Weisselberg, *Saving* Miranda, *supra* note 5, at 119–20.

97. Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211 (2001).

98. *Miranda*, 384 U.S. at 473–74.

99. *Id.* at 474 ("Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice . . . .").

100. *Id.* ("at any time prior to . . . questioning").

101. Weisselberg, *Saving* Miranda, *supra* note 5, at 121.

102. *Miranda*, 384 U.S. at 467.

suspect has for information—the warnings themselves. Once the police read the warnings, the suspect enjoys the more powerful claim to cut off questioning. This latter claim resembles the claim against police beatings discussed above. But it is more complicated for two main reasons. First, it must be invoked, unlike a claim against beating. Second, police questioning is only *sort of* compelling; that is, whether *Miranda* deems police questioning compelling depends on whether the suspect invokes the right. Police beating, by contrast, is always considered compelling and cannot be waived.

As for the requirement of invocation, this means that the right to cut off questioning itself includes two further Hohfeldian incidents, the *power* to invoke the claim and the claim itself not to be questioned. A suspect has the power by uttering certain words to trigger the claim that he not be questioned. If a suspect says "I want to remain silent" or "I want a lawyer," he has exercised his power and now has the claim that the police not question him, and the police have a correlative duty not to question him.

Once the suspect invokes the claim not to be questioned, the police have a duty not to question him. If the police violate this duty, the government cannot use any resulting statement in its case-in-chief against the suspect (now defendant), though it may use such statements to impeach him (as long as those statements were voluntary).[103] This claim against police questioning (once asserted) falls under the larger set of a suspect's claims against police compulsion. Thus, the two chief claims that protect a suspect's liberty not to speak are (i) the claim against torture and other physical abuse and (ii) the claim against questioning. The first claim guards against physical interference; the second, against psychological interference.[104]

2. Is the Claim Not to Be Questioned Really a Claim?

There is one technical detail left concerning the right to cut off police questioning. In the foregoing discussion, I took the Supreme Court at its word when it repeated in *Miranda*,[105] *Mosley*,[106] *Thompkins*,[107] and elsewhere[108] that a suspect has a "right to cut off questioning" and that this right must be "scrupulously honored." The Court has largely treated this right, when triggered, as a true claim. It has spoken of an actual duty of the

103. Oregon v. Hass, 420 U.S. 714 (1975).

104. We can also add the *Miranda* warnings themselves to the mix—a suspect has a Hohfeldian claim to receive the warnings, and the police have a duty to provide them.

105. 384 U.S. at 474.

106. Michigan v. Mosley, 423 U.S. 96, 104 (1975).

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

108. *E.g.*, Arizona v. Roberson, 486 U.S. 675, 683 (1988).

police to stop questioning. *Miranda* said that once invoked "the interrogation must cease."[109]

But do the police have a duty to stop questioning after a suspect asserts his *Miranda* rights and invokes the claim against questioning? Not literally—for if they did, a suspect could sue under § 1983 to seek damages for a violation of that duty. They cannot. The Court made clear in *Chavez v. Martinez* that a suspect cannot sue for a violation of the *Miranda* rights alone—the only remedy is exclusion of the evidence from any criminal trial.[110] If the government decides not to try the suspect, as in *Chavez*, there is no remedy such as money damages. The Ninth Circuit in *Cooper v. Dupnik* held that a suspect has no cause of action against police who questioned him after he had invoked his *Miranda* rights if there is not also a finding of actual coercion.[111] These cases tell us what the language of the Fifth Amendment already reveals: the Fifth Amendment and *Miranda* are rules of admissibility and only apply if the government actually brings a criminal case. These cases suggest that the right to cut off questioning, even once invoked, is not truly a "claim" in the Hohfeldian sense, or at least it is merely a conditional claim, conditional on the government prosecuting.

But in *Chavez* and *Cooper*, the failure to warn was completely unhinged from the later question of admissibility at trial. If we restrict ourselves only to those cases that go to trial, or at least to a suppression hearing, then we eliminate the problems caused by *Chavez*. The suspect's claim that the police not question her is therefore conditional on the government actually trying her. We can take account of this conditionality by rephrasing the claim at issue as follows: a defendant has a claim that the government not introduce any statements she made as a result of police questioning that occurred after she invoked her right to cut off police questioning. This formulation is accurate, though it alters the focus from the stationhouse interrogation to trial, from suspect to defendant. It seems to me to make sense to use the shorthand "right to cut off questioning" and "claim against questioning" to return the focus to the suspect as long as we understand this *is* a shorthand and does not refer to a freestanding claim if there is no actual trial.

If the claim not to be questioned is not really a claim, what is it? Under a Hohfeldian view, it is a liability.[112] This liability corresponds with the government's power to bring criminal charges. If the government exercises

109. *Miranda*, 384 U.S. at 474.

110. 538 U.S. 760 (2003).

111. 963 F.2d 1220, 1244 (9th Cir. 1992), *overruled on other grounds by* Chavez v. Martinez, 538 U.S. 760 (2003).

112. This analysis follows a similar analysis that Wellman applied to the so-called duty to mitigate damages in a contract action, but with certain changes. WELLMAN, *supra* note 21, at 32.

this power, it converts the suspect's liability into a claim, a claim that certain statements not be used against him at trial. The term liability usually describes a potential detriment, but it can also describe a potential benefit.[113] For example, if I make an offer to buy your car, you have the power to accept and I have the liability that you might accept. If you do accept, I now have a claim to your car as well as a duty to pay for it. Thus, describing the situation chronologically, a suspect has the power to invoke a liability in himself; if the government exercises its correlative power to bring a criminal case, the suspect's liability becomes a claim that statements not be used against him. Again, little is lost and much gained by referring to this as a right to cut off police questioning.

D. Right to Counsel

Far more than the right to cut off questioning, the Court in *Miranda* envisioned that defense counsel would play an important role in interrogations and provide protection against compulsion. Several times the Court portrayed the happy scenario in which the suspect would ask for a lawyer, one would be provided, and the suspect would answer questions with the protection of the lawyer.[114] This seemed the perfect compromise: counsel would protect suspects from the compelling nature of questioning[115] and police would still receive answers to legitimate investigative questions. The Court could protect suspects but retain police interrogations.

This utopia, of course, never materialized. As Justice Jackson said well before *Miranda*, "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."[116] This adage remains true today.[117] First, a suspect who confesses to the police in hopes of leniency will receive none, even if the police have implied or even promised he will.[118] The police lack

113. Hohfeld, *supra* note 19, at 44.

114. *Miranda*, 384 U.S. at 470 ("The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police . . . .").

115. *Id.* ("With a lawyer present the likelihood that the police will practice coercion is reduced . . . .").

116. Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring).

117. Dickerson v. United States, 530 U.S. 428, 449 (2000) (Scalia, J., dissenting); F. LEE BAILEY & HENRY B. ROTHBLATT, INVESTIGATION AND PREPARATION OF CRIMINAL CASES § 2.3 (2d ed 1985); ROGER M. GOLDMAN ET AL., 1 CRIMINAL LAW ADVOCACY § 2.01A[6] (2011).

118. *E.g.*, People v. Pasch, 604 N.E.2d 294, 302 (Ill. 1992) (noting that police cannot promise a suspect he will not get the death penalty, only prosecutors can); New Jersey v. Marsh, 676 A.2d 603, 605 (N.J Super. Ct. App. Div. 1996) (stating that police cannot promise a suspect that his DWI summons will be dismissed, only prosecutors can); Ohio v. Fulton, 583 N.E.2d 1088, 1090 (Ohio Ct. App. 1990) ("plea bargain agreements entered into by police officers are unenforceable");

authorization to make binding plea deals; in most jurisdictions, only the prosecutor's office can make such deals.[119] Second, even for one who is innocent, it almost never makes sense for him to tell his story to the police.[120] In doing so, he often will make damaging admissions.[121] An innocent suspect may admit he knew the victim or that he was at the scene—thus bolstering the government's case.[122] Even a suspect who provides an alibi might find that the government then changes the time when the crime occurred—not necessarily improperly. If the police have strong evidence of guilt, they will consider the alibi, even if true, not exculpatory and revisit their tentative notions of when the crime occurred. Finally, innocent people sometimes confess falsely.[123] For these and other reasons, defense lawyers routinely tell suspects not to speak to the police under any circumstances.[124]

Rather than accompany the suspect when he talks to the police, lawyers speak to their client alone and then deal directly with the prosecutor.[125] After all, in many jurisdictions a suspect will be charged and arraigned within about twenty-four hours,[126] and at arraignment, the suspect will usually be assigned a lawyer who can make appropriate arrangements.[127]

As a result, when a suspect says he wants a lawyer, the police know if they furnish one, she will simply tell the suspect not to speak to them. And *Miranda* does not actually require the police furnish a lawyer to a suspect who asks for one. It only requires the police to furnish a lawyer *if they*

Commonwealth v. Stipetich, 652 A.2d 1294 (Pa. 1995) (noting that police cannot promise a suspect that his drug possession charges will be dismissed).

119. *E.g.*, *Pasch*, 604 N.E.2d at 302; *Marsh*, 676 A.2d at 605; *Stipetich*, 652 A.2d at 1295; ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 43 (2007).

120. 1 CRIMINAL DEFENSE TECHNIQUES § 3.01[1] (Robert M. Cipes et al. eds., 2011).

121. Peter Arenella, *Foreword: O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1250 (1996) (explaining that suspect would have to admit he was at the scene); Steven B. Duke, *Does* Miranda *Protect the Innocent or the Guilty?*, 10 CHAP. L. REV. 551, 565–66 (2007); Richard A. Leo, Miranda*'s Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259, 278–79 (1996).

122. Escobedo v. Illinois, 378 U.S. 478, 482–83 (1964) (where suspect denied any involvement in murder, but under interrogation, admitted he was there, leading to his admission of complicity and his conviction for murder).

123. *E.g.*, Leo, *supra* note 30; Saul M. Kassin, *Inside Interrogation: Why Innocent People Confess*, 32 AM. J. TRIAL. ADVOC. 525, 537–39 (2009); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 985–86 (1997).

124. PAUL BERGMAN & SARA J. BERMAN-BARRETT, THE CRIMINAL LAW HANDBOOK: KNOW YOUR RIGHTS, SURVIVE THE SYSTEM 24 (9th ed. 2007).

125. GOLDMAN ET AL., *supra* note 118, § 2.01A[6]. Of course, if the suspect or defendant becomes a cooperating witness pursuant to a deal with the prosecutor, then she will talk to the government. *Id.* § 11A.05A (discussing authority of prosecutors to offer cooperation agreements); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 8.11(e) (5th ed. 2009).

126. *See, e.g.*, FED. R. CRIM. P. 5(a); Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 68–69 (1991); GOLDMAN ET AL., *supra* note 118, § 2.01A[10].

127. *See, e.g.*, FED. R. CRIM. P. 44(a). Most jurisdictions provide indigent defendants a lawyer at arraignment, but some do not. *See* 22 C.J.S. *Criminal Law* §§ 349–50 (2006).

question the suspect.[128] As a result, if a suspect asks for a lawyer, the police will simply end the interrogation—they will almost never provide a lawyer.[129]

The right to counsel under *Miranda* is an illusion as a practical matter.[130] What it boils down to is another way for suspects to invoke their right to cut off police questioning. The only difference is this: if a suspect triggers the right to cut off questioning by invoking counsel, as opposed merely to invoking the right to remain silent, the protections have traditionally been stronger[131]—though the Court has been recently diminishing those differences.[132]

Suspects have two ways to end the interrogation (other than a full and satisfactory confession). First they may assert the "right to remain silent," that is, the right to cut off questioning. Second, they may ask for a lawyer, a request that will also end the interrogation. Either way, the Hohfeldian model holds: suspects enjoy a liberty not to speak, protected by the claims, once invoked, to end questioning.

III. CONFUSION AND CLARITY

In the Part above, I showed how the *Miranda* case created a new right to cut off questioning. But *Miranda* also created confusion around this right because it did not make clear whether a suspect must invoke the right, or whether the suspect enjoyed the right and the police must obtain a waiver before questioning. Though the courts before *Thompkins* seemed to require a suspect to invoke the right to cut off questioning, the courts make this question hard to answer because they use the phrase "right to remain silent" when they discuss both waiver and invocation.

Below I will examine the language of *Miranda* to show how this confusion arose, then discuss the development of that confusion until *Thompkins*. Even in *Thompkins* and after, courts continue to use the same phrase for both sub-rights.

In Part III.B, I show how the use of two sub-rights brings clarity. It also shows in Part IV how use of the two sub-rights helps us evaluate whether

128. *See, e.g.*, Edwards v. Arizona, 451 U.S. 477, 484–85 (1981); Miranda v. Arizona, 384 U.S. 436, 474 (1966).

129. *See* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 300 n.206 (1993).

130. It is only after the government charges a suspect and he becomes a defendant that he has a real, Sixth Amendment right to counsel—a claim that the government actually furnish him with a lawyer, at least for critical stages of the proceedings, Montejo v. Louisiana, 129 S. Ct. 2079, 2085 (2009), such as line-ups, United States v. Wade, 388 U.S. 218, 227–28 (1967), suppression hearings, plea negotiations, and of course, trials, Gideon v. Wainwright, 372 U.S. 335, 348 (1963).

131. *Edwards*, 451 U.S. at 485.

132. *Montejo*, 129 S. Ct. at 2088–89.

we *should* require suspects to invoke the right to cut off questioning, rather than require a waiver before the police may question; it also helps us evaluate whether it is fair to require suspects to invoke this right unambiguously, as *Thompkins* did.

In the discussion below, three main distinctions emerge: first, I distinguish the two sub-rights by name rather than simply using the same phrase, "right to remain silent." Second, I examine whether *Miranda* and other early cases required that the right to cut off questioning must be invoked or whether this emerged later. Third, I show how courts created even more confusion by misusing the terms "waiver" and "invocation" as exact opposites—namely, saying that a suspect has "waived" because he did not invoke.

A. Confusion

1. Miranda

In *Miranda*, the Court outlined the procedure the police must follow after they have read the suspect the warnings, and in doing so, it provided two basic scenarios. In the first scenario, the suspect invokes the "privilege," and in the second scenario, the suspect does not. In both scenarios, the Court used the term "privilege" to refer both to what must be invoked and what may be waived. It first says that "any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise"—and must be suppressed.[133] Yet only two paragraphs later, the Court says: "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination . . . ."[134] The case appears to require that a suspect invoke the same right that the government must show he waived.

Two obvious interpretations present themselves. The first I call the two-track model, which ultimately led to the accepted doctrine; the second I call the unified model, which, though plausible and perhaps the best interpretation, fell by the wayside. I discuss each below.

2. Miranda*—The Two-Track Model*

In the two-track model, *Miranda* envisioned only the two scenarios it described, ignoring the third. In the first track, it imagined that a suspect

133. *Miranda*, 384 U.S. at 474.

134. *Id.* at 475.

would expressly waive the "right to remain silent" and thereby waive both the liberty not to speak and the claim against police questioning. In this scenario, the suspect permits questioning and any answers he gives can become evidence against him at trial. In the second track, the suspect invokes the right to remain silent, which invokes the claim against questioning and means the police cannot question him.

But the Court in *Miranda* did not consider the third track: the suspect remains silent and neither waives nor invokes. Such silence presents no trouble with respect to the liberty not to speak, since the remaining silent suspect exercises that very liberty. In addition, such silence clearly does not waive the liberty not to speak on any understanding of waiver.

But a suspect's silence in this third track does create a problem concerning the claim against police questioning: if that claim is the type that the suspect already enjoys, then in the face of silence, the police may not question. If, on the other hand, a suspect must invoke the claim against questioning, then the police may question in the face of silence. *Miranda* does not answer this question because it never considers this scenario. Under the two-track model, *Miranda's* silence as to this third track leaves a gap filled by later cases, and most particularly *Thompkins*, which held suspects must *invoke* the claim against questioning.

For the reasons set forth in more detail below, I believe this is the best literal reading of the words of *Miranda* and its overall structure, though it might not have been the subjective intent of its authors. But because its words and structure so readily lend themselves to this interpretation, later courts and especially *Thompkins* easily filled the gap with a requirement that suspects invoke the claim against questioning.

The two-track model, under the most obvious reading, does create the surface contradiction that a suspect can waive but must invoke the same right—the right to remain silent. My division of the right to remain silent into two sub-rights solves this problem. But there is another solution—avoid the contradiction entirely with a unified model.

3. Miranda—*The Unified Model*

The second option, the unified model, treats the right to remain silent as a unified right in the sense that the two sub-rights function together. When a suspect waives, she waives both sub-rights; when she invokes, she invokes both. And the default beginning position is the strongest for the suspect in line with the overall tenor of *Miranda*: a suspect enjoys both the liberty not to speak and the claim against questioning, and police must always obtain a waiver before interrogation. Thus, if the suspect remains silent, the police may not question.

This model solves, or rather avoids, the problem of waiving and invoking the same right by sequencing them in time. An invocation can only come after an earlier waiver. That is, a suspect need never invoke either sub-right at the outset because she already enjoys them; they are hers to waive. But if she *does* waive the rights, agrees to speak and to be questioned, she may later invoke her rights to end questioning. This invocation is really an unwaiving of her earlier waiver, and it is the only role invocation plays under the unified model interpretation of *Miranda*.

Under this view, there are two initial scenarios: first, the suspect waives her right to remain silent, meaning she agrees to talk and be questioned. Second, the suspect does not waive her rights, either through silence or through an "assertion" of her rights, which is really simply a confirmation or reaffirmation that she is not waiving them. When the suspect does not waive, the police may not question her. Of course, later in time, a suspect who has waived may later invoke—that is, unwaive—and restore herself to her initial position, in which the police may not question her. *Thompkins* rejected this view,[135] but that does not mean it is not a correct interpretation of *Miranda.*

Many endorse the unified model and read *Miranda* to require a waiver before questioning.[136] For example, one leading police interrogation manual, newly edited in 1967 to respond to *Miranda*, said the police must obtain a waiver before questioning.[137] Another leading manual does not clearly state one way or the other whether police must obtain a waiver before they question—it merely tracks the language of *Miranda*.[138]

Scholars such as Charles Weisselberg also argue that *Miranda* required that police obtain a waiver before they interrogate. This requirement creates, he writes, "an unpressured 'time out' prior to questioning, [so] that suspects would have to articulate waivers clearly before questioning could

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

136. Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519, 1588 (2008); Hugh B. Kaplan & Tom P. Taylor, *Honest-Services Fraud, Interrogation Cases Top List of Significant Rulings of Term*, 87 CRIM. L. REP. (BNA) 766 (2010) (Yale Kamisar states in interview about *Thompkins* that *Miranda* envisioned that a suspect would either waive or not waive his rights at the outset, and if he did not, police could not question him); Kit Kinports, *The Supreme Court's Love-Hate Relationship with* Miranda, 101 J. CRIM. L. & CRIMINOLOGY 375, 421–22 (2011).

137. FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 4–5 (2d ed. 1967) ("[T]he only time a police interrogation can be conducted of a suspect who is in custody or otherwise restrained of his freedom is *after* he has been given the required warnings and *after* he has expressly stated that he is willing to answer questions . . . ."). The latest edition similarly requires a waiver before questioning, though it permits for implied waiver. FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 491 (4th ed. 2001).

138. CHARLES E. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (2d ed. 1970).

begin."[139] Under this view, the invocation the *Miranda* Court speaks of refers to a retraction of the original waiver, if any.[140]

Finally, others also argue that requiring a waiver before questioning accords with the basic principle of *Miranda*: that police questioning is inherently compelling.

This view—that *Miranda* required waiver before questioning—is attractive, but it does not entirely square with *Miranda*. Even though the Court likely did not consider whether the police may question absent waiver, the Court structured its opinion in a way that affirmatively suggests they may. First, if the *Miranda* Court had espoused the view that invocation merely referred to a retraction of an earlier waiver, it would have *started* by saying that the police cannot question until they get a waiver and *then* discussed how, after waiver and the interrogation has started, the suspect may end it with an invocation. But instead, when the Court came to discuss the police procedures after the warnings, the Court started by discussing invocation, saying if the suspect invokes, the police must end questioning. It *then* turned to the issue of waiver, saying if the interrogation continues, no statement is *admissible* absent waiver. The order the Court chose to describe invocation and waiver strongly suggests the Court believed the suspect could only stop the questioning by invoking his rights.

Second, the Court, when discussing the timing of the invocation, says that questioning must cease if the suspect invokes "at any time *prior to* or during questioning."[141] Again, this casts doubt on Weisselberg's reading since it seems odd that a suspect would first waive but then invoke, that is, retract his waiver, all prior to any questioning.

Third, the Court repeatedly envisioned a scenario in which the police question a suspect who has not waived the privilege. For example, it says that the Court will not presume waiver from a confession that follows lengthy interrogation. But in such a scenario, how did the interrogation come about? If the suspect waived at the outset (Weisselberg's view), then the question of whether the suspect waived when he confessed would not arise: he already waived at the beginning. That leaves the only other possibility: that the suspect need not waive before the police interrogate, as long as he has not invoked. But by the time the suspect does make any

139. Weisselberg, *supra* note 136, at 1588.

140. *Id.* at 1529 ("The Court thus distinguished between the lack of waiver, which would prevent *initiation* of interrogation, and an affirmative *invocation*, which would halt questioning after it had legitimately begun.").

141. Miranda v. Arizona, 384 U.S. 436, 473–74 (1966) (emphasis added).

statement, the government must show that he waived (and, on my view, waived his liberty not to speak).[142]

Fourth, a requirement that the police obtain a waiver before questioning is no more aligned with the underlying principle of *Miranda* than the requirement that suspects invoke the right. After all, *Miranda* did not *ban* police questioning. Rather, it forged a compromise that permitted police questioning. *Both* a waiver requirement and an invocation requirement represent a compromise that allows questioning in some circumstances. Where the Court drew the line, where it settled this compromise, cannot be determined by looking at the underlying principle of *Miranda*. True, requiring waiver provides more protection to suspects, but we cannot say the principle of *Miranda* is to provide suspects maximum protection; rather, the Court repeatedly said it was balancing the needs of police against the rights of suspects.

*4. Post-*Miranda *Requirement of Invocation*

As discussed below, subsequent cases increasingly began to require suspects to invoke the claim against questioning until *Thompkins* solidified the requirement. Under a two-track model interpretation of *Miranda*, those later courts merely filled in a gap left undecided in *Miranda*; under a unified model interpretation, those later courts essentially overruled or at least substantially modified *Miranda* on this point. Either way, the result is the same.

In the years immediately after *Miranda*, lower courts did not clearly require or reject police questioning absent waiver.[143] But in 1979, the Court in *North Carolina v. Butler* held that a suspect may waive his *Miranda* rights implicitly by a course of conduct.[144] This holding suggests that the police must be permitted to interrogate without a waiver in order for the suspect to demonstrate by conduct the implicit waiver, as the Court in *Thompkins* pointed out.[145]

142. Another possibility: one could argue that the suspect waived the right against interrogation but not the liberty not to speak. This argument will not work because under *Miranda*, and to this day, no one has provided the necessary language for a suspect to select in that manner because the players treat "the right to remain silent" as unitary. If a suspect "waives" or "waives the right to remain silent," she waives both sub-rights.

143. United States v. Boston, 508 F.2d 1171, 1175 (2d Cir. 1974) (examining rights of a suspect who apparently was questioned without waiver); United States v. Hayes, 385 F.2d 375, 376 (4th Cir. 1967) (finding implicit waiver without saying whether waiver occurred before or during questioning where suspected was questioned without express waiver). *But see* Sullins v. United States, 389 F.2d 985, 988 (10th Cir. 1968) (holding that police must obtain a waiver before questioning).

144. 441 U.S. 369, 373 (1979).

145. Berghuis v. Thompkins, 130 S. Ct. 2250, 2270 (2010).

But the big change came in 1994 when the Court decided *Davis v. United States*.[146] In that case, a suspect waived his right to counsel and answered police questions until he said, "[m]aybe I should talk to a lawyer."[147] The police continued to question him and he confessed. He sought to suppress his confession, arguing he had requested counsel, thereby invoking his right to cut off questioning. Since the police nevertheless continued to question him, he argued they had violated his *Miranda* rights.

The Court rejected his argument. It held that a suspect in his shoes must invoke unambiguously, and that his request for counsel had been ambiguous.[148] The Court required that his invocation be an unambiguous invocation in part because this suspect had previously waived, permitting the police to question; in such a context, the invocation—that is, retraction of the waiver—must be clear.[149]

In fact, the *Davis* decision says nothing about whether a suspect must invoke his right to counsel *at the outset* in order to preclude questioning or whether the police must first obtain a waiver to question. It merely addressed an invocation after an earlier waiver. Nevertheless, some federal circuit courts applied its reasoning to an *initial* invocation,[150] even when the suspect had not previously waived, and applied the reasoning to the right to silence as well. For example, in *United States v. Cardwell*, the Fourth Circuit held that the police are "free to engage in custodial interrogation when they have given *Miranda* warnings and the defendant does not specifically invoke those rights."[151]

Thus, even if *Miranda* itself did not permit questioning absent waiver, many courts began to permit such questioning in the wake of *Butler*, *Davis*, and of course, *Thompkins*. Under current law, courts require invocation for one sub-right, the right to cut off questioning, but retained waiver for the other, the liberty not to speak, all the while continuing to use the same term, "right to remain silent," for both.

5. Misuse of "Waiver" and "Invoke"

In addition, even recent court cases have added to the confusion by misusing the terms waive and invoke. Courts will often use "waive" when a suspect fails to invoke, and "invoke" to describe a suspect who has simply

146. 512 U.S. 452 (1994).

147. *Id.* at 455.

148. *Id.* at 459.

149. *Id.* at 460.

150. United States v. Washington, 462 F.3d 1124 (9th Cir. 2006); United States v. Cardwell, 433 F.3d 378 (4th Cir. 2005); Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000).

151. 433 F.3d at 389.

made clear he refuses to waive. It certainly makes sense for a person to make clear she does not wish to waive her rights, but the word "invoke" is the wrong word; a better word might be reaffirm or confirm. For example, the Ninth Circuit recently wrote: "A person waives the right to remain silent if, after being informed of that right, the person does not invoke that right."[152]

Similarly, in *United States v. Plugh* (*Plugh I*), the Second Circuit addressed whether a defendant had sufficiently invoked his right to remain silent so as to require that the police cease questioning.[153] The suspect had refused to sign a waiver form and also had said, "I am not sure if I should be talking to you."[154] The court made clear the question was whether he had invoked his right to remain silent, but throughout the opinion, the court *also* stated that the question was whether he had *retained* his right[155]—in other words, it posed the question as one of waiver. Indeed, the court went so far as to argue that, because he unambiguously refused to waive his rights, he had invoked them. The court treated invocation as non-waiver, and it did so because it failed to separate the underlying sub-rights.

These courts likely use waiver and invocation misleadingly as exact opposites for the same reason that might explain why *Miranda* itself established such a confusing regime in such confusing language. These courts may only have envisioned two possibilities after police read the warnings: (i) the suspect waives and agrees to talk or (ii) the suspect invokes and says he does not wish to talk. With only these two possibilities, waiver and invocation do function as exact opposites and so there would be little practical harm in treating the terms as exact opposites. In addition, the two sub-rights would remain aligned. If a suspect waives, he waives both the liberty not to speak and the right to cut off questioning, and equivalently, he has not invoked; and vice versa. But a third possibility exists: the suspect says nothing, or nothing clearly, one way or the other. This possibility shows that we cannot treat waiver and invocation as simple opposites—if the suspect neither waives nor invokes, then a non-waiver cannot equal an invocation since there has been no invocation, and vice versa.

After *Thompkins*, the Second Circuit reconsidered and overruled *Plugh I* precisely on the grounds that the earlier decision ignored the third track.[156] The Second Circuit drew a distinction between invocation and waiver and said that they were governed by different standards with different

152. *Washington*, 462 F.3d at 1134.

153. 576 F.3d 135, 140 (2d Cir. 2009), *rev'd*, 648 F.3d 118 (2d Cir. 2011).

154. *Id.* at 138.

155. *Id.* at 139.

156. United States v. Plugh, 648 F.3d 118, 120 (2d Cir. 2011).

outcomes. It noted that some suspects neither waive nor invoke their rights, and that a failure to waive is not the same as an invocation—a rejection of the problem identified in *Plugh I* above.

> Without question, the most legally remarkable and distinct choices a defendant can make are to (1) unambiguously invoke those rights and thereby cut off further questioning or (2) knowingly and voluntarily waive those rights and cooperate fully. But between those two analytic end posts is a significant middle ground—one all too familiar to those with law enforcement experience—occupied by those suspects who are simply unsure of how they wish to proceed.[157]

The Second Circuit in *Plugh II* took steps in the right direction that followed naturally from *Thompkins*. But even here the Second Circuit failed to take the final and most helpful step: to recognize that waiver and invocation operate on separate sub-rights. Instead, it repeatedly framed the question as whether the suspect invoked his "*Miranda* rights,"[158] or his "right to remain silent" or simply "his rights," and whether he waived his "'*[Miranda]* rights'"[159] or "those rights." It never correlated invocation with the right to cut off questioning and waiver with the right to remain silent or literally not to speak. On the other hand, it does not matter much that the Second Circuit did not identify two sub-rights by name since it accurately separated the function of each, recognizing a suspect must invoke the right to cut off questioning but waive the right literally not to speak. It does not matter because the Second Circuit was merely applying the requirements for each sub-right announced in *Thompkins* rather than establishing those requirements.

But separating the two sub-rights does become crucial for any court seeking to *establish* the standard for each sub-right, because without recognizing and naming the sub-rights, a court cannot identify a rationale for requiring a certain regime. As shown in the next two Subparts below, this problem mars the *Thompkins* holding requiring unambiguous invocation of the right to cut of questioning.

6. Berghuis v. Thompkins

Thompkins squarely presented the third track that *Miranda* left undiscussed—a suspect who neither waived nor invoked. In that case, the

157. *Id.* at 125.
158. *Id.* at 124.
159. *Id.* at 127.

police arrested the defendant for murder and read him his *Miranda* rights. They then questioned him for two hours and forty-five minutes. He remained almost entirely silent during the questioning, and according to the Court, he neither invoked nor waived his rights until the end. Finally, when the police detective asked: "Do you believe in God," Thompkins made eye contact and said, "yes" as his eyes welled up with tears. The questioning continued:

> "Do you pray to God?"
> "Yes."
> "Do you pray to God to forgive you for shooting that boy down?"
> "Yes," Thompkins said and looked away.[160]

The difficulties began at oral argument, where some Justices confused whether silence fails to invoke or whether it amounts to a waiver—again without saying invocation or waiver of which right in particular. Justice Breyer asked whether prolonged silence can become a clear statement of non-waiver and whether this requires the police to stop questioning.[161] Did he mean that the police must obtain a waiver before questioning? If so, why does the suspect *need* to show he's not waiving through extended silence? If Breyer meant a suspect must *invoke* the right to cut off police questioning, was he wondering whether an extended silence can amount to such an invocation? We cannot know because during the discussion no one made clear which right they spoke of.

Early in his argument, counsel for Michigan said, "I have to carefully delineate between waiver and invocation."[162] His statement was promising, but he did not distinguish between which right is waived, which invoked, and so he did little to dispel the confusion.

At a certain point, the conversation became so lost in what is being waived, what invoked, that Justice Scalia said: "Wait. Excuse me. A waiver of what? I thought the Chief Justice was talking about a waiver of your right to remain silent."[163] Later in the oral argument, Justice Scalia identified the key distinction, though using waiver for both, between the right to remain silent and the right not to be interrogated.

> It seems to me you're confusing a – a waiver of – of the right to remain silent with a waiver of the right not to be interrogated, which is the right that you are asserting here, a right not to be

160. Berghuis v. Thompkins, 130 S. Ct. 2250, 2257 (2010).

161. Transcript of Oral Argument at 12–15, Berghuis v. Thompkins, 130 S. Ct. 2250 (2010) (No. 08-1470).

162. *Id.* at 5.

163. *Id.* at 53.

> interrogated, unless going in you say, I waive my right to remain silent. That's – that's the new right that you are asserting.[164]

When he said the right not to be interrogated is new, he presumably did not mean the right to cut off police questioning; what he asserted is new is that suspects should enjoy the right without needing to invoke it.

But in writing the decision, Justice Kennedy failed to follow up on Justice Scalia's identification of the two sub-rights by name—though at times he did use the term "right to cut off questioning."[165] The Court started with the premise that Thompkins had neither invoked nor waived his right to remain silent during the 2 ¾ hours of relative silence.[166] This premise alone seems odd—again, either Thompkins had the right to remain silent and need not invoke it, or he lacked it and then could not have waived it.

But when the Court turned to analyze the case, it structured its opinion based upon the two aspects of the right to remain silent, but in each section largely clung to the term "right to remain silent."[167] That is, despite the structure of the opinion, the Court never expressly said it was addressing two different sub-rights of the right to remain silent.

In section III.A, it addressed whether Thompkins, in remaining silent for 2 ¾ hours had implicitly *invoked* the right to remain silent; if he had, the police would have to have stopped questioning.[168] The Court held that to invoke the right to remain silent, one must do so unambiguously, and that Thompkins had not.[169] The Court wrote that all he needed to do to invoke the right to remain silent was to state that he wished to remain silent.[170]

In the next section, III.B, the Court assessed whether in remaining almost entirely silent for 2 ¾ hours but then answering those three fateful questions, he had *waived* the right to remain silent. The Court held that he had waived the right because his answer to the detective's last question amounted to "a course of conduct" that implicitly waived the right to remain silent.[171]

This structure is appropriate since the Court addressed the two functional aspects of the right to remain silent separately, using an invocation model for one, a waiver model for the other. But by continuing to use the same term, right to remain silent, for separate rights, it continued

164. *Id.* at 54.
165. *Thompkins*, 130 S. Ct. at 2260.
166. *Id.*
167. *Id.*
168. *Id.* at 2259.
169. *Id.*
170. *Id.* at 2260.
171. *Id.* at 2263.

to create confusion. For example, when the *Thompkins* Court transitioned from Part "A" to Part "B," the Court said: "Even absent the accused's invocation of the right to remain silent, the accused's statement during custodial interrogation is inadmissible at trial unless . . . [he] 'waived [*Miranda*] rights' . . . ."[172]

The dissent similarly made statements that, at least superficially, appear to be nonsense by saying that waiver and invocation are distinct but still apply to the same right: "The question whether a suspect has validly waived his right is 'entirely distinct' as a matter of law from whether he invoked that right.'"[173] But it is not only waiver and invocation that are distinct; it is the two sub-rights that are distinct.

7. Treatises and Law Review Articles

The confusion among courts has become reflected in treatises and law review articles, which similarly speak of a single "right to remain silent." In Wayne LaFave's *Criminal Procedure Treatise*, for example, in the section on interrogation and confessions, the authors have a major subsection: "*Miranda*: Waiver of Rights."[174] That section does not distinguish between the right to cut off questioning versus the right not to speak.[175] It does provide separate subsections for waiver and for invocation of rights, but in each case, it is the waiver or assertion *of the same right*, the right to remain silent. It does not explain how one can waive but assert the same right.[176] Joseph Cook's treatise contains a separate section only for waiver, and it does not explain how one can invoke and waive the same right.[177] Stephen Saltzburg and Daniel Capra likewise refer to the same right, the right to remain silent, as the right that is waived or invoked, though they do point out that when a suspect invokes the right, the police must end the interrogation.[178]

The Court has so normalized the use of waiver and invocation language for the same rights that law review articles by many scholars also use the

172. *Id.* at 2260 (quoting North Carolina v. Butler, 441 U.S. 369, 373 (1979)).

173. *Id.* at 2268 (Sotomayor, J., dissenting) (quoting Smith v. Illinois, 469 U.S. 91 (1984)). The Court in *Smith* referred to a scenario in which a person waives and then invokes (takes back the waiver), which is different from what Justice Sotomayor appears to refer to, though Justice Sotomayor goes on to consider that possibility as well. 469 U.S. at 98.

174. LAFAVE ET AL., *supra* note 126, § 6.9.

175. *Id.*

176. The authors do address the "special problem" of a suspect who invokes the right and then later purportedly waives it under *Michigan v. Mosley*. *Id.* § 6.9(f) (citing Michigan v. Mosley, 423 U.S. 96 (1975)).

177. JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 6:35 (3d ed. 1996)

178. STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 747–48, 758–62 (7th ed. 2004); *see also* NANCY HOLLANDER ET AL., WHARTON'S CRIMINAL PROCEDURE § 19:13 (14th ed. Supp. 2010).

same language without much apparent reflection,[179] saying, for example, that "it has turned out to be easy for suspects to waive their rights, . . . and difficult for them to invoke."[180] Welsh S. White discussed how little real power the right to cut off questioning entails, since police may wait and try again later.[181] But in doing so, he spoke of a suspect invoking "his right to remain silent."[182] White of course understands that invoking the "right to remain silent" is equivalent to invoking a right to "halt police questioning"—the problem is that a failure to identify the actual right at issue leads to misunderstanding whether it is the type of right that needs to be invoked at all.[183]

In his article, Miranda*'s Mistake*, William J. Stuntz suggested that a suspect must invoke the right to cut off questioning, but later implied they must be found to have waived that right.[184] For example, he divided suspects into categories: "The first group consists of suspects who invoke their rights—those who utter the magic words, 'I don't want to talk; I want to see a lawyer'—as soon as the warnings are given, before questioning begins."[185] Stuntz seems to believe here that a suspect *must* invoke in order to cut off police questioning, based in part upon comparison with his other categories. But a few pages later he suggested suspects must waive before police may question: "suspects can waive their *Miranda* rights and agree to submit to police questioning."[186] Of course, Stuntz was focused on a different issue: the *Miranda* regime is unfair because it rewards recidivists "savvy" enough to cut off police questioning but punishes the inexperienced, possibly innocent suspect.[187] Nevertheless, his discussion shows how murky the issue becomes when we fail to separate the sub-rights and use the terms invoke and waive precisely.

Some have recognized there is a problem without identifying it, and have gone to some lengths to make sense of a right that must be invoked but that can also be waived. For example, in its *amicus* brief to the Court in *Thompkins*, the United States argued that a suspect need not waive the right to remain silent for questioning to continue but must have done so for any

179. Kinports, *supra* note 136; *see also* Harvey Gee, *In Order to Be Silent, You Must First Speak: The Supreme Court Extends* Davis's *Clarity Requirement to the Right to Remain Silent in* Berghuis v. Thompkins, 44 J. MARSHALL L. REV. 423 (2011).

180. Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599, 1615–16 n.46 (2009). Professor Coughlin's article presents a fascinating discussion of narrative and police interrogation—her focus certainly is not on waiver or invocation.

181. Welsh S. White, Miranda's *Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1215–16 (2001).

182. *Id.* at 1215–16.

183. *Id.* at 1213.

184. William J. Stuntz, Miranda*'s Mistake*, 99 MICH. L. REV. 975, 982 (2001).

185. *Id.*

186. *Id.* at 984.

187. *Id.* at 977.

statement to be *admissible.*[188] *Amicus* thus distinguishes between the prerequisite to questioning and the prerequisite to admissibility.[189] The distinction is correct and accomplishes the same outcome as a two sub-rights view, but the explanation of *Amicus* retains the confusion of language by retaining the use of "right to remain silent" for both invocation and waiver.

B. Clarity—Two Rights Uncovered

The tangle above loosens when we identify the two sub-rights of the right to remain silent—the liberty not to speak and the right to cut off police questioning—and when we insist upon using the terms "waive" and "invoke" precisely. A suspect may waive the liberty not to speak, and the government must show that she did so before her statements are admissible. But a suspect must invoke the right to cut off police questioning, a proposition made clear by both the majority and dissent in *Thompkins*. This means that the police may question absent waiver (of either sub-right).

1. Thompkins *Again*

The two sub-rights are particularly helpful in critiquing both the majority and dissenting opinions in *Thompkins* and showing how both opinions improperly trade on the term "right to remain silent" to strengthen arguments that are far weaker when we call the right by its proper name, the right to cut off questioning.

As noted above, that case involved a suspect who neither waived nor invoked for 2 ¾ hours, and therefore presented both questions of invocation and waiver. In section III.A of the decision, the Court assessed whether Thompkins had invoked the right to cut off police questioning. Here, the Court did use the term "right to cut off questioning,"[190] though it more prominently used the less helpful "right to remain silent."[191] The Court held that a suspect must invoke the right to cut off police questioning unambiguously, and that Thompkins' long silence was not an unambiguous assertion.[192]

If the majority in section III.A essentially analyzed the question as whether Thompkins had invoked his right to cut off questioning, what

188. Brief for the United States as Amicus Curiae Supporting Petitioner at 21–22, Thompkins v. Berghuis, 130 S. Ct. 2250 (2009) (No. 08-1470), 2009 WL 4927918.

189. *Id.* at 22.

190. Berghuis v. Thompkins, 130 S. Ct. 2250, 2259–60 (2010).

191. *Id.*

192. *Id.* at 2260.

difference does it make if the Court also used the term "right to remain silent?" The problem is that the court implicitly leveraged the specific words of that phrase "right to remain silent" to bolster its argument. The argument came in two parts. First, it argued implicitly that its standard that a person must invoke the right unambiguously is fair because it is so "simple" to invoke unambiguously.[193] Second, it argued that to invoke the "right to remain silent" unambiguously, all one must do is say, I want "to remain silent." Since those are the same words as the *Miranda* warning—you have the right to remain silent—it no doubt seemed to the Court that it should be straightforward for a suspect to mimic these words in asserting the right.

The foregoing argument only works, however, if you use the phrase "right to remain silent." But the actual right at issue is not "the right to remain silent." The right is the "right to cut off questioning." When we use language that actually reflects the right, we discover that it is not so easy for a suspect to invoke *that* right unambiguously because the suspect was *never told* he had this right or how to invoke it. Thus, requiring an *unambiguous* invocation of it—or really requiring him to invoke it at all—suddenly does not seem so fair. Again, the Court was only able to make this argument by masking the real right—the right to cut off questioning—under the guise of the "right to remain silent."

The dissent agreed that the right to cut off police questioning is the type of right that must be invoked; it simply disagreed that the right must be invoked *unambiguously*; an ambiguous invocation is enough. Under that standard, it argued that Thompkins had invoked by remaining silent.[194]

Interestingly, the dissent used a similar technique as the majority to make a misleading argument based upon the phrase "right to remain silent" when what it really referred to was the right to cut off questioning. The dissent argued that surely remaining *silent* should count as invoking the right to remain *silent*.[195] But this argument is simply a play on the word "silent." It is unconvincing because the *real* right at issue is not the right to remain silent in the sense of the right not to speak; rather, the right at issue is the right to cut off questioning. It is far less obvious that *silence* implicitly invokes the right to cut off police questioning.

In section III.B, the majority addressed whether Thompkins had waived the right to remain silent. This section is best seen as addressing whether he waived the right literally not to speak. The Court held that as long as a suspect understands his rights, he may waive simply by

193. *Id.*
194. *Id.* at 2270–73
195. *Id.* at 2276.

speaking.[196] As discussed more fully below, this holding makes some sense. When we see the right as the right literally not to speak, it seems more sensible that as long as someone understands his rights, he may waive the right not to speak simply by speaking.

It is in section III.C that my terminology could have provided the most help to the Court. In that section, the Court responds to Thompkins' contention that the police must obtain a waiver of the *Miranda* rights before they may interrogate a suspect.[197] The Court rejected this assertion, and as discussed above, even under *Miranda* it was right to do so. But the Court's argument becomes difficult to follow because it continued simply to use the term "right to remain silent." That is, the Court had to acknowledge that the government must show that the suspect waived his "rights" before a statement is admissible.[198] If this is so, why shouldn't the suspect be shown to have waived his rights before interrogation begins? This seems to follow naturally if we are speaking of the same right—but we are not. If the Court simply distinguished the rights, it could easily have stated that waiver only applies to the right not to speak. As for the right to cut off questioning, that right must be invoked, and therefore, police need not obtain a waiver of that right before interrogating the suspect.

2. After Thompkins

Even after *Thompkins*, courts continue to conflate the liberty not to speak and the right to cut off questioning under the banner "right to silence."[199] For example, a Ninth Circuit case last summer raised many of these precise issues. Dale Hurd was arrested for killing his wife. He agreed to talk to the police without a lawyer and claimed the gun went off by accident. But when they asked him to re-enact the events leading to her death, he refused. At trial, the prosecution repeatedly argued that Hurd's silence—his refusal to reenact the shooting—demonstrated his guilt. The jury convicted.[200]

Hurd eventually petitioned the Ninth Circuit for habeas relief, which the Court granted. In response to the government's argument that a suspect cannot remain silent selectively, the Court said that a suspect may "invoke his right to silence at any time."[201] But the Court also said that the police may continue to question under *Thompkins*. This seems to be a contradiction: under *Miranda*, if the suspect "invokes" his right to silence,

196. *Id.* at 2261.
197. *Id.* at 2263.
198. *Id.* at 2264.
199. Hurd v. Terhune, 619 F.3d 1080, 1087 (9th Cir. 2010).
200. *Id.* at 1082.
201. *Id.* at 1087.

police questioning must cease. What the Ninth Circuit meant, however, was this: Hurd invoked his liberty not to speak simply by not speaking; he had not, however, invoked his right to cut off police questioning simply by refusing to speak—consistent with *Thompkins*. The Ninth Circuit ruling was correct, but its explanation is difficult to understand because it did not separate the two sub-rights and because it used the word "invoke," which usually refers to the right to cut off questioning.

The problems that arose in *Hurd* are likely to recur ever more frequently in the future as more and more police tape record interrogations,[202] as the police did in *Hurd*. Recordings will reveal instances of suspects selectively answering in ways that would have been forgotten without a recording. When courts listen to the real give-and-take of an interrogation, they will need to keep clear the difference between waiving the liberty not to speak versus invoking the right to cut off questioning.

IV. WAIVER, INVOCATION, AND THE TWO SUB-RIGHTS

The *Miranda* right to remain silent contains two main components, a liberty at its core and a claim against police questioning standing like a soldier on the perimeter to protect that core. In Part IV.A below, I examine the waiver requirement for the liberty not to speak. In Part IV.A below, I examine how the claim not to be questioned operates and conclude that the Court should require the police to warn suspects they have this right.

A. Waiver and the Liberty Not to Speak

Thompkins held that as long as a suspect understands the warnings, he may waive simply by speaking.[203] This Subpart shows why that holding at least makes sense, though it might ultimately be wrong. What *Thompkins* did in effect was to reduce the threshold a suspect must pass before what he says will become admissible. It did so in the language of waiver, but as I discuss below, the language of waiver in some ways confuses the issue. The real issue is whether we want to impose a protective threshold (or obstacle, depending on your viewpoint) to help protect the liberty not to speak.

202. Several states require the police to electronically record interrogations. Richard A. Leo et al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 528 (2006).

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

1. Thompkins*' Curtailment of the* Miranda *Waiver*

For the purpose of my analysis of *Thompkins*, there are two functional parts of a *Miranda* waiver: the notice part and the operative part.[204] The notice part requires that the suspect understand his rights, that he waive "knowingly and intelligently,"[205] or as the Court in *Moran v. Burbine* put it, that the suspect be aware of the nature of the right and the consequences of waiving it.[206] All these requirements relate to what happens in the suspect's mind. Does he understand his rights and their consequences? Naturally, we will in part look at what he says and does during the interrogation to determine whether he understood his rights, but the inquiry is ultimately into what he understood.

But a waiver also has an operative part—the actual waiver part. When the suspect says, "I waive my rights," this is the operative part; he has accomplished the waiver. The words "I waive," are performative, as Austin would put it, analogous to saying, "I do" at a wedding ceremony.[207] As to this operative part, the suspect must of course waive any rights voluntarily. But in the discussion below, I will focus on whether the suspect even operatively waived.

Miranda created a high threshold for the operative part of the waiver by requiring, more or less, that it be express, i.e., "I waive these rights." The government, it wrote, bears a "heavy burden" to show waiver. A suspect must "specifically"[208] waive—a term Justice Brennan later argued meant that it must be an express waiver.[209] The *Miranda* Court went so far as to say that even an express statement by the defendant that he waives might not be enough. "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement *could* constitute a waiver."[210]

But since then, the Court has progressively whittled away the operative part of the waiver. In *North Carolina v. Butler*, the Court held that a suspect can waive implicitly.[211] That is, the police and the courts can "infer" a waiver from the suspect's "actions and words" or his "course of

204. The Court typically divides the waiver analysis differently, first whether it was voluntary and second whether it was knowing. *Id.* at 2260. But for my purposes the two important aspects are the notice part and the operative part.

205. Miranda v. Arizona, 384 U.S. 436, 475 (1966).

206. Moran v. Burbine, 475 U.S. 412, 421 (1986).

207. J. L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975).

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

209. North Carolina v. Butler, 441 U.S. 369, 378 (1979) (Brennan, J., dissenting).

210. *Miranda*, 384 U.S. at 475 (emphasis added).

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

conduct."[212] This departed from *Miranda's* apparent requirement that the waiver be express. On the other hand, the Court in *Butler* did seem to impose an implied-in-fact waiver requirement with its focus on the defendant's actions and words and course of conduct.

In *Thompkins*, the Court reduced the operative part of the waiver requirement to a suspect simply speaking, even answering a single question.[213] "Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent."[214] The Court justified this holding by noting first that a waiver need not be express; an implied waiver was sufficient. It relied on *Butler* for this proposition. But *Thompkins* seems to have taken "implied" one step further to include implied-*in-law*, that is, constructive waiver: "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 protection those rights afford."[215] No longer need we look at conduct to determine whether the suspect, in his mind, intended to waive his rights; what he thinks has become irrelevant. Rather, speaking waives as a matter of law.

The *Thompkins* Court then held that Thompkins waived his right by answering the detective's question about whether he prayed to God for forgiveness for shooting the boy.[216] This answer showed a course of conduct indicating waiver, presumably because speaking is inconsistent with a right to remain silent.

When viewed in terms of waiver, the holding in *Thompkins* is indefensible. It nakedly imposed a constructive waiver requirement for a fundamental constitutional right.

2. Miranda *Actually Precludes Waiver*

But if we abandon waiver-talk and consider the liberty not to speak as a Hohfeldian liberty, the holding in *Thompkins* makes more sense. We must remember that the right to remain silent contains a liberty not to speak protected by the claim against questioning. Waiver applies *only* to the liberty—for *Thompkins* makes clear a suspect must invoke the claim. Since

212. *Id.*

213. Well before *Thompkins*, one scholar argued that the Court had effectively reduced the waiver requirement to notice. George C. Thomas III, *Separated at Birth but Siblings Nonetheless:* Miranda *and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1087 (2001).

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

215. *Id.* (emphasis added).

216. *Id.* at 2263.

we speak of waiver of a liberty only, we must examine what it means to waive a liberty.

One may waive a liberty in the strong, prospective sense. For example, when a defendant testifies at trial on direct examination, he waives the Fifth Amendment liberty for cross-examination on those topics.[217] If he testifies on direct concerning the facts of the case and refuses to answer the prosecutor's questions concerning those same facts on cross, the judge can put him in jail for contempt.[218]

Thus, one may waive the liberty not to speak by testifying at trial or in some other, similar proceeding.[219] He has waived the liberty because on cross-examination, the defendant *does* have a legal duty to testify.

The same applies to the First Amendment liberty of free speech. A person who enters government employment waives, to some extent, her free speech rights—either by contract[220] or by operation of law.[221] Government employees who read classified material have waived their right to disclose it;[222] that is, they have substituted a duty not to speak for a liberty to speak.

In this strong sense of "waiver," to waive a liberty means to *impose* upon oneself a duty that did not previously apply. In Hohfeldian terms this also follows logically: a liberty is the opposite of a duty. To waive a liberty must mean to undertake a duty.[223] At the moment a defendant testifies on direct examination and waives his liberty, he undertakes a duty to testify on cross examination. When Valerie Wilson (Plame) joined the CIA and signed a "Secrecy Agreement," she undertook a duty not to reveal classified material.[224]

217. Raffel v. United States, 271 U.S. 494, 497 (1926); Brown v. Walker, 161 U.S. 591, 597–98 (1896); Reagan v. United States, 157 U.S. 301, 305 (1895). The scope of the waiver differs by jurisdiction. All jurisdictions permit cross-examination on the facts to which the defendant testified. But some jurisdictions also permit cross-examination on the defendant's character for truthfulness, and others do not. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2276 (John T. McNaughton rev., 1961).

218. Brown v. United States, 356 U.S. 148, 157 (1958) (witness who testified on direct in civil case but refused to answer questions on cross examination received a six-month contempt sentence).

219. *Id.*

220. Wilson v. C.I.A., 586 F.3d 171, 183 (2d Cir. 2009) ("Indeed, once a government employee signs an agreement not to disclose information properly classified pursuant to executive order, that employee 'simply has no first amendment right to publish' such information." (quoting Stillman v. C.I.A., 319 F.3d 546, 548 (D.C. Cir. 2003))).

221. Garcetti v. Ceballos, 547 U.S. 410, 417–19 (2006).

222. *Wilson*, 586 F.3d at 183.

223. Even when we speak of other Hohfeldian positions, waiver substitutes the opposite position. If I have a claim that you not assault me and I waive that claim so that we may wrestle, I have substituted a "no-claim" for my claim. My no-claim means I have no claim that you not grab me, and you no longer have a duty not to grab me.

224. *Wilson*, 586 F.3d at 178.

But *Miranda* did not require that suspects waive the right to remain silent, that is, the liberty not to speak, in this strong, prospective sense. Quite the opposite—*Miranda precluded* this type of waiver. Nothing a suspect does can impose a duty upon him to continue speaking.[225] As the Court put it, "there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated."[226] *Miranda* expressly rejected the notion that suspects waive the liberty not to speak in any prospective sense when it noted that it was not bound by the cases that imposed such a prospective waiver on witnesses in other contexts.

If a suspect does not and cannot waive the liberty not to speak in this strong, prospective sense, in what sense can a suspect waive the liberty not to speak? My answer is that he cannot—that waiver only makes sense and is useful as a functioning concept if it imposes some duty prospectively. In other words, a suspect does not waive the liberty not to speak; rather, he simply *does not exercise* that liberty.

The everyday analogy I used above to illustrate a liberty in general makes more clear why the *Miranda* situation does not really involve a waiver. Imagine again my liberty to walk down the street. Since this is a full liberty, I also have the liberty not to walk down the street. It is mid-afternoon on a very hot summer day and I decide to stay home. In choosing not to walk down the street, I have merely chosen not to exercise my liberty to walk down the street. But I have not *waived* my liberty to walk down the street. At any moment I choose, I can walk down the street. A liberty merely says what I may do. If I do not do it, I don't waive that liberty; rather, I simply do not take advantage but I continue to retain it. I continue to enjoy a liberty whether or not I actually exercise it.

The same argument holds for the liberty not to speak. It merely says what I may do, that I may choose not to speak since I have no duty to speak. But if I choose to speak, all I have done is failed to take advantage of this liberty not to speak. And under *Miranda*, even as I speak, I retain the liberty not to speak and at any time can stop talking.[227] The police have no right to cross-examination. In fact, even if I did make the express statement, in writing, "I waive my rights," I would still retain the liberty not to speak since at any time I could stop speaking. Saying "I waive" imposes no duty on me to speak. Thus, in speaking, I am not waiving my liberty not to speak; I am simply not taking advantage of it.

225. Miranda v. Arizona, 384 U.S. 436, 475–76 (1966); *see also* Hurd v. Terhune, 619 F.3d 1080, 1087 (9th Cir. 2010) ("A suspect may remain selectively silent by answering some questions and then refusing to answer others without taking the risk that his silence may be used against him at trial.")

226. *Miranda*, 384 U.S. at 475–76.

227. *Id.* at 469.

I do not mean to suggest that the liberty not to speak should enjoy no protection. But its protection derives not from requiring that suspects waive that liberty; rather, it derives from the right to cut off police questioning and the right against torture and other abuse. Again, just as my claim that others not assault me protects my liberty to walk down the street.

This view helps explain the language the Court uses in *Thompkins*. The Court says this: "If Thompkins wanted to remain silent, he could have said nothing . . . ."[228] Again, the Court does not discuss Hohfeld, but this language suggests the Court is treating the right to remain silent here as a liberty, one that a suspect may exercise or not as he chooses.

This view becomes even clearer when we consider spontaneous statements. When a suspect, even one in custody, volunteers a statement without any police questioning, that statement is admissible.[229] *Miranda* itself says that neither the Fifth Amendment nor the *Miranda* regime bars such volunteered statements.[230] If the police arrest a suspect and he volunteers a statement before he has been read his warnings, that statement is admissible. If the police do read him his rights and he volunteers a statement before the police ask a question, likewise that statement is admissible without any need for the government to show waiver. That is, when a suspect makes a spontaneous statement, the government need not show any waiver at all.

The Court has thus *always* treated spontaneous statements as pure liberties. True, the Court has not used a Hohfeldian analysis in coming to this conclusion. Rather, it simply says that when a person makes a spontaneous statement, that statement is necessarily voluntary since there is no government action that might act as coercive.[231] But the liberty analysis captures the same notion. The government need not show waiver for a spontaneous statement because the waiver analysis does not apply to a pure liberty. If a person chooses not to take advantage of her liberty not to speak, that is a choice rather than a relinquishment.

Thus, the Court in *Thompkins* has brought statements that result from police questioning closer to spontaneous statements by treating them both as pure liberties, as conduct the suspect may engage in or not at her option. For both spontaneous statements and those resulting from interrogation, speaking alone means that the statement may come in. The Court in the latter situation *calls* this a waiver, but it really seems to be treating it as an unexercised liberty.[232] Of course, for statements arising in police custody,

228. Berghuis v. Thompkins, 130 S. Ct. 2250, 2263 (2010).

229. *Miranda*, 384 U.S. at 477–78.

230. *Id.* at 478.

231. The arrest itself could in theory count as coercive action, but the Court has not so held.

232. *Thompkins*, 130 S. Ct. at 2262.

the police must provide the *Miranda* warnings, but this relates to the notice aspect of waiver, not the operative part.

This view of *Thompkins* only works, however, if we view the liberty entirely in isolation *as* a liberty. That is, it makes sense if the liberty not to speak were akin to the liberty a football player has to run with the ball—a liberty that you must fight for and, in many instances, simply won't be effective. But the right to remain silent and the liberty not to talk that stands at its core comes with protective claims such as the Fifth Amendment claim that the police not beat a person and the *Miranda* right to cut off police questioning. The problem with *Thompkins* is not that it weakens the waiver requirement for the liberty not to speak but that it weakens the claim against questioning that protects the exercise of that liberty.

3. What Does the Miranda *Waiver Waive?*

In the above discussion, I have shown that it makes little sense to say that a suspect waives his liberty not to speak. In this Subpart, I show that we cannot articulate any other right that is waived by the so-called *Miranda* waiver by eliminating the only two other reasonable possibilities; in the next Subpart, I propose an alternative explanation for what function the *Miranda* waiver serves.

One could argue that when a suspect waives, he waives the claim against questioning, and that *Thompkins* was wrong when it required that suspects invoke this right rather than waive it. Under this view, a suspect already enjoys the claim against questioning, and *Miranda* requires that the police obtain a waiver of the suspect's claim to cut off questioning before they begin the interrogation. Requiring that a suspect waive his "right to remain silent" before the police may question would also re-unify the treatment of two sub-rights. There would no longer be two separate analyses of invocation and waiver. More important, requiring waiver of the claim not to be questioned would place the emphasis of the right to remain silent where it belongs, functionally—on the government conduct that is potentially compelling: questioning. If police questioning is inherently compelling, then it makes sense that the suspect should automatically have the claim not to be questioned.

Such a change in the law, to require that the claim not to be questioned be waived before the police may interrogate, would bring theoretical order to the conflict of waiver and invocation requirements. But *Thompkins* and the cases leading to it chose another path by requiring that a suspect invoke the right to cut off questioning; that means waiver must apply to some other right. That means that even if *Miranda* conceived of waiver as a waiver of the claim against questioning, we can no longer point to that claim as the right waived by suspects.

Second, we may consider this argument: when a suspect waives, he waives his future objection at trial to the admission of any statement he makes to the police. This view fails because it is circular. Before a suspect may waive his future objection, we must determine what that objection would have been based upon. The only answer to present itself is this: the (now) defendant objects to the admission of his statement on the grounds that he never waived his *Miranda* rights. Circular—and we have still not discovered what is being waived.

The foregoing should show that we can articulate no concrete right that is waived when a suspect supposedly waives his "right to remain silent"—meaning his liberty not to speak. Below I propose an alternative explanation.

4. Waiver as Consideration

I propose that it is better simply to think of the *Miranda* waiver requirement as a process that forces the suspect to consider carefully whether to speak and also helps to dispel any growing coercive atmosphere brought about by police questioning. True, that process requires the suspect to say words like "I waive"—or at least did under the original *Miranda* regime—but the function of the requirement is what really matters: protecting the liberty not to speak.

Under this view, the Court in *Miranda* used the waiver requirement to impose an extra level of protection for suspects to ensure that their decisions to speak were not coerced, and it did so by creating a threshold that forces the suspects to stop and deliberate. This parallels one purpose that the high waiver requirement serves for trial rights—to ensure that the defendant has thought carefully about waiving such important rights.[233]

In the context of *Miranda*, any requirement that forces a suspect to stop and think would work for this purpose. The Court required a suspect to say "I waive my rights," but what that means is "I am sure I want to talk even though I know I do not have to." It amounts to a reminder to the defendant that he has a liberty not to speak, a reminder made more effective by requiring *him* to say it. For a suspect to say "I waive these rights" performs a few functions. He acknowledges that he understands the rights. He acknowledges the consequences of waiving them. He acknowledges that he need not speak, and he acknowledges that what he says will be used against him in court. In this way, a suspect who says "I waive" says that he acknowledges and understands his rights and does not wish to take advantage of them, even though he realizes he could. I am not arguing that

233. *See, e.g.*, Faretta v. California, 422 U.S. 806, 835 (1975) (requiring warning defendant of hazard of waiving counsel "so that the record will establish that 'he knows what he is doing . . . .'").

any given suspect actually does acknowledge and understand these issues; rather, I argue that to say "I waive" is understood to have that meaning, at least constructively.

The foregoing may sound like semantics, and to some extent it is. But it helps us to understand the precise function of *Miranda's* waiver requirement. When we understand what a suspect actually means, at least constructively, when he says, "I waive my rights," we begin to consider that perhaps suspects should say something else that is more concrete and meaningful. To do so would likely require that the suspect address each right individually: "I understand I do not need to speak, but wish to speak anyway." "I understand that if I do speak, what I say will be used against me in court, and I wish to speak anyway." Etc. These statements seem to accomplish the same goals as *Miranda*'s waiver requirement but without using the term or even concept of waiver. Indeed, they relate to the defendant's understanding of the rights and their consequences as a test of whether he truly wishes to proceed despite the downside.

In any event, the current *Miranda* waiver requirement seems to impose a useful threshold, even if the word "waiver" does not mean what waiver usually means. But if suspects do not understand what the word waiver means, it may perform a less useful function. The liberty not to speak requires this additional protection since, as discussed below, the right to cut off police questioning often does not provide adequate protection.

We can therefore see this threshold requirement of *Miranda* waiver as another Hohfeldian incident on the perimeter that helps to protect the liberty not to speak. It forces the suspect to deliberate and carefully consider whether he wishes to speak *in the face of police questioning*. That is, we do not need suspects to think carefully about speaking unless they are being questioned because only then is there a potentially compelling force.

In *Thompkins*, had the police been required to get Thompkins to say "I waive," or "Yes, I'm sure I want to talk," he might have paused and realized that the God-line of questioning was having a compelling effect and that he should remain silent.

Whether we think of the requirement that a person say, "I waive my rights" as an actual waiver is less important than seeing that it functions as a threshold, and under *Miranda*, a high threshold. Of course, by the time we come to *Thompkins*, this threshold has been eliminated. Though *Thompkins* does not analyze the issue this way, its elimination of any threshold before speaking and "waiving" can only be justified by thinking of the liberty not to speak as something a suspect simply chooses not to exercise. Had *Miranda* expressly required suspects to surmount a threshold by saying they understood their rights and wished to proceed anyway, *Thompkins* would have had to rely upon other grounds to eliminate this

threshold requirement—grounds that more nakedly sought to help prosecutions. For in the end, whether we provide an additional threshold for defendants, and how high it should be, relates to our underlying beliefs about how much protection suspects should get.

B. The Claim Not to Be Questioned

As discussed above, the claim not to be questioned, once invoked, protects the liberty not to speak. Or at least that's its design. Below I show that the current framework frustrates this design for a few reasons. First, police do not warn suspects they have this right. Second, the right does not effectively protect the liberty not to speak because most suspects lack the wherewithal to deploy the right in the face of a professional interrogator.

1. The Missing Miranda *Warning*

The Court in *Thompkins* was wrong to require that a suspect invoke the right to cut off police questioning *unambiguously* because the police never warn the suspect he has this right—it is the missing *Miranda* warning.[234] As noted above, Justice Brennan identified this problem in his memo to Chief Justice Warren and asked whether the Court shouldn't require police to warn suspects they enjoy this power. Warren rejected this suggestion, apparently because his clerks feared that such a warning would invalidate FBI practice.[235]

Of course, police are free to warn suspects they have the right to cut off questioning even absent a Supreme Court requirement. In practice, however, they don't. One study found that out of the 560 jurisdictions studied, 98.2% provided no warning that a suspect can end police questioning.[236] The warning a suspect does receive, "the right to remain silent," does not imply that the police must stop asking questions. A suspect does not know that she can simply say that she wants to end the interrogation entirely.

It is unfair to require a suspect to invoke unambiguously a right he is unaware of. The requirement does not even make sense. The Court in *Thompkins* said that a suspect may invoke the right to cut off questioning "unambiguously" simply by saying he "wishes to remain silent." But these

234. The right to cut off police questioning is not the only missing *Miranda* warning. Numerous scholars have argued that the police should warn suspects that their silence cannot be used against them and some police departments provide this warning. Mark A. Godsey, *Reformulating the* Miranda *Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 783, 793 (2006).

235. Hale et al., *supra* note 89.

236. Richard Rogers et al., *An Analysis of* Miranda *Warnings and Waivers: Comprehension and Coverage*, 31 LAW & HUM. BEHAV. 177, 186 (2007).

words do *not* unambiguously invoke the right to *cut off police questioning*. All those words invoke, or rather announce, is that the suspect will not speak; the words say nothing about questioning. True, the right to cut off questioning is a sub-right of the right to remain silent, so invoking the larger right should invoke the smaller one. But that's only by operation of law; suspects will not know this.

But the problem lies not only with the requirement that the suspect invoke unambiguously; it lies also with the requirement that the suspect invoke at all. That requirement is also unfair if the suspect is not told of the right. It seems clear the police should warn of this right.

The invocation requirement also exacerbates another unfair feature of *Miranda*—it rewards recidivists savvy enough to invoke and cut off police questioning and punishes unsophisticated suspects.[237] We might reduce this unfairness somewhat by recognizing that all suspects enjoy the right not to be questioned unless they waive. Of course, unsophisticated suspects will still waive more often than sophisticated ones, but one can imagine the difference will be reduced.

How would this new warning work? Professor DeClue has proposed a model *Miranda* warning in which the police would repeatedly make clear to the suspect that she could end police questioning any time.[238] The language he uses makes clear how far the actual warnings are from informing suspects of the right to cut off police questioning: "You have the right to remain silent . . . . You can say no right now, and that's it. We'll stop . . . . at any time you can say the magic words. 'Stop, I don't want to talk anymore.' And that's it. We'll stop."[239]

One might question whether adding this warning would really make a difference, whether it would materially change the warning already given, that a suspect has the right to remain silent. Is the right to cut off police questioning different in a suspect's mind from the "right to remain silent?" I believe it is. Roughly 80% of suspects waive their *Miranda* rights.[240] As Leo said, "Perhaps the most obvious explanation is that suspects may not know they can invoke their rights and terminate interrogation once it has begun."[241] In a study measuring how well juveniles understand the *Miranda* rights compared to adults, each group was asked to write in their

237. Stuntz, *supra* note 185, at 977.

238. Gregory DeClue, *Oral* Miranda *Warnings: A Checklist and a Model Presentation*, 35 J. PSYCHIATRY & L. 421, 439–41 (2007).

239. *Id.* at 439.

240. Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1012 (2001) [hereinafter Leo, Miranda *in the 21st Century*] (78-96%); Richard A. Leo, Miranda *and the Problem of False Confessions*, *in* THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING 271, 275 (Richard A. Leo & George C. Thomas III eds., 1998).

241. Leo, Miranda *in the 21st Century*, *supra* note 240, at 1013.

own words what the rights mean. In the few sample answers provided, none said that the rights meant they could end police questioning.[242]

One reason suspects waive might be that the right to remain silent puts the focus on the suspect. The police say, in essence, you can remain silent, but people who remain silent are usually guilty. Even for suspects who know their silence cannot be used against them, the focus is still on their reluctance to speak.

By contrast, the right to cut off police questioning puts the focus on the police conduct. It might well be easier psychologically for a suspect to invoke the right to cut off police questioning since it is reasonable for a person not to want questions. After all, asking questions of a stranger is generally considered rude;[243] to say no to someone who wishes to ask a series of personal questions about your criminal culpability enjoys a greater moral foundation than to say you do not wish to *answer* whether you committed a crime.

2. Is the Claim Not to Be Questioned Effective?

The failure to warn suspects that they have the right to end questioning makes that right far less effective in its purpose: protecting the liberty not to speak. But even if the suspect knows she has a right to end police questioning, will she use it effectively? If the claim against police questioning fails to be effective, then this vital protection for the liberty not to speak falls away. The liberty itself is endangered. Is the claim not to be questioned effective?

Before we answer that question, we must first determine *why* a suspect has the right to cut off police questioning. The superficial answer is that police questioning is compelling. *Miranda* said that absent warnings, police questioning is "inherently compelling."[244] But the Court did not ban police questioning outright. Once the warnings have been given, the police may interrogate unless the suspect invokes his rights. Unlike beatings or other physical motivations and hindrances, police questioning is only *sort of* compelling under Supreme Court doctrine, which leaves it in an odd middle area. It is hard to see how the warnings could somehow transform a

242. Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1151–60 (1980).

243. Greenawalt notes that it is rude to ask someone to account for themselves without any solid grounds for suspicion, and he uses this every day morality to draw conclusions about the propriety of Fifth Amendment protections. R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15 (1981).

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

compelling tactic into one that is not compelling, at least in many circumstances.[245]

The underlying principle seems to be this: the *suspect* decides whether police questioning would be compelling.[246] The suspect might ground his decision based upon the nature of the questioning itself or upon his knowledge of himself and his vulnerabilities. He therefore is best situated to decide whether police questioning would have an unduly powerful effect, one that would amount to compulsion. The suspect can decide if police questioning would likely make him unable or afraid to exercise his liberty not to speak. If he decides the questioning has become too coercive or simply that he is too vulnerable, he may simply invoke his right and the police will stop questioning him; if he decides he can tough it out and he also decides he would like to hear what the police have to say,[247] he will not invoke the right. Under this theory, if he fails to invoke the right, we assume that *for him*, police questioning is not compelling. Or at least it is not compelling *until* he decides to invoke the right, which he can do at any time.[248] As Professor White wrote in criticizing this theory: "Based on this language, the [Supreme] Court apparently believes that, in most instances, . . . [i]f the suspect believes she lacks the resources to deal with the pressures generated by custodial interrogation, she can invoke one of her rights, thereby avoiding interrogation."[249]

Simply to state the theory is to highlight its flaws. Suspects are poorly situated to determine whether police questioning will have a compelling effect both because they often do not know how they will respond to police questioning and because they do not understand the way in which police questioning can be compelling.[250] As for the first, a suspect is unlikely to appreciate whether he is vulnerable. Juveniles and those with mental illness are particularly vulnerable to police questioning and yet also likely not to assess accurately their vulnerability to police questioning.[251] But most competent adults probably do not have a good assessment of themselves on

245. Schulhofer, *Reconsidering* Miranda, *supra* note 6, at 454.

246. Stuntz, *supra* note 185, at 976 ("*Miranda* left it for suspects to decide, by either agreeing to talk or by calling a halt to questioning and/or calling for the help of a lawyer, whether the police were behaving too coercively.").

247. Berghuis v. Thompkins, 130 S. Ct. 2250 (2010).

248. This theory would operate even if we were to impose a requirement that the suspect *waive* the claim not to be questioned. In such a case, the suspect would still have the choice to permit questioning and the theory would have to be that the suspect is free to decide whether police questioning would, for him, amount to compulsion.

249. White, *supra* note 182, at 1214.

250. Stuntz, *supra* note 185, at 976–77 ("Suspects do not, in fact, separate good questioning from bad.").

251. For example, in the Central Park Jogger Case, five juveniles each independently confessed, falsely, to a brutal gang rape and attempted murder after persistent police questioning. Leo, *supra* note 30, at 484.

this particular trait, especially those who have never been interrogated before. Anyone who has been even a witness under cross-examination appreciates how powerful pointed questioning by a determined professional can be. Even lawyers—yes, even lawyers—are notoriously bad witnesses on cross-examination.

In addition, most suspects probably do not recognize how compelling police questioning can be for anyone, regardless of individual vulnerabilities. Studies show that innocent people in particular feel confident to answer police questions,[252] in part because they are more likely to lack experience with police interrogation than those who are guilty.[253] In fact, even during police questioning the suspect will not realize that the line of questioning, the entire process, has a compulsive effect. That's the whole point; for better or worse, the police use numerous techniques to lull the suspect into trusting the police.[254]

Numerous scholars have persuasively argued that, at least in many cases, suspects will be too overwhelmed by police interrogation methods to invoke the right to cut off questioning.[255] Thus for many suspects, the right to cut off police questioning might not provide sufficient protection against police questioning simply because suspects may often fail to invoke by mistake. That is, they believe that police questioning will not have a compelling effect on them when in reality it will.

Proponents of the requirement that suspects invoke argue this regime protects a suspect's freedom of choice and autonomy. For example, the Court in *Thompkins* said that a suspect may wish to hear what the police have to say and that the information the police provide will help him to make a *better informed* choice about whether to talk to the police. But the problem is this: the police decide exactly what information to provide the suspect in making this determination, and they will provide only that information best calculated to encourage him to talk. To say police questioning helps enlarge the suspect's choices is like saying a dictator who completely controls the media helps the voters choose whom to vote for. The dictator supplies only that information that puts him in a positive—indeed glorious—light; when "elections" come, those who vote know little else. The very premise of voter choice that undergirds the First Amendment requires that the government allow voters all information, including information derogatory to the government. The same principle applies here:

252. Kassin et al., *supra* note 31, at 23.

253. *Id.*; Stuntz, *supra* note 184, at 993 ("Innocent suspects' natural reaction is to explain themselves . . . .").

254. INBAU ET AL., *supra* note 138, at 9, 93; Kassin et al., *supra* note 31.

255. White, *supra* note 182, at 1215; Weisselberg, *supra* note 136; Leo, Miranda *in the 21st Century*, *supra* note 240, at 1014–15.

we cannot use choice to justify police questioning because that questioning tends to dominate the suspect by providing only certain information.

It is unclear whether there is a solution to this problem. Professor Weisselberg argued that police tactics combined with current Supreme Court doctrine have made the right to cut off police questioning irremediably ineffective.[256] It is beyond the scope of this Article to fix *Miranda*. But if the right to cut off police questioning is ineffective, we need other protections for the liberty not to speak. The Court could impose a stronger "waiver" by requiring a greater threshold before suspects' statements become admissible—but that is exactly what the Court in *Thompkins* eliminated. The Court could, as many have suggested, require that the police periodically remind suspects of their rights and include among the warnings the right to end questioning.

In the end, the Court in *Thompkins* weakened the liberty not to speak both indirectly by undermining the protective right to cut off police questioning and directly by essentially eliminating the operative part of the waiver requirement. Whether one agrees with these moves in *Thompkins*, at least we can see by separating the two rights what the Court has done.

CONCLUSION

The *Miranda* right to remain silent contains two main sub-rights: the right literally not to speak and the right to cut off police questioning. The Court in *Miranda* and since has never expressly said that these are two separate rights. But at the same time it has *treated* the two sub-rights differently. For the right not to speak, the Court has required the government to obtain a waiver before anything a suspect says becomes admissible. For the right to cut off police questioning, the Court has required the suspect to *invoke* that right; otherwise, the police were free to question a suspect.

Despite creating separate functions for each sub-right, the Court has continued as recently as this summer in *Berghuis v. Thompkins* to use the same term, "right to remain silent," to refer to both sub-rights, thus confusing when the suspect must invoke and when the government must show waiver. In addition, by using the same phrase, the Court has obscured the right that really matters, the right to cut off police questioning. The right to cut off police questioning is the mechanism that protects the liberty not to speak.

This Article showed how these two sub-rights map onto the two Hohfeldian elements. The right not to speak is a "liberty," and the right to

256. Weisselberg, *supra* note 136, at 1521 ("*Miranda* is largely dead. It is time to 'pronounce the body,' as they say on television, and move on.").

cut off police questioning amounts to a claim. The liberty not to speak lies at the core of the right to remain silent—it is ultimately the right we seek to protect. The claim not to be questioned, like the claim not to be tortured, stands on the perimeter like a soldier, protecting the liberty not to speak.

When we treat the two sub-rights separately, we can see more easily the changes *Thompkins* brought about. As for the liberty not to speak, this Article showed how that holding makes sense. Indeed, analyzing the liberty not to speak as a question of waiver makes little sense; as long as a suspect understands he has the right to remain silent, it seems sensible that he should have the choice simply not to exercise that liberty by speaking. The Fifth Amendment protects against compulsion, and as long as the suspect has not been compelled, he should have the choice whether to speak or not. In other words, what protects against police compulsion is not the liberty not to speak but the right to cut off police questioning, along with the right against torture and other physical abuse.

But *Thompkins* substantially weakened the very *Miranda* claim that stands as a protection for the liberty—the right to cut off police questioning. Here *Thompkins* erred significantly. It required that suspects invoke the right to cut off police questioning unambiguously even though the Court has never required police to warn suspects they even have that right. The Court in *Thompkins* failed to see how the right to cut off police questioning performs a vital function in protecting the liberty not to speak, and it failed to see how these two Hohfeldian elements interact and reinforce each other. At the very least, the Court should require that police warn suspects that they have the right to cut off police questioning. To bring about a proper balance between the state and suspects, the suspects' right to cut off questioning should be a right suspects already enjoy, theirs to be waived, and police should therefore be required to obtain a waiver before they may question.