COMMENT

Hung Up on Semantics: A Critique of *Davis v. United States*

By SAMIRA SADEGHI*

Table of Contents

* Member, Third Year Class; M.Sc. London School of Economics and Political Science, 1993; B.A. UCLA, 1992. This Comment is dedicated to my parents and role models, Ahmad and Shahla, for their unfailing support of my education, my sister Saha for the inspiring example she sets, and Ian for always reminding me, "merrily, merrily, merrily, merrily, life is but a dream."

Introduction

After years of speculation,[1] the United States Supreme Court has finally decided the legal effect of a suspect's ambiguous or equivocal reference to counsel during interrogation.[2] In a five to four decision,[3] the Court held in *Davis v. United States* that an ambiguously worded request is insufficient to invoke counsel.[4] The Court further held the police have no duty to clarify an ambiguous request for counsel during interrogation to determine whether the suspect is invoking the Fifth Amendment right to counsel.[5]

Although striving to create a bright-line rule, their holding may well create more confusion than clarity. The Court provides little guidance in determining which statements are considered ambiguous.[6] The police are still left with "difficult judgment calls," with suspects' Fifth Amendment rights hanging in the balance.[7] Moreover, the *Davis* decision disregards the underlying rationales, set forth in *Miranda v. Arizona*,[8] for interposing an attorney between a criminal suspect and law enforcement officials during custodial interrogation.[9] *Davis* places the greatest burden upon a variety of suspects who are least able to shoulder it: the poor; the uneducated; women; and ethnic minorities whose cultural, educational, or lingual attributes are more

1. *See, e.g.*, James J. Tomkovicz, *Standard for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975 (1986); Charles Shreffler, Jr., Note, *Judicial Approaches to the Ambiguous Request for Counsel Since* Miranda v. Arizona, 62 NOTRE DAME L. REV. 460 (1987); Ada Clapp, Comment, *The Second Circuit Review—1988-1989 Term: Criminal Procedure: The Second Circuit Adopts a Clarification Approach to Ambiguous Requests for Counsel:* United States v. Gotay, 56 BROOK. L. REV. 511 (1990).

2. Davis v. United States, 114 S. Ct. 2350, 2352 (1994).

3. Chief Justice Rehnquist, and Justices O'Connor, Kennedy, Thomas, and Scalia constituted a majority; Justice Scalia also filed a concurring opinion. Justices Souter, Blackmun, Stevens, and Ginsburg concurred in the judgment.

4. *Davis*, 114 S. Ct. at 2355.

5. *Id.* at 2356.

6. *Id.* at 2355.

7. *Id.* at 2356.

8. 384 U.S. 436 (1966).

9. *Davis*, 114 S. Ct. at 2360-61 (Souter, J., concurring).

likely to lead to the use of equivocal language when invoking counsel.[10]

Prior to *Davis*, lower courts had developed three different approaches to determining the consequences of an ambiguous reference to counsel: the per se invocation standard, the clarification standard, and the threshold-of-clarity standard.[11] Under the "per se invocation" standard, any reference to counsel made by the suspect after *Miranda* warnings would be considered a per se invocation of counsel, requiring the complete cessation of police-initiated interrogation.[12] Under the "clarification" standard, adopted by the majority of jurisdictions,[13] the police are allowed to continue the exchange but are limited to questions aimed at clarifying whether the suspect is invoking the right to counsel through an ambiguous statement.[14] Under the "threshold-of-clarity" standard, a suspect's statement is required to meet a certain threshold of clarity before becoming effective, allowing the police to continue their questioning unhindered.[15]

This Comment criticizes the Court's decision to adopt the most uncompromising of these approaches. In doing so, the Court failed to heed the dictates of its own precedent[16] as well as what a majority of American courts[17] and a significant body of law enforcement agencies[18] have come to regard as the most fair and equitable procedure in the context of police interrogation—the clarification standard. The Court has effectively converted the right to counsel during interroga-

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

11. Smith v. Illinois, 469 U.S. 91, 96 n.3 (1984); *Davis*, 114 S. Ct. at 2353-54.

12. *See, e.g.*, United States v. Porter, 764 F.2d 1, 6 (1st Cir. 1985); Maglio v. Jago, 580 F.2d 202, 205 (6th Cir. 1978).

13. For a sample list of jurisdictions, see Ainsworth, *supra* note 10, at 308 n.254.

14. *See Davis*, 114 S. Ct. at 2353.

15. *See Smith*, 469 U.S. at 96 n.3.

16. *Davis*, 114 S. Ct. at 2359 (Souter, J., concurring) (citing Miranda v. Arizona, 384 U.S. 436, 474 (1966); Edwards v. Arizona, 451 U.S. 477, 484-85 (1981); and Minnick v. Mississippi, 498 U.S. 146 (1990)).

17. *See* Ainsworth, *supra* note 10, at 308 n.254.

18. Brief Amici Curiae of Americans for Effective Law Enforcement, Inc., Joined by the International Association of Chiefs of Police, Inc., the National District Attorneys Association, Inc., and the National Sheriffs' Association, in Support of the Respondent, Davis v. United States, 114 S. Ct. 2350 (1994) (No. 92-1949), *quoted in Davis*, 114 S. Ct. at 2359 n.2 (Souter, J., concurring).

tion into an empty promise: it has become remarkably easy to waive[19] and, after *Davis*, extremely difficult to reinvoke.[20]

This Comment further argues that although a majority of courts consider the clarification approach the most feasible standard to apply,[21] it leads to a whole new set of complications, such as the use of clarifying questions to badger suspects into rescinding their request for counsel.[22] Alternatives involving the use of the clarification standard, supplemented by a systemic crackdown on police officers known to be abusing the clarification process, have been suggested.[23] However, the per se invocation standard remains the only approach which realistically ensures that even timid and unassertive suspects can access their constitutional right to the assistance of counsel during custodial interrogation.

Section I of this Comment provides a brief review of the history and evolution of the case law in this area, beginning with *Miranda*, and analyzes the original rationale behind providing suspects with a Fifth Amendment right to counsel. Section II summarizes the particulars of the *Davis* decision, detailing the plurality and concurring opinions. Section III provides a critique of *Davis*, and Section IV analyzes its impact on federal and state decisions involving the Fifth Amendment rights of suspects during interrogation. Section V proposes that state courts treat *Davis* as a foundation and provide greater protection to suspects during the interrogation process by requiring, at the very least, clarification of an ambiguous statement.[24] Finally, this Com-

19. North Carolina v. Butler, 441 U.S. 369 (1979) (holding no express waiver of *Miranda* rights is necessary and an implied waiver can be inferred from the words and actions of the suspect).

20. David Jonas, counsel for Respondent, made this point during arguments before the Court. *Arguments Before the Court*, 62 U.S.L.W. 3681, 3681-82 (1994); *see infra* notes 149-150 and accompanying text.

21. For a cogent statement of this position, see Tomkovicz, *supra* note 1, at 1009-13; *see also* Shreffler, *supra* note 1, at 470-72.

22. *Davis*, 114 S. Ct. at 2363 (Souter, J., concurring).

23. Professor Yale Kamisar suggested this approach during the *U.S. Law Week* Constitutional Law Conference reviewing the Supreme Court's 1993-94 term. *Constitutional Law Scholars Assess Impact of Supreme Court's 1993-94 Term*, 63 U.S.L.W. 2229, 2234 (1994) [hereinafter *U.S. Law Week* Constitutional Law Conference]; *see infra* note 236 and accompanying text; *see also* YALE KAMISAR, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, *in* POLICE INTERROGATIONS AND CONFESSIONS 27, 31-32 (1980).

24. *See, e.g.*, State v. Hoey, 881 P.2d 504 (Haw. 1994) (providing Hawaiian citizens with broader protections under the state constitution than that recognized by the *Davis* majority under the federal constitution, and adopting the clarification approach); *infra* note 227.

ment advocates the per se invocation standard as the only approach that truly protects the Fifth Amendment rights of suspects in custody.

I. Legal Background

A. *Miranda v. Arizona* and Suspects' Fifth Amendment Rights

For the past thirty years, the United States Supreme Court's decision in *Miranda v. Arizona*[25] has provided the doctrinal framework for the application of the Fifth Amendment[26] right against compulsory self-incrimination during custodial[27] interrogations. The *Miranda* Court recognized the need for procedural safeguards to protect this right in the face of the pressures inherent in the interrogation process.[28] A clear history of abuse by law enforcement officials led the Court to declare:

> We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.[29]

The procedural safeguards consist of a set of warnings that include the right to remain silent and the right to have counsel, retained or appointed, present at the interrogation.[30] These warnings are so well known today through exposure on television[31] that even the

25. 384 U.S. 436 (1966).

26. "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

27. The *Miranda* Court defined "custodial interrogation" as police-initiated questioning "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. Generally, a suspect is considered to be in custody if she reasonably perceives that she is not free to leave; recently in a per curiam decision, the Court re-emphasized the determination of custody depends on how a "reasonable person" in the suspect's shoes would have perceived the situation. Stansbury v. California, 114 S. Ct. 1526, 1529 (1994).

28. *Miranda*, 384 U.S. at 444.

29. *Id.* at 467.

30. The Court clearly set forth these warnings in a summary of its holding:

> [The suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479.

31. With the rise in popularity of television programs depicting actual police work, such as *Cops* and *Real Stories of the Highway Patrol*, viewers now get a first-hand look at this aspect of criminal procedure.

youngest members of society can recite them verbatim.[32] By requiring the police to inform suspects of their constitutional rights, the Court hoped to combat the inherently coercive and compelling atmosphere of a custodial interrogation.[33]

Miranda suggested there could be no questioning if the suspect indicates "in any manner and at any stage of the process that he wishes to consult with an attorney."[34] Read for its face value, the words "in any manner" and "at any stage" suggest that any reference to counsel, regardless of equivocality or ambiguity, should immediately terminate the interrogation.[35] The Court considered the right to have counsel present at the interrogation "indispensable to the protection of the Fifth Amendment privilege."[36]

B. Post-Miranda Case Law: Carving Away at the Protections

The Court began narrowing *Miranda* as early as 1971, when it held that statements taken in violation of *Miranda* could be used to impeach a defendant's testimony.[37] Eight years later, the Court held a juvenile suspect's request to see his probation officer during interrogation was not the equivalent of a request for a lawyer, despite clear indications that the juvenile doubted the police would honestly procure an attorney for him.[38] In that same year, the Court held an ex-

32. Marcy Strauss, *Reinterrogation*, 22 HASTINGS CONST. L.Q. 359, 364 n.27 (1995) (author noting that even her seven and nine-year-old sons can recite the warnings almost verbatim).

33. *Miranda*, 384 U.S. at 457-58.

34. *Id.* at 444-45.

35. This interpretation is even supported by language in Justice Clark's dissent in *Miranda*, wherein he states: "When *at any point* during an interrogation the accused seeks affirmatively *or impliedly* to invoke his rights to silence or counsel, interrogation must be foregone or postponed." *Id.* at 500 (Clark, J., dissenting) (emphasis added).

36. *Id.* at 469. The Court later clarified in Edwards v. Arizona, 451 U.S. 477 (1981), that while the right to counsel is not found on the face of the Fifth Amendment, the right created in *Miranda* stems directly from the Fifth Amendment. *Edwards*, 451 U.S. at 481-82.

37. Harris v. New York, 401 U.S. 222 (1971). This case has been criticized as severely undercutting the purposes of *Miranda*: Evidence submitted before a jury ostensibly to impeach a defendant often seems to prove the guilt of the defendant, especially since juries are notoriously incapable of distinguishing between the substantive and impeachment values of such testimony. For an example of the detrimental impact of this decision on suspects' rights during interrogations, see Cooper v. Dupnik, 963 F.2d 1220 (9th Cir.) (en banc) (uncovering detailed police plan whereby suspects' requests for counsel were systematically ignored to induce hopelessness and extract a confession which could later be used to impeach the suspects at trial and keep them off the witness stand), *cert. denied*, 113 S. Ct. 407 (1992).

38. Fare v. Michael C., 442 U.S. 707 (1979). The juvenile's reason for not demanding a lawyer was probably a lack of trust, rather than a lack of interest. When told of his right to

press waiver of *Miranda* rights was unnecessary, finding an implied waiver could be inferred from the actions and words of the person being interrogated.[39]

In *Edwards v. Arizona*, the Court created a bright-line rule: once a suspect has invoked counsel, the police must cease all questioning until counsel has been provided or the suspect initiates a new exchange, whereupon police may resume questioning.[40] The same rule, however, narrowed the standard for determining whether an invocation had actually occurred. The *Edwards* Court stated, "it is inconsistent with *Miranda* and its progeny for the authorities . . . to reinterrogate an accused in custody if he has *clearly asserted* his right to counsel."[41] This language itself conflicted with the "in any manner"[42] language in *Miranda* and established, through the plain meaning of the words "clearly asserted," a much higher standard for the invocation of the right to counsel than set forth by *Miranda*.

Soon after, the Court went even further and began carving out major exceptions to the *Edwards* rule. In *Oregon v. Bradshaw*, the suspect clearly invoked his right to counsel,[43] but the Court nevertheless found the defendant had later "initiated" a conversation with police by asking, "Well, what is going to happen to me now?," thereby removing the *Edwards* protection and allowing police to continue interrogation despite the clear invocation of counsel.[44]

The *Miranda* warnings themselves began to take on less significance. The Court created the "public safety exception," whereby police need not read the *Miranda* warnings prior to questioning prompted by concern for public safety.[45] In 1985, the Court found that the failure to give *Miranda* warnings prior to a first interrogation did not destroy the admissibility of information obtained during a prewarned second interrogation.[46] The Court ignored the psychologically corrosive effect an unwarned first confession would have on a suspect's decision whether to remain silent during the second interrogation, and rejected the "cat-out-of-the-bag" theory put forth by the

counsel, Michael C. replied, "How [do] I know you guys won't pull no police officer in and tell me he's an attorney?" *Id.* at 710.

39. North Carolina v. Butler, 441 U.S. 369 (1979).

40. 451 U.S. 477, 484-85 (1981).

41. *Id.* at 485 (emphasis added).

42. *Miranda*, 384 U.S. at 444-45.

43. 462 U.S. 1039, 1041-42 (1983).

44. *Id.* at 1045.

45. New York v. Quarles, 467 U.S. 649 (1984) (holding evidence obtained through this questioning was admissible despite the absence of warnings).

46. Oregon v. Elstad, 470 U.S. 298 (1985).

dissent.[47] Justice Brennan, in dissent, called the decision a "potentially crippling blow to *Miranda* and the ability of courts to safeguard the rights of persons accused of crime."[48] Several years later in *Duckworth v. Eagan*, the Court found police had complied with *Miranda* despite the fact that the warnings given to the suspect were ambiguous and inexact, and in the view of the dissent, outright misleading to "frightened suspects unlettered in law."[49]

The role of counsel during the interrogation came into serious question following the Court's decision in *Moran v. Burbine*.[50] In a six to three decision,[51] the Court found the suspect's waiver remained effective, despite the police declining to tell him that a lawyer had been retained for him and even preventing the lawyer, through trickery, from seeing the suspect.[52]

Thereafter, decisions of the Court favorable to the suspect applied only after there had been a "clear" invocation of counsel and *Edwards* had been triggered. In *Arizona v. Roberson*, the Court held the *Edwards* ban against further interrogation applied even when police wished to question the suspect about a different crime, making the Fifth Amendment invocation nonoffense specific.[53] And in Justice Blackmun's last opinion, the Court held once a suspect had invoked and consulted with counsel, the *Edwards* rule was deemed violated unless the lawyer was present during the subsequent questioning.[54]

From this case law, it is apparent that the Court intended to provide strong *Miranda* protections only after the suspect had made a clear invocation of counsel. Prior to that invocation, only limited protection would be available. Following a clear invocation, the police were to immediately cease questioning under *Edwards*; and according to *Roberson*, there was to be no questioning about the original crime or any other crime.[55] The police were also to provide the suspect with

47. *Id.* at 321 (Brennan, J., dissenting).

48. *Id.* at 319.

49. 492 U.S. 195, 216 (1989) (Marshall, J., dissenting). The warnings included the sentence: "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." *Id.* at 198.

50. 475 U.S. 412 (1986).

51. Chief Justice Burger and Justices White, Blackmun, Powell, Rehnquist, and O'Connor constituted the majority. Justices Stevens, Brennan, and Marshall dissented.

52. *Moran*, 475 U.S. at 412 (suspect's lawyer called the station and the police told her that her client would not be questioned or put in a line-up that night; shortly after this conversation with the lawyer, police procured a written waiver of the suspect's *Miranda* rights and subsequently, a confession).

53. 486 U.S. 675 (1988).

54. Minnick v. Mississippi, 498 U.S. 146 (1990).

55. 486 U.S. 675 (1988).

counsel and allow that counsel to be present during subsequent interrogations.[56]

Two questions remained for the Court: first, what exactly constitutes a "clear" or "ambiguous" invocation of counsel; and second, what legal effect to accord "ambiguous" invocations of counsel. These were the issues taken up by the Court in *Davis*.

II. *Davis v. United States*

A. Factual Background

Robert L. Davis, a member of the United States Navy, spent the evening of October 2, 1988 playing pool with fellow Seaman Apprentice Keith Shackleford at a club on the Charleston Naval Base in North Carolina.[57] Shackleford made a thirty dollar wager with Davis over a game of pool, but lost the game and refused to pay.[58] Later that night, Shackleford was beaten to death with a pool cue on a loading dock.[59] His body was discovered early the next morning.[60]

In the course of investigation, the Naval Investigative Service (NIS) agents found that only privately-owned pool cues could be removed from the club.[61] The NIS agents further discovered that Davis was at the club that evening, absent from his duty station without authorization the following morning, and owned two cues—one of which had a bloodstain on it.[62] Davis had also been overheard saying that Shackleford had been "hit and jabbed with a pool stick" when this information regarding the manner of death was not common knowledge.[63]

On November 4, 1988, Davis was interviewed at an NIS office.[64] He was advised of his Article 31(b) rights and his right to counsel.[65]

---

56. *Minnick*, 498 U.S. 146 (1990).

57. Davis v. United States, 114 S. Ct. 2350, 2352 (1994).

58. *Id.* at 2352-53.

59. *Id.* at 2353. Shackleford died of head injuries inflicted with a blunt object, later determined to be a pool cue. United States v. Davis, 36 M.J. 337, 338 (C.M.A. 1990).

60. *Davis*, 114 S. Ct. at 2353.

61. *Id.*

62. *Id.*

63. *Davis*, 36 M.J. at 339.

64. *Id.* Petitioner's brief indicates that Davis was handcuffed to his chair throughout the duration of the interview and that the NIS agents had access to videotape and audiotape equipment but deliberately chose not to utilize this equipment. Brief of Petitioner at 10, Davis v. United States, 114 S. Ct. 2350 (1994) (No. 92-1949).

65. *Davis*, 36 M.J. at 339. The military equivalent of the *Miranda* warning about the right to silence reads:

Davis executed a written waiver of his rights,[66] orally waived his rights, and agreed to answer some questions "because he didn't kill anyone."[67]

About an hour and a half into the interview, Davis said, "Maybe I should talk to a lawyer."[68] The agents then ceased questioning Davis about the murder. One of the agents who testified at trial stated:

> [At that point we] made it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, 'No, I'm not asking for a lawyer,' and then he continued on, and said, 'No, I don't want a lawyer.'[69]

Following a short break, the agents briefly reminded Davis of his rights and resumed questioning.[70] About an hour later, Davis said, "I think I want a lawyer before I say anything else."[71] The agents then ceased the interrogation.[72]

B. Lower Court Decisions

At his general court-martial, Davis moved to suppress statements he had made during the November 4 interview.[73] The military judge denied his motion, holding that Davis's mention of a lawyer was "not in the form of a request for counsel."[74] Davis was convicted of unpremeditated murder, largely based on the results of the interrogation.[75]

> (b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

Uniform Code of Military Justice, art. 31(b), 10 U.S.C. § 831 (1995).

66. *Davis*, 36 M.J. at 339.

67. *Id.*

68. *Id.* at 339-40.

69. *Id.* at 340.

70. *Id.*

71. Davis v. United States, 114 S. Ct. 2350, 2353 (1994).

72. *Id.*

73. *Id.*

74. *Davis*, 36 M.J. at 341.

75. While Davis orally denied killing Shackleford at this interrogation, he did retract an earlier alibi involving his girlfriend and admitted he was at the club "with three other friends." *Id.* at 340. Davis's approved sentence provided for a dishonorable discharge, confinement for life, total forfeiture of pay and allowances, and a reduction in rank to the lowest pay grade. *Id.* at 338; *Davis*, 114 S. Ct. at 2353.

In 1991, the Court of Military Review affirmed the findings and sentence.[76] The United States Court of Military Appeals also affirmed[77] after finding that the agents had correctly clarified Davis's statement, "Maybe I should talk to a lawyer," and he had not, in fact, invoked his right to counsel at that point in the interrogation.[78] The United States Supreme Court granted certiorari, and affirmed the judgment in a five to four decision.[79]

C. The United States Supreme Court Opinions

1. Justice O'Connor's Plurality Decision

Five members of the Court,[80] in an opinion authored by Justice O'Connor, affirmed the decision of the U.S. Court of Military Appeals.[81] In the plurality opinion,[82] the Court went even further than the lower court and held that police are under no obligation to either terminate the interrogation or to clarify the suspect's statement unless a suspect unambiguously and unequivocally requests an attorney.[83]

The plurality began its analysis with a review of the three different approaches used by lower courts in considering a suspect's ambiguous or equivocal request for counsel.[84] It then provided a brief overview of post-*Miranda* case law, highlighting the safeguards established since *Miranda* to ensure that a suspect, having invoked counsel, was protected from further interrogation.[85] The Court emphasized, however, that the "'rigid' prophylactic rule"[86] of *Edwards* applied only when a suspect had "clearly asserted"[87] the right to counsel, and ambiguous invocations did not trigger the protection of the *Edwards* rule.[88] A suspect was required to request counsel "sufficiently clearly that a reasonable police officer in the circumstances would understand

76. *See Davis*, 36 M.J. at 338.
77. *Id.* at 341.
78. *Id.* at 342.
79. *Davis*, 114 S. Ct. at 2359 (the Court unanimously affirmed the lower court's ruling, but four of the concurring justices did not endorse the threshold-of-clarity standard).
80. Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Thomas joined the opinion. Justice Scalia also filed a concurring opinion.
81. *Davis*, 114 S. Ct. at 2357.
82. Although Justice Scalia constituted the fifth justice to join in this decision, the rationale in his concurring opinion differs significantly from that of Justice O'Connor's opinion.
83. *Davis*, 114 S. Ct. at 2356.
84. *Id.* at 2353; *see supra* notes 11-15 and accompanying text.
85. *Davis*, 114 S. Ct. at 2354-55.
86. *Id.* at 2355 (quoting Fare v. Michael C., 442 U.S. 707, 719 (1979)).
87. Edwards v. Arizona, 451 U.S. 477, 485 (1981).
88. *Davis*, 114 S. Ct. at 2355.

the statement to be a request for an attorney."[89] Hence, the plurality declined the "invitation to extend *Edwards*."[90]

The plurality noted the disadvantaged position of suspects who, because of "fear, intimidation, lack of linguistic skills, or a variety of other reasons," would fail to utilize clear language in requesting an attorney.[91] Notwithstanding this, they felt the "primary protection" offered these suspects was the *Miranda* warnings themselves, concluding that a knowing and voluntary waiver[92] of these rights was an indication of a suspect's willingness to remain unassisted during interrogation.[93] The justices rationalized their decision with the need for effective law enforcement, or as Justice O'Connor described it, "the other side of the *Miranda* equation."[94] They feared the easy application of the *Edwards* rule would be lost if police were required to cease questioning upon an ambiguous invocation of counsel.[95] Further, the plurality declined to adopt the clarification standard, stating that while it would be good practice for police to clarify an ambiguous statement, they were under no obligation to do so.[96]

2. *Justice Scalia's Concurring Opinion*[97]

Justice Scalia focused his opinion upon a wholly separate issue, namely, section 3501 of title 18 of the United States Code, a statute governing the admissibility of confessions in federal prosecutions.[98] Congress added this provision as part of the Omnibus Crime Control and Safe Streets Act of 1968 in response to intense opposition to the *Miranda* ruling.[99] Although the statute is rarely raised by the U.S. Department of Justice in cases involving confessions,[100] and successive

89. *Id.*

90. *Id.*

91. *Id.* at 2356.

92. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (holding waiver is an "intentional relinquishment or abandonment of a known right or privilege").

93. *Davis*, 114 S. Ct. at 2356.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Davis*, 114 S. Ct. at 2357 (Scalia, J., concurring). The issues raised by Justice Scalia's concurrence, while interesting, are beyond the scope of this Comment.

98. *Id.* at 2357.

99. Omnibus Crime Control and Safe Streets Act of 1968, tit. II, 18 U.S.C. § 3501(a) (1995).

100. The U.S. Department of Justice is perhaps motivated by the likely unconstitutionality of the provision if applied to confessions. LIVA BAKER, MIRANDA: Crime, Law and Politics 207 (1983).

administrations have been steadfast in their refusal to enforce it,[101] Justice Scalia argued that the time has come for the statute to receive the attention it is due.[102]

Section 3501(b) sets forth a "totality of the circumstances" test which allows a trial judge to look at "all the circumstances surrounding the giving of the confession" to determine whether it was voluntarily given.[103] Under this statute, the failure to advise the suspect of the right to silence and right to counsel may not be fatal to the admissibility of the confession if the trial judge finds the remaining circumstances indicate the confession was voluntarily given.[104]

By eliminating the rebuttable presumption created in *Miranda*,[105] the provision is effectively a legislative overruling of the landmark decision. Justice Scalia noted that for most of this century, a case-by-case determination of voluntariness was the key to admissibility of confessions.[106] Section 3501 would reinstate this case-by-case determination of voluntariness, substituting the judgment of Congress for that of the Court.

The congressional provision gives rise to many uncertainties—whether Congress should be able to legislatively overrule Court decisions,[107] the desired breadth of prosecutorial discretion, and even the meaning or constitutionality of section 3501. Notwithstanding these debates, Justice Scalia argued since the statute is on the books, as federal judges, "[w]e shirk our duty if we systematically disregard that statutory command simply because the Justice Department declines to remind us of it."[108] He served notice that he would apply the statute to the next case before the Court which comes within the terms of section 3501.[109]

---

101. The Johnson Administration was the first of successive administrations to instruct federal law enforcement agencies (the only entities to which title II is applicable) to ignore the statute. *Id.* It was felt that if the Court held section 3501 unconstitutional, the net effect would be to have more, not fewer, criminals on the streets. *Id.*

102. *Davis*, 114 S. Ct. at 2358 (Scalia, J., concurring).

103. 18 U.S.C. § 3501(b) (1995).

104. *Davis*, 114 S. Ct. at 2357 (Scalia, J., concurring).

105. Miranda v. Arizona, 384 U.S. 436, 467 (1966) (arguing custodial interrogations conducted without the proper safeguards contain inherently compelling pressures that work to undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely).

106. *See Davis*, 114 S. Ct. at 2358 (Scalia, J., concurring).

107. Professor Yale Kamisar discussed the topic of legislative "overruling" of constitutional precedents at the *U.S. Law Week* Constitutional Law Conference, *supra* note 23, at 2235-36.

108. *Davis*, 114 S. Ct. at 2358 (Scalia, J., concurring).

109. *Id.*

3. Justice Souter's Concurring Opinion[110]

In his concurring opinion, joined by three other justices,[111] Justice Souter agreed with the majority that the agents did not overstep their bounds in asking clarifying questions about Davis's statement and therefore concurred in affirming Davis's conviction.[112] The opinion rejected, however, the conclusion that the agents had no legal obligation to discern what Davis meant through his ambiguous reference to counsel.[113]

Justice Souter pointed to the Court's own precedent, a majority of lower courts, and a large body of law enforcement officials, all of whom argue to the contrary.[114] In the interests of fairness and practicality, law enforcement officials should cease interrogation and attempt to determine what a suspect means by an ambiguous reference to counsel.[115]

To establish the groundwork, Justice Souter set forth two widely accepted principles inherent in the relationship between police and suspects in a custodial interrogation: (1) *Miranda* exists to ensure the suspect receives a fair opportunity to choose whether to remain silent throughout the interrogation process; and (2) *Miranda* must remain consistent with practical realities of the real world.[116] According to Justice Souter, the clarification approach fulfills both of these goals.[117] It assures that the suspect's wishes will be honored by the police, deals with real-world misunderstandings that occur during the interrogation process, and acknowledges the limited ability of both the police and courts to apply "fine distinctions and intricate rules."[118]

The opinion then proceeded to test the plurality's approach against these same two principles and concluded it "does not fare so well."[119] Justice Souter noted that fear, intimidation, linguistic inabilities, and ignorance are all prevalent characteristics of criminal suspects in custody.[120] Given these factors, the Court had in the past

110. *Id.* at 2358.
111. Justices Blackmun, Stevens, and Ginsburg joined this opinion.
112. *Davis*, 114 S. Ct. at 2359 (Souter, J., concurring).
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 2360-61.

been disinclined to require precision or clarity, but rather gave the suspect the benefit of the doubt when requesting counsel.[121]

Justice Souter also refuted the distinction between invocations made before and after an initial waiver of *Miranda* rights.[122] He pointed out that the goal of *Miranda* itself was to provide suspects with a "continuous opportunity" to exercise their rights "in any manner and at any stage."[123] Such language clearly contradicts the notion that *Miranda* rights should be more difficult to reinvoke once initially waived and the suspect should bear the burden of showing an unequivocal reinvocation was made.[124]

Quoting language from *Miranda*,[125] Justice Souter further argued that *Miranda* warnings cannot, in and of themselves, be relied upon to counteract the inherently coercive atmosphere of a custodial interrogation.[126] He pointed out that the plurality's approach creates a situation in which suspects will feel increasingly desperate as their wishes, albeit ambiguously expressed, are ignored by the interrogators.[127] The *Miranda* warnings are empty words to suspects who "may well see further objection as futile and confession (true or not) as the only way to end his interrogation."[128]

Justice Souter contested the plurality's assertion that the threshold-of-clarity approach furthers the strong societal interest in effective law enforcement.[129] Although lost confessions do exact a price from society, Justice Souter stated, "it is [a price] that *Miranda* itself determined should be borne."[130] He also questioned the "ease of application" claimed by the plurality's approach, asserting that the threshold-of-clarity standard leaves "'difficult judgment calls'" to law enforcement officials instead of the suspect—arguably the most competent party to resolve the ambiguity.[131]

121. *Id.* at 2361 (citing Michigan v. Jackson, 475 U.S. 625, 633 (1986); Connecticut v. Barrett, 479 U.S. 523, 529 (1987); Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Oregon v. Bradshaw, 462 U.S. 1039, 1051 (1983) (Powell, J., concurring); Minnick v. Mississippi, 498 U.S. 146, 160 (1990) (Scalia, J., dissenting)).

122. *Id.*

123. *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 444-45 (1966)).

124. *Id.*

125. *Miranda*, 384 U.S. at 469 ("A once-stated warning, delivered by those who will conduct the interrogation cannot itself suffice . . . [to] assure that the . . . right to choose between silence and speech remains unfettered throughout the interrogation process.").

126. *Davis*, 114 S. Ct. at 2361-62 (Souter, J., concurring).

127. *Id.*

128. *Id.* at 2362.

129. *Id.* at 2363.

130. *Id.*

131. *Id.* (quoting *Davis*, 114 S. Ct. at 2356).

Despite *Miranda*'s support for the per se invocation approach, requiring an end to interrogation upon even an ambiguous request for counsel, Justice Souter stopped short of endorsing that position.[132] He acknowledged that clarifying questions can be used to badger a suspect into rescinding an earlier invocation.[133] However, he found the per se invocation approach inconsistent with *Miranda* case law in that "the strong bias in favor of individual choice may also be disserved by stopping questioning when a suspect wants it to continue (but where his statement might be understood otherwise)."[134] In other words, the danger of the per se invocation approach is that even suspects who wish to cooperate with the police and offer a confession might inadvertently terminate the interrogation with an ambiguous request for counsel. The societal costs in this scenario would be even more difficult to bear, according to Justice Souter.[135]

Justice Souter concluded his opinion with the hope that "trial courts will apply today's ruling sensibly (without requiring criminal suspects to speak with the discrimination of an Oxford don)"[136] and interrogators will follow the "good police practice" of clarifying ambiguous requests for counsel.[137]

III. A Critique of *Davis*: Police Efficiency in Exchange for Suspects' Rights

A. *Miranda* Rights after *Davis*

From the outset, the plurality opinion makes it plain that *Miranda* rights are not constitutionally decreed, but rather are judicially created procedural safeguards.[138] The tenor of this proposition makes it clear that the plurality does not regard the *Miranda* protections as sacred and is, in fact, averse to the idea of providing protections over and above what has already been granted.

In view of the prior case law, the Court's plurality decision is not entirely surprising.[139] In cases following *Miranda*, the Court provided

132. *Id.*
133. *Id.*
134. *Id.* at 2364.
135. *Id.*
136. *Id.*
137. *Id.* (quoting *Davis*, 114 S. Ct. at 2356).
138. *Id.* at 2354.
139. Many court watchers predicted this outcome. *See, e.g.*, Clapp, *supra* note 1, at 519.

affirmative protection only to suspects who had crossed the *Edwards* threshold by clearly asserting their right to counsel.[140]

In the very first sentence of the opinion, the *Davis* plurality disregards the "in any manner and at any stage"[141] language of *Miranda*, instead substituting the "clearly assert[s]"[142] language of *Edwards* as the basis for determining whether a suspect has indeed invoked the right to counsel.[143] This sets the tone for the rest of the opinion, which effectively ignores the original language and rationale of *Miranda*.[144]

In fact, it is *Edwards*, rather than *Miranda*, that serves as the beginning, middle, and end of the plurality's analysis. The plurality frames the issue within the *Edwards* context,[145] thereby implying that an invocation insufficiently clear to trigger the *Edwards* protection should trigger no protection at all. The plurality makes the exacting standard in *Edwards* the yardstick by which all suspect requests are to be measured.

The opinion provides a detailed explanation of the plurality's refusal to "extend *Edwards*" by requiring police officers to cease interrogation immediately upon an ambiguous reference to counsel.[146] While this explanation does address the plurality's rejection of the per se invocation approach, it fails to explain why the plurality chooses the other extreme of the spectrum, the threshold-of-clarity approach. In fact, the plurality never explains its rejection of the clarification approach—the approach most widely accepted by courts and law enforcement officials.[147]

Relying on *Edwards*, the Court's primary concern was the clarity with which a suspect invoked his or her right, expecting a suspect under interrogation to "clearly assert" a request for counsel.[148] Not only does this place an unacceptably high emphasis upon subtle lin-

140. *See supra* notes 53-56 and accompanying text. The Court reaffirmed this in *Smith v. Illinois*, stating, "Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease." 469 U.S. 91, 98 (1984).

141. Miranda v. Arizona, 384 U.S. 436, 444-45 (1966).

142. Edwards v. Arizona, 451 U.S. 477, 485 (1981).

143. *Davis*, 114 S. Ct. at 2352.

144. *Id.* at 2360-61 (Souter, J., concurring); *see also supra* notes 41-42 and accompanying text.

145. According to Justice O'Connor, the question presented was "how law enforcement officers should respond when a suspect makes a reference to counsel that is insufficiently clear to invoke the *Edwards* prohibition on further questioning." *Id.* at 2352.

146. *Id.* at 2355.

147. *See supra* note 18.

148. *Davis*, 114 S. Ct. at 2355.

guistic differences, it also creates a greater burden for suspects in circumstances in which they are least able or likely to satisfy it.

Furthermore, the effect is to make *Miranda* rights easier to waive than to assert. A waiver may be inferred from the aggregate of a suspect's words and actions,[149] while an invocation must be clearly and unequivocally asserted. In other words, a waiver need not be expressly stated, but an invocation requires a direct and explicit statement. During arguments before the Court, counsel for Respondent, David Jonas, compared this to a swinging door leading to the right to counsel: a suspect would have to push hard on the door to gain entry and obtain counsel, whereas to waive the right, all he would have to do was touch it lightly and it flew open.[150] This outcome is incompatible with the underpinnings of *Miranda* and, most importantly, the spirit of the Fifth Amendment.

B. *Davis* Ignores Cultural and Sociolinguistic Differences

The decision in *Davis* will have the greatest negative impact upon those suspects who are most in need of *Miranda* protections. The plurality and the concurring opinions both acknowledge that certain groups, including women and ethnic minorities, will feel the brunt of the decision to adopt the threshold-of-clarity approach.[151] Due to cultural and sociolinguistic differences, these groups of suspects utilize ambiguous or equivocal language more often than other suspects, even in contexts in which they are trying to express a firm desire or imperative. Groups with a pronounced use of indirect or hedged speech patterns include, inter alia, women,[152] African-Americans,[153] and suspects who speak Arabic, Farsi,[154] Yiddish, Japanese, Indonesian, and Greek.[155] With regard to foreign cultures in the United

149. North Carolina v. Butler, 441 U.S. 369 (1979).

150. *Arguments Before the Court*, *supra* note 20, at 3681-82.

151. *Davis*, 114 S. Ct. at 2356; *id.* at 2361 n.4 (Souter, J., concurring).

152. *See* Ainsworth, *supra* note 10 at 271 (citing ROBIN LAKOFF, LANGUAGE AND WOMAN'S PLACE (1975) and Janet Holmes, *'Women's Language': A Functional Approach*, 24 GEN. LINGUISTICS 149 (1984)).

153. *See* Ainsworth, *supra* note 10 at 318 (citing Thurmon Garner, *Cooperative Communication Strategies: Observations in a Black Community*, 14 J. BLACK STUD. 233, 234-48 (1983) and GENEVA SMITHERMAN, TALKIN AND TESTIFYIN: THE LANGUAGE OF BLACK AMERICA (1977)).

154. As a first generation Iranian-American, I find the predominant use of Farsi in our home and my general cultural upbringing have infused my English with heightened politeness and deference, which could conceivably be misunderstood as ambiguity.

155. *See generally* JOHN J. GUMPERZ & JENNY COOK-GUMPERZ, LANGUAGE AND SOCIAL IDENTITY (John J. Gumperz ed., 1982).

States, this pattern of speech is often passed on to second, third, and even fourth generation members.[156]

Professor Janet Ainsworth has argued that due to an overall sense of powerlessness, certain segments of the population tend to use indirect and equivocal speech patterns.[157] The five main characteristics of this speech pattern are: hedges, tag questions, modal verbs, avoidance of imperatives, and rising intonations.[158]

Hedges are expressions such as "kind of," "sort of," "I think," "I guess," "maybe," or "perhaps," which soften or undercut an assertion.[159] Ainsworth's example of the use of tag questions is, "I should see a lawyer, shouldn't I?" rather than "I should see a lawyer."[160] Modal verbs consist of verbs such as "may," "might," "could," "ought," "should," or "must," which are similar to hedges in undercutting the assertiveness of a statement.[161] An absence of imperatives is illustrated by the contrast between "If you don't mind, would you call my lawyer?" and "Call my lawyer."[162] The final characteristic common to these groups is the use of a rising intonation when making a declarative statement, even though rising intonations are ordinarily used to indicate a question; compare the meaning of "I need a lawyer" and "I need a lawyer?"[163] While Ainsworth acknowledges that not all members of these groups share these characteristics, there is enough sociolinguistic research to demonstrate that powerless sectors of society do speak in registers other than the "standard" white male middle-class pattern.[164]

Further aggravating matters, these suspects' sense of powerlessness is heightened by the fear and intimidation inherent in custodial interrogations.[165] Tactics such as isolation of suspects, relentless and repetitive questioning, "good cop/bad cop" routines, and the creation of an atmosphere of domination are encouraged in police training

156. DEBORAH TANNEN, *Ethnic Style in Male-Female Conversation*, *in* GUMPERZ & COOK-GUMPERZ, *supra* note 155, at 223-30.

157. *See generally* Ainsworth, *supra* note 10.

158. For a lucid and in-depth look at this speech pattern and its effect on suspects' rights, see *id.* at 275-82.

159. *Id.* at 276.

160. *Id.* at 277-78.

161. *Id.* at 280.

162. *Id.* at 281.

163. *Id.* at 282.

164. *Id.* at 263.

165. *Id.* at 287.

manuals to effectuate interrogations successful in gaining confessions.[166]

In jurisdictions applying the threshold-of-clarity approach, requests for a lawyer voiced in this register were repeatedly found to have failed to invoke the right to counsel. Statements found inadequate to invoke counsel almost invariably included the use of lexical hedges, tag questions, and other modes of expression associated with this register.[167]

By requiring "a clear assertion"[168] to invoke counsel, *Davis* ensures that it will be more difficult for this sector of society to invoke their rights during interrogation, even when they truly desire the assistance of an attorney.[169] The *Davis* decision knowingly furthers "the incorporation of unconscious androcentric assumptions into legal doctrine"[170] to the detriment of nonwhite, nonmale sectors of society.

In addition, the plurality ignores the damaging psychological effects the threshold-of-clarity approach can have on these suspects.[171] More important than just an abstract knowledge of one's rights is the recognition that police are prepared to honor those rights. If a suspect speaking in an indirect register voices a request in what she or he believes to be an imperative (but in fact is in ambiguous terms), and the request is completely disregarded by the police, the suspect may become convinced her or his rights and wishes are being systematically ignored by the interrogators. A sense of desperation may ensue, in which the suspect believes the only way to end the interrogation is to

166. FRED INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 24 (3d ed. 1986), *quoted in* Davis v. United States, 114 S. Ct. 2350, 2361 n.4 (1994) (Souter, J., concurring).

167. *See, e.g.*, State v. Campbell, 367 N.W.2d 454, 459 (Minn. 1985) ("[I]f I'm going to be charged with murder *maybe* I should talk to an attorney.") (emphasis added); People v. Kendricks, 459 N.E.2d 1137, 1139 (Ill. 1984) ("You know, *I kind of think* I know [sic] a lawyer, don't I?" or "*I think I might* need a lawyer.") (emphasis added); Bunch v. Commonwealth, 304 S.E.2d 271, 275 (Va. 1983) (Suspect said he "'*felt* like he *might* want to talk to a lawyer.'") (emphasis added); State v. Moorman, 744 P.2d 679, 685 (Ariz. 1987) ("*I wonder* if I need an attorney.") (emphasis added); State v. Johnson, 318 N.W.2d 417, 430 (Iowa 1982) ("*Should* I have my lawyer here?") (emphasis added).

168. *Davis*, 114 S. Ct. at 2356.

169. For federal and state cases following *Davis* that exhibit this phenomenon, see section IV, *infra*.

170. Ainsworth, *supra* note 10, at 261.

171. This point is noted in Justice Souter's concurring opinion, wherein he states, "When a suspect understands his (expressed) wishes to have been ignored . . . in contravention of the 'rights' just read to him by his interrogator, he may well see further objection as futile and confession (true or not) as the only way to end his interrogation." *Davis*, 114 S. Ct. at 2362 (Souter, J., concurring); *see also id.* at 2361 n.4 (Souter, J., concurring).

confess to the crime.[172] It is precisely this sense of desperation which most often leads to false confessions and compelled self-incrimination, the very ills proscribed by the Fifth Amendment and against which the *Miranda* Court strove to protect.

The plurality regards the *Miranda* warnings themselves as the "primary protection" for these disadvantaged suspects.[173] They contend that once a suspect's rights have been read and waived, the suspect has "indicated his [or her] willingness to deal with the police unassisted."[174] Hence, once there has been a knowing and intelligent waiver of *Miranda* rights, the burden for reinvoking them lies with the suspect, requiring a clear and unequivocal request for counsel.[175]

First, the plurality assumes that *Miranda* warnings, read once by the interrogators, are sufficient to ensure the suspect has fully understood his or her rights.[176] This is a deeply flawed and misleading assumption. The pervasive presence of the *Miranda* warnings in the mass media has overfamiliarized the public with the warnings, rendering them rote and ineffective. Many suspects, having heard the warnings, still do not understand that they may remain silent without incriminating themselves[177] or have the right to an attorney not just at court but also *during* the interrogation.[178] Given that a voluntary

172. *See, e.g.*, Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 407 (1992). The court uncovered a detailed police task force plan to systematically ignore suspects' requests for counsel, aiming to induce hopelessness and extract confessions which could later be used to impeach suspects and keep them off the witness stand. *Id.* at 1225.

173. *Davis*, 114 S. Ct. at 2356.

174. *Id.* It is relevant to note that police training manuals often recommend that officers downplay the *Miranda* warnings to decrease the possibility of suspects invoking their rights. *See, e.g.*, JOHN M. MACDONALD & DAVID L. MICHAUD, INTERROGATION AND CRIMINAL PROFILES FOR POLICE OFFICERS 17 (1987) ("Do not make a big issue of advising the suspect of his rights. Do it quickly, do it briefly, and do not repeat it."); *see also supra* note 49 and accompanying text; *infra* note 186.

175. *Davis*, 114 S. Ct. at 2356.

176. After stating that the warnings are a suspect's primary protection, the plurality cites *Moran v. Burbine* for the proposition that, "[f]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process." 475 U.S. 412, 427 (1986), *quoted in Davis*, 114 S. Ct. at 2356.

177. This belief is furthered by police statements which imply that cooperation would be in the suspect's best interests, or conversely, that invocation of counsel is *not* in the suspect's interest. *See, e.g.*, Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979). Officers in *Thompson* advised the suspect that "'if he waited and talked to an attorney, the first thing the attorney would tell him is not to say anything and that if he had anything he thought we should know, that he should go ahead and tell us.'" *Id.* at 770 n.2.

178. *See also* CHARLES J. OGLETREE, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826 (1987). Professor Ogletree states:

waiver ordinarily requires an "intentional relinquishment or abandonment of a *known right* or privilege,"[179] waivers obtained from these suspects are of questionable validity.

Second, the police are asked to play conflicting roles during the interrogation process. They are to assume the role of an advocate in reading suspects their rights and ensuring they are understood. At the same time, they are law enforcement officers interrogating the suspect in an attempt to elicit incriminating statements. It is difficult, if not impossible, for officers to adequately play both these roles. Given that their objective is to obtain a confession, the police have little interest in clearly explaining a suspect's rights, dispelling any misconceptions a suspect may have about these rights, or ensuring a knowing and intelligent waiver.

Third, the distinction between a prewaiver invocation and a postwaiver invocation is clearly inconsistent with *Miranda*. The *Davis* plurality fails to take into account the *Miranda* Court's intention to create rights that persist throughout the interrogation process and provide a "continuous opportunity" for the suspect to exercise his or her rights "at any stage," including after an initial waiver.[180]

Suspects might waive their rights initially to remain cooperative with the police, but may want to reinvoke their rights later in the interrogation as the questioning becomes more intense and they feel themselves being incriminated. Placing a higher affirmative duty upon a suspect when reinvoking is not only inconsistent with *Miranda*, but is also in effect punishing the suspect for having cooperated with police questioning in its initial phase. Suspects have no incentive to cooperate with the police and waive their rights initially, especially if their own waivers will make it more difficult for them to exercise their rights to silence or counsel later in the interrogation. Furthermore,

> My own experience as a public defender has been that many suspects make statements during the process of police interrogation and are surprised to learn thereafter that they had a constitutional right to remain silent or to have an attorney present during questioning. This pattern suggests that *Miranda* warnings as currently delivered by the police are not an effective means of informing suspects both of the existence and extent of their privilege against self-incrimination and of their right to consult with counsel before they make any statements.

Id. at 1827-28.

179. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (emphasis added).

180. Miranda v. Arizona, 384 U.S. 436, 444-45 (1966). The *Miranda* Court emphasized this point several times in the opinion. The Court asserted the *Miranda* safeguards existed "to assure that the individual's right to choose between silence and speech *remains unfettered throughout the interrogation process.*" *Id.* at 469 (emphasis added). Later, the Court repeated: "Opportunity to exercise these rights must be afforded to [the suspect] *throughout the interrogation.*" *Id.* at 479 (emphasis added).

this higher affirmative duty makes *Miranda* protections difficult to invoke precisely at the stage of the interrogation when a suspect's Fifth Amendment rights are most likely to be violated through compelled self-incrimination.

C. Clear or Ambiguous?: Uncertainties Ccreated by Davis

The plurality rejects the per se invocation approach for fear of losing the "clarity and ease of application" of the *Edwards* rule.[181] The concern for clarity and ease of application, however, remains unabated after the *Davis* decision since the opinion fails to adequately distinguish clear requests for counsel from ambiguous ones. The opinion merely states: "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning."[182] Alternatively, the opinion states, "[the suspect] must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."[183]

Neither of these descriptions provides a solid basis for distinguishing between statements. Officers are still left with "difficult judgment calls"[184] in determining whether a statement is clear or ambiguous. Imagine a suspect says, "I believe I want an attorney." Is this a clear invocation of counsel? Is the statement, "I think I want an attorney," more or less clear? What if a suspect asks, "May I have an attorney?" Is this ambiguous because of its query form?[185] These are the kinds of decisions that will be made by law enforcement officers during interrogations. Inevitably, the determination of whether an invocation is sufficiently clear will hinge on fine linguistic differences

181. *Davis*, 114 S. Ct. at 2356.

182. *Id.* at 2355.

183. *Id.*

184. *Id.* at 2356. Even courts are often nonplussed by these decisions. In deciding whether the suspect had invoked his right to silence through the "ambiguous" words "I can't say nothing," a district court following *Davis* characterized it as a "close call." United States v. Sanchez, 866 F. Supp. 1542, 1559 (D. Kan. 1994). The court opted to believe the officer's interpretation of the statement as a fear of reprisal from cohorts rather than an invocation of the right to silence. *Id.*

185. In fact, this type of politeness can be and has been misconstrued as ambiguity following the *Davis* decision. *See, e.g.*, Ledbetter v. Edwards, 35 F.3d 1062, 1070 (6th Cir. 1994) (finding suspect's statement that "it would be nice" to have an attorney to be ambiguous and insufficient to invoke the right to counsel).

and subjective understandings, reducing the suspect's Fifth Amendment rights to mere semantics.[186]

Perhaps the most troubling aspect of the threshold-of-clarity approach is that it leaves the fox guarding the henhouse. The police have little incentive to find that a statement was a clear invocation of rights. Given even the barest hint of an ambiguity, the police are prone to press on with the questioning rather than cease interrogation and risk losing a confession. Therefore, conferring upon the interrogating officer the power to decide when a clear invocation has been made is tantamount to eliminating a suspect's rights. Moreover, once the determination is made, suspects realistically have little recourse. Considering the frequent propensity of courts to defer to an officer's decision, suspects will most often lose any "swearing matches" before the court.[187]

The plurality's approach is unsound for two reasons: first, it leaves this difficult determination to a police officer rather than the suspects themselves, who are arguably most qualified to decide what they meant by their statements; and second, it unrealistically requires the utmost linguistic care from criminal suspects, rather than according them the broad leeway they need to assert themselves in the fearful and intimidating atmosphere of a custodial interrogation.[188]

186. Note the double standard: suspects must assert their right to counsel clearly and unequivocally, while the police are given wide latitude and may issue the *Miranda* warnings in vague and inexact forms. *See* Duckworth v. Eagan, 492 U.S. 195 (1989). This is particularly disturbing given the plurality's assertion in *Davis* that "the primary protection afforded suspects . . . is the *Miranda* warnings themselves." *Davis*, 114 S. Ct. at 2356; *see supra* note 49 and accompanying text. *But see* Commonwealth v. Miranda, 641 N.E.2d 139, 140 (Mass. App. Ct. 1994) (citing *Davis* for the proposition that the primary protection afforded suspects was the *Miranda* warnings themselves, and setting aside a verdict due to inadequate recitation of the warnings by the officer involved).

187. *See, e.g.*, People v. Krueger, 412 N.E.2d 537 (Ill. 1980). While questioning a suspect about several burglaries, officers began asking him about a stabbing death, at which point the suspect said, "Wait a minute. Maybe I ought to have an attorney. You guys are trying to pin a murder rap on me, give me 20 to 40 years." *Id.* at 538. The officers did not cease interrogation or provide him with an attorney. None of the interrogating officers believed this statement to be a request for counsel and the Illinois Supreme Court accepted their judgment, stating, "the officers must be allowed to exercise their judgment in determining whether a suspect has requested counsel." *Id.* at 540; *see also* State v. Kekona, 886 P.2d 740 (Haw. 1994). In *Kekona*, the suspect claimed he had said, "I no like talk no more [sic]" prior to his confession, thus invoking his right to silence. *Id.* at 744. The officers denied he had made such a statement. *Id.* The interrogation was not tape recorded despite the presence of such equipment in the station. *Id.* at 747. The Supreme Court of Hawaii sided with the officers despite their failure to record the interrogation. *Id.* at 743. Furthermore, they overlooked the fact that the suspect had a learning disability and the equivalent of a fourth grade education. *Id.*

188. *See supra* notes 120-121 and accompanying text.

D. Public Policy Arguments Underlying *Davis*

The decision in *Davis* represents a fork in the road in many ways. In determining the level of clarity with which a suspect must voice his or her request for counsel, the Court essentially decided the breadth with which *Miranda* and *Edwards* would apply, and which suspects would benefit from their protection. The Court also chose between the competing interests of the suspect's right to have counsel present during interrogation and the desire for police efficiency.

Underlying the decision in *Davis* is the implicit suggestion that the involvement of an attorney in the interrogation process may "unduly hamper[ ] the gathering of information."[189] This notion is disturbing and clearly at odds with prior Supreme Court jurisprudence regarding the role of lawyers in the criminal justice system.[190]

In *Escobedo v. Illinois*, the Court stated, "No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, [his constitutional] rights."[191] To seek to remove the presence of counsel for fear it might hamper police investigation is to ignore the constitutional boundaries within which the police are required to conduct their investigation. While concern for law enforcement effectiveness is legitimate, and lost confessions do exact a price from society, the price is one which the *Miranda* Court decreed should be paid to ensure certain constitutional rights.[192]

The *Miranda* Court felt strongly about the role of counsel during the interrogation process, and concluded lawyers are present to protect the rights of their clients, not to hamper police investigation.[193] The Court stated that "[i]n doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement."[194]

---

189. *Davis*, 114 S. Ct. at 2356.

190. *See, e.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964) (disallowing confession obtained in police station house inadmissible due to deprivation of the right to counsel). *But see* Moran v. Burbine, 475 U.S. 412 (1986) (suspect's waiver of rights effective even though police declined to tell him of counsel retained for him and prevented counsel from seeing her client); *supra* notes 50-52 and accompanying text. For analysis of the Court's decision in *Moran*, see Laura Antonelli, Note, Moran v. Burbine: *The Decline of Defense Counsel's "Vital" Role in the Criminal Justice System*, 36 CATH. U. L. REV. 253 (1986).

191. *Escobedo*, 378 U.S. at 490.

192. *Davis*, 114 S. Ct. at 2363 (Souter, J., concurring).

193. *Miranda*, 384 U.S. at 479-82. The Court stated that "[i]n fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution." *Id.* at 481.

194. *Id.* at 480.

The *Davis* Court preferred "the other side of the *Miranda* equation: the need for effective law enforcement."[195] The furthering of police efficiency, however, should not necessitate the denial of suspects' rights or the exclusion of attorneys from the interrogation process. A reluctance to provide lawyers during the interrogation process does not further the desire for police efficiency as much as it suggests dissatisfaction with the Fifth Amendment itself.

Much more is at stake than simply the sanctity of the right to counsel during interrogation. At the core of *Davis* is a willingness to accept possibly involuntary confessions and compelled self-incrimination. In its quest to further police efficiency, the Court has overlooked the very real prospect of convictions, with the attendant loss of liberty or even life, based upon unreliable confessions.

IV. The Scope and Effect of the *Davis* Decision

While a seemingly narrow decision, the impact of *Davis* is being felt in a much wider context. In federal and state courts, *Davis* is being cited to undercut suspects' *Miranda* rights during the interrogation process, both with respect to the right to counsel and the right to silence.

A. Federal Courts and *Davis*

1. Davis and the Right to Counsel

The exacting standard of invocation set forth by *Davis* is having a clear impact on the outcome of federal cases dealing with the right to counsel during interrogation. The Sixth Circuit concluded in *Ledbetter v. Edwards* that the suspect's statement "it would be nice" to have an attorney was more ambiguous than that in *Davis* and therefore, insufficient to invoke counsel.[196] Under *Davis*, the suspect's politeness was interpreted as ambiguity, thereby depriving him of his right to counsel. The *Ledbetter* court ignored that the three hour interrogation took place after midnight and involved trickery and misrepresentations, such as false witness and fingerprint identifications.[197]

195. *Davis*, 114 S. Ct. at 2356.

196. 35 F.3d 1062, 1069-70 (6th Cir. 1994).

197. *Id.* at 1065. The interrogation began at 12:25 a.m. and continued for three hours. *Id.* During the interrogation, the suspect was shown two enlarged photographs and a chart supposedly indicating that a fingerprint expert had made a "14 point comparison" between a latent print from the suspect's van and his fingerprint. *Id.* He was falsely told the victim and two witnesses had identified him from a photographic array. *Id.* He was furthered advised the victim was waiting outside the interview room to identify him. *Id.* A female police officer was then positioned in front of a two-way mirror so her silhouette could be

In *Lord v. Duckworth*, the Seventh Circuit applied *Davis* and found the suspect had not clearly invoked counsel, despite the suspect having asked about counsel on two separate occasions, each time receiving uninformative responses from the police.[198] On the first occasion, the suspect stated, "I can't afford a lawyer but is there anyway [sic] I can get one?"[199] Instead of explaining to the suspect that he could have an attorney right away free of charge, the officer simply replied, "Yeah," and nodded his head.[200] The next day, as an officer went to retrieve a tape recorder to record further statements, the suspect asked if he would be able to obtain a lawyer when he went to court.[201] The officers replied that the court had a procedure for appointing lawyers.[202] Throughout this two-day custodial interrogation, it is obvious the suspect did not understand that he could have counsel at any time without charge. Nor did the officers make any attempt to explain this to him. The Seventh Circuit held the suspect's statements "appeared to be in the nature of queries regarding future access to counsel for a court hearing rather than a request for counsel at that time," and thus insufficient to invoke counsel.[203] The court failed to question whether the suspect even understood the nature of his rights and whether the police had a duty to clearly explain them.

Suspects such as these are in a no-win situation after *Davis*. Despite having been read their *Miranda* warnings, they evidently lack understanding of their exact rights. Yet under *Davis*, their questions regarding counsel, being classified as ambiguous invocations, can go unanswered or be completely ignored by the police. Hence, they can neither gain the information they need through their questions, nor can they make a clear invocation of their rights.

Similarly, in a Fifth Circuit case, *United States v. Scurlock*, the suspect stated that she needed a lawyer prior to the taping of her confession.[204] In response, the officer handed her the district attorney's

---

seen by the suspect. *Id.* Officers left the room and then returned to tell the suspect that the victim had positively identified him. *Id.* These tactics are sanctioned by the Court, as long as they do not deprive the suspect of knowledge of his rights and the consequences of waiving them. *See* Moran v. Burbine, 475 U.S. 417 (1986); *see also* Frazier v. Cupp, 394 U.S. 731, 739 (1969) (holding officer's lie to the suspect that his partner had confessed did not make the suspect's statements inadmissible).

198. 29 F.3d 1216 (7th Cir. 1994).

199. *Id.* at 1218.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. 52 F.3d 531, 535-36 (5th Cir. 1995).

business card and suggested that once she had employed a lawyer, the lawyer should contact the district attorney listed on the card.[205] Once again, the court overlooked this wholly inadequate response to a request for counsel, finding that the suspect's queries could be interpreted as a "recognition by the defendant of her need for an attorney in the future if the case reached the indictment stage."[206]

2. *Davis* and the Right to Silence

Since many courts feel the same standard should apply to both the right to silence and the right to counsel, they are extrapolating from *Davis* and narrowing the standard for invocations of the right to silence as well. The Eleventh Circuit in *Coleman v. Singletary* stated:

> Because [the need for a bright-line rule] applies with equal force to the invocation of the right to remain silent, and because we have previously held that the same rule should apply in both contexts, we hold that the *Davis* rule applies to invocations of the right to remain silent.[207]

In *Coleman*, the Eleventh Circuit set aside its previous clarification standard and cited *Davis* to support the proposition that a juvenile suspect's statement during interrogation was insufficiently clear to invoke his right to silence.[208] The following exchange took place *after* a public defender had contacted the interrogating officers and asked them to cease questioning the youth:

> [Officer 1]: And what you're saying, or what you're about to say you're going to do of your own free will; is that correct?
> [Suspect]: Yes. Unless, what about that one guy, though?
> [Officer 1]: What guy?
> [Suspect]: The guy—
> [Officer 2]: Public defender.
> [Suspect]: Yeah.
> [Officer 1]: Okay.
> [Officer 2]: I explained to him what the public defender was—
> [Officer 1]: Okay. Tony, do you feel that you want to have a public defender?
> [Suspect]: I don't know. But if he said to stop it I don't want to do what he said not to do.
> [Officer 1]: All right. Well, do you have any objections to talking to us? . . . If you want to talk to us we'll listen. . . .
> [Suspect]: I guess if that guy thinks it's all right, I don't care.[209]

205. *Id.* at 536.
206. *Id.* at 537.
207. 30 F.3d 1420, 1424 (11th Cir. 1994).
208. *Id.* at 1423-24.
209. *Id.* at 1422-23.

The Eleventh Circuit adopted the *Davis* approach, under which they found the suspect had not clearly invoked his right to silence through the statement, "I don't know. But if he said to stop it, I don't want to do what he said not to do."[210] The dissent argued that in common usage the word "but" usually "qualifies and limits preceding language."[211] Hence, the juvenile's statement was arguably intended to express his desire to remain silent until he knew what his lawyer would advise him to do.[212] The dissent also argued that the suspect, a fifteen-year-old boy, "cannot be expected to speak with the clarity of an average adult."[213]

Likewise, a district court in Kansas found that a suspect's statement, "I can't say nothing," was ambiguous, thus failing to invoke his right to silence.[214] Despite indications that the suspect had not understood the *Miranda* warnings, due to his limited English language skills, the court accepted as "plausible" the officer's interpretation of the statement as a fear of reprisals from cohorts rather than an invocation of his right to silence.[215] These cases demonstrate that *Davis* is having a much broader impact than expected, infringing on suspects' right to silence as well.

B. State Courts and *Davis*

Despite the option to provide greater protections under their respective state constitutions, many state courts have quickly adopted the *Davis* threshhold-of-clarity standard. The Arizona Supreme Court in *State v. Eastlack* found the suspect's statement, "I think I better talk to a lawyer first," to be ambiguous and insufficient to invoke counsel under the *Davis* standard.[216] The suspect's use of the hedge "I think" effectively cost him his right to counsel. The court cited *Davis* and said, "The statement itself was ambiguous, using the

210. *Id.* at 1423-24.

211. *Id.* at 1428 (Johnson, J., dissenting).

212. *Id.*

213. *Id.* at 1429 n.3.

214. United States v. Sanchez, 866 F. Supp. 1542, 1559 (D. Kan. 1994).

215. *Id.* Non-English speaking suspects are particularly vulnerable to misinterpretation when making a request. *See, e.g.,* United States v. De La Jara, 973 F.2d 746, 750-51 (9th Cir. 1992) (noting that Spanish-speaking interpreter, through whom the request for counsel was made, admitted the request could have been misclassified as ambiguous when in fact it was unambiguous).

216. 883 P.2d 999, 1006-07 (Ariz. 1994).

equivocal language 'I think' rather than the language of a clear request."[217]

Just as in federal courts, the invocations put in the form of a question were most often found to be ambiguous by state courts. In *Higgins v. State*, the Supreme Court of Arkansas cited *Davis* in finding a suspect's query, "Do you think I need a lawyer?" to be ambiguous and inadequate to invoke counsel.[218] In *People v. Crittenden*, the Supreme Court of California also used the *Davis* standard, and found the suspect had not invoked his right to counsel through the question, "Did you say I could have a lawyer?"[219] In *State v. Bailey*, the Supreme Court of Kansas followed *Davis* and held that the suspect's question as to whether "he should ask for an attorney at that time" was ambiguous and did not require clarification.[220]

Similarly, in *State v. Panetti*, a Texas appellate court cited *Davis* and found the suspect's question, "Should I be answering these questions without my lawyer, or does it matter, or I mean I—I give up, anyway," to be ambiguous and insufficient to invoke counsel.[221] In doing so, the court reversed its earlier holding in the same case, in which the officer had failed to sufficiently narrow his response to clarifying the request.[222] Following *Davis*, the court stated, "[W]e see no reason to . . . create greater rights on behalf of criminal suspects against the state than the United States Constitution requires."[223] As illustrated by these cases, the *Davis* standard does not require the police to even acknowledge the suspect's question, much less provide an

217. *Id.* at 1007. A concurring justice correctly pointed out that even in the *Davis* case itself, the statement, "I think I want a lawyer before I say anything else," qualified as an unequivocal invocation of counsel and successfully halted the interrogation. *Id.* at 1021 (Kleinschmidt, J., concurring). The justice felt the phrase "I think" in this context was "not, as used by most people, all that ambiguous." *Id.* (Kleinschmidt, J., concurring).

218. 879 S.W.2d 424, 428 (Ark. 1994). The suspect asked this before the interrogation and received the response, "You will have to have one." *Id.* at 425. Again, the court ignored this wholly uninformative and arguably misleading reply by the officer.

219. 885 P.2d 887, 909, 912-13 (Cal. 1994). California courts may not have the option of providing greater protection under the California Constitution. Pursuant to article I, section 28(d) of the California Constitution, added as a result of Proposition 8 in 1981, the California Supreme Court is constricted to the use of federal standards in reviewing defendants' claims. *See id.* at 912. On issues already decided by the United States Supreme Court under the Constitution, Proposition 8 eliminated the "independent state grounds" standard for reviewing claims. Hence, the California Supreme Court is foreclosed from deciding the *Davis* issue independently. *See In re* Lance W., 694 P.2d 744, 752-53 (Cal. 1988).

220. 889 P.2d 738, 745-47 (Kan. 1995) (emphasis omitted).

221. 891 S.W.2d 281, 282, 284 (Tex. Ct. App. 1994).

222. *Id.* at 282.

223. *Id.* at 284.

adequate answer, and allows them to continue their interrogation unhindered.

Similar to federal courts, state courts are also applying the *Davis* standard to the right to silence. The Supreme Court of West Virginia in *State v. Farley* declined to officially adopt the *Davis* approach[224] but stated, "We believe that under *Davis* insubstantial and trivial doubt, reasonably caused by the defendant's ambiguous statements as to whether he wants the interrogation to end, should be resolved in favor of the police."[225] Subsequently, the court found the suspect had failed to invoke his right to silence during interrogation.[226]

The pattern of these decisions confirms the notion that powerless sectors of society are paying the heaviest price. Under *Davis*, invocations found to be ambiguous, and thus ineffective, predictably involved the attributes and speech patterns of the powerless—ignorance of their rights, unassertiveness, over-politeness, timidity, hesitation, distrust and, most often, imperatives expressed in query form. These cases poignantly illustrate that an inability to conform to the Court's exacting linguistic standard could cost suspects their rights to silence and counsel during custodial interrogation.

V. Proposal

While federal courts are bound by *Davis*, state courts remain free to treat the decision as a foundation and provide greater protections under their respective state constitutions.[227] This Comment argues that the threshold-of-clarity and clarification standards do not adequately protect suspects' rights and proposes that states adopt the per se invocation standard as the only approach which is in line with prior jurisprudence and the spirit of the Fifth Amendment itself.

A. Threshold-of-Clarity and Clarification Approaches Are Inadequate to Protect Suspects' Rights

The threshold-of-clarity approach is inconsistent with Supreme Court precedent and the advice of a majority of courts and law en-

224. 452 S.E.2d 50, 59 n.12 (W. Va. 1994).

225. *Id.* at 59.

226. *Id.*

227. *See, e.g.*, State v. Hoey, 881 P.2d 504 (Haw. 1994). The court stated, "[W]e are free to give broader protection under the Hawai'i [sic] Constitution than that given by the federal constitution. . . . [W]e choose to afford our citizens broader protection under . . . the Hawai'i [sic] Constitution than that recognized by the *Davis* majority." *Id.* at 523; *see also supra* note 24. *But see supra* note 219 (regarding California courts, Proposition 8, and the California Constitution).

forcement agencies. This approach will undercut a suspect's Fifth Amendment rights to silence and counsel, and unfairly place a heavier burden upon the suspect in an already intimidating situation.

Similarly, the clarification approach presents new difficulties due to the potential for abuse inherent in the clarifying process.[228] Clarifying questions, ostensibly used to determine the wishes of the suspect, may instead be used to badger the suspect into rescinding what may have been a desire to have counsel. For example, in *Bane v. State*, the following conversation took place while the interrogator was "clarifying" the suspect's statement:

> [Officer]: [I]t's my understanding you don't want to sign the rights form now is that right?
> [Suspect]: Not 'til you know?
> [Officer]: O.K.
> [Suspect]: When I talk to my lawyer I'll.
> [Officer]: O.K. But you don't want a lawyer at this time, is that correct?
> [Suspect]: I will get a lawyer.
> [Officer]: O.K. But you don't want one now is what I'm saying. O.K.?
> [Suspect]: I'd like to have one but you know I [sic] it would be hard to get hold of one right now.
> [Officer]: Well what I am asking you Clayton is do you wish to give me a statement at this time without having a lawyer present?
> [Suspect]: Well I can I can [sic] tell you what I did.
> [Officer]: O.K. that's what, that's what [sic] I'm asking.[229]

This exchange demonstrates how an officer, while ostensibly determining the suspect's wishes, is in fact badgering the suspect and discouraging him from invoking his right to counsel. Despite having been read his *Miranda* rights, the suspect clearly does not understand that a lawyer can be appointed, and the officer makes no attempt to explain the ease with which an attorney may be procured for him at no charge. The Indiana Supreme Court held the suspect had not invoked his right to counsel through this exchange.[230]

Hence, officers can easily discourage the invocation of counsel while seemingly attempting to ascertain the suspect's wishes, thereby transforming a beneficial process into a detrimental one. At that point, the suspect's remedies are few since the officers have followed the correct procedure by "clarifying" the suspect's statement.

228. This problem is acknowledged in Justice Souter's concurring opinion. Davis v. United States, 114 S. Ct. 2350, 2363 (1994) (Souter, J., concurring).

229. 587 N.E.2d 97, 103 (Ind. 1992).

230. *Id.*

A further difficulty with the clarification approach is that officers may use the clarifying process to circumvent *Edwards*. Rather than ending the interrogation upon a clearly asserted invocation of counsel, officers may proceed to "clarify" the statement and, in the process, often persuade the suspect to forego counsel and speak with the police instead.

This phenomenon is poignantly illustrated by a Fifth Circuit case, *Nash v. Estelle*,[231] often cited with approval by courts which have adopted the clarification standard.[232] In *Nash*, the suspect clearly and unequivocally invoked his right to counsel:

> [Suspect]: If I want a lawyer present, I just put down I want him present?
> [Officer]: Please just tell us about it. Any time we are talking and you decide that you need someone else here, you just tell me about it and we will get somebody up here.
> [Suspect]: Well, I don't have the money to hire one, but I would like, you know, to have one appointed.
> [Officer]: You want one to be appointed for you?
> [Suspect]: Yes, sir.[233]

Upon this invocation, the *Edwards* protection should have been triggered and all questioning should have ceased. Nevertheless, the officer continued to question him, albeit in a "clarifying" manner, after which the suspect signed a waiver form.[234] The court found the suspect's invocation of counsel was merely equivocal, properly clarified by the officer.[235] Thus the clarification approach provides an avenue through which officers, backed by the courts, are able to bypass even the bright-line rule of *Edwards*.

One commentator has suggested using the clarification standard supplemented by heightened judicial scrutiny of police behavior.[236] It

231. 597 F.2d 513 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 981 (1979).

232. *See, e.g.*, Towne v. Dugger, 899 F.2d 1104 (11th Cir. 1990); United States v. Fouche, 833 F.2d 1284 (9th Cir. 1987).

233. *Nash*, 597 F.2d at 516-17.

234. *Id.*

235. *Id.* at 517.

236. *See supra* note 23 and accompanying text. A more far-reaching alternative is to have the right to counsel "attach" at the custodial interrogation stage, just as it does at the initiation of adversary criminal proceedings under the Sixth Amendment. United States v. Gouveia, 467 U.S. 180, 188 (1984). Under this "per se bar" approach, any statements obtained without having first afforded the suspect a chance to consult with counsel would be deemed inadmissible. *See generally* Ogletree, *supra* note 178. This concept was originally advocated by the American Civil Liberties Union (ACLU) in their amicus brief in *Miranda*. Brief of the American Civil Liberties Union as Amicus Curiae, *in* LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 701, 727 (Philip B. Kurland & Gerhard Casper eds., 1975). However, the

is argued that this approach can succeed in safeguarding suspects' rights if courts use their judicial oversight to crack down on officers abusing the clarification process.[237] Unfortunately, this type of oversight will once again burden the courts and strain already depleted judicial resources. Furthermore, it will lead to "swearing matches" between suspects and the police which suspects rarely win.[238] Realistically, without an effective system of oversight and discipline, this approach remains unprotective of suspects' *Miranda* rights.

B. The Per Se Invocation Standard

Several basic factors must be kept in mind when deciding which invocation standard to adopt. First, coerciveness and a heightened potential for abuse are inherent in the custodial interrogation process.[239] Second, due to a severe overload of the judicial system, there is a great need for the conservation of judicial resources. Third, in the interests of practical application, a clear standard or bright-line rule is preferable.[240] Finally, any standard adopted must treat all persons equally and ensure that all suspects have a fair opportunity to access their Fifth Amendment rights.

The per se invocation standard pays heed to all of these concerns. It recognizes the coercion inherent in the custodial interrogation process. Accordingly, it grants the suspect the benefit of the doubt, so that any mention of counsel will trigger the suspect's constitutional rights. It furthers the interests of judicial economy, as it is a bright-line rule requiring virtually no guesswork by police officers or courts.[241] Most importantly, this standard ensures all citizens equal access to their Fifth Amendment rights, regardless of their particular attributes or speech patterns. Also, this approach is consistent with

---

Court in *Davis* reiterated its rejection of the suggestion "that each police station must have a 'station house lawyer' present at all times to advise prisoners." Davis v. United States, 114 S. Ct. 2350, 2356 (1994) (quoting Miranda v. Arizona, 384 U.S. 436, 474 (1966)).

237. *See supra* note 23.

238. *See supra* note 187 and accompanying text.

239. This served as the basis for the *Miranda* decision. *Miranda*, 384 U.S. at 444.

240. Chief Justice Rehnquist reminded counsel during oral argument: "This has got to be administered by thousands of trial courts." *Arguments Before the Court*, *supra* note 20, at 3682.

241. In the words of Justice Levinson of the Hawaiian Supreme Court, decisions which overlook misapplication of required procedure by the police "virtually invite[ ] a deluge of time-consuming and avoidable appeals in the future," thereby increasing the costs of the criminal justice system. State v. Kekona, 886 P.2d 740, 747 (Haw. 1994) (Levinson, J., concurring in part and dissenting in part).

precedent and supported by the "in any manner and at any stage"[242] language of *Miranda*.

Nor would the per se invocation standard unduly infringe upon law enforcement efficiency. In practice, *Miranda* has not had a great impact upon the ability of the police to obtain confessions.[243] In fact, law enforcement agencies prefer the retention of *Miranda*-type rules because they are simple to apply and help avoid the suppression of evidence at trial.[244] Moreover, the effectiveness of *Miranda* has been severely curtailed by the Court's post-*Miranda* case law, which greatly narrowed its application.[245] Any effect the per se invocation standard might have on law enforcement is limited to what *Miranda* itself has been shown to have on law enforcement—an effect which the *Miranda* Court decreed should be borne by society in exchange for the protection of a constitutional right.

Justice Souter criticizes the per se invocation approach as potentially thwarting a suspect's wish to talk to the police.[246] The Justice's reasoning is flawed and disingenuous, as it is difficult to conceive of

242. *Miranda*, 384 U.S. at 444-45.

243. *See* Michael Wald et al., *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519 (1967) (finding *Miranda* had no significant impact on the New Haven, Connecticut criminal justice system); John Griffiths & Richard E. Ayres, *A Postscript to the* Miranda *Project: Interrogation of Draft Protestors*, 77 YALE L.J. 300 (1967) (*Miranda* warnings did not prevent self-incrimination in study conducted on Yale students, faculty, and staff); Richard H. Seeburger & R. Stanton Wettick, Jr., Miranda *in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 23 (1967) (*Miranda* had no significant effect on conviction rates in Pittsburgh); Richard J. Medalie et al., *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement* Miranda, 66 MICH. L. REV. 1347, 1394-95 (1968) (*Miranda* had no observable effect on suspect, attorney, or police behavior in Washington, D.C.); Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of* Miranda, 47 DENV. L.J. 1 (1970) (implementation of *Miranda* warnings in the FBI, Colorado Springs, and Denver police departments are ineffective); James W. Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of* Miranda *on Police Effectuality*, 64 J. CRIM. L. & CRIMINOLOGY 320, 325 (1973) (interrogations conducted in the Los Angeles metropolitan area were successful in 69% of pre-*Miranda* cases and 67% of post-*Miranda* cases); Welsh S. White, *Defending* Miranda: *A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 17 (1986) (*Miranda* has relatively little effect on law enforcement and the ability to obtain confessions); Ogletree, *supra* note 178, at 1827; Mark Berger, *Compromise and Continuity:* Miranda *Waivers, Confession Admissibility, and the Retention of the Interrogation Protections*, 49 U. PITT. L. REV. 1007, 1009 (1988). *But see* Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1424 (1985) (questioning validity of empirical studies and conclusion that *Miranda* has had little effect on law enforcement); Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering* Miranda," 54 U. CHI. L. REV. 938, 945-48 (1987) (*Miranda* has had negative effects on law enforcement).

244. Berger, *supra* note 243, at 1010.

245. *See supra* section I.B.

246. Davis v. United States, 114 S. Ct. 2350, 2364 (1994) (Souter, J., concurring).

(and he does not detail) a situation in which a suspect would benefit from uncounseled interrogation. Moreover, any statement by a suspect involving counsel *should* automatically invoke that right. It is doubtful whether a suspect in a high pressure situation such as a custodial interrogation will ever mention a lawyer without a genuine and coexisting desire to consult with counsel.

The per se invocation standard is not absurd, radical, or imprudent, but rather in keeping with the *Miranda* language requiring that questioning should cease if the suspect indicated "*in any manner* and *at any stage* of the process that he wish[ed] to consult with an attorney."[247] Should the Court feel this approach is unwise, it should have the intellectual honesty and integrity to actually overrule *Miranda*, rather than simply maneuver its way around the landmark decision each time this type of Fifth Amendment question is presented.[248]

Perhaps the key distinction between advocates of the per se invocation approach and advocates of more restrictive approaches is their attitude towards law enforcement. Essentially, the choice hinges upon one's level of trust and confidence in the good faith of officers. While it is by no means the case that all officers are untrustworthy, it is also naive to assume that no officer will ever abuse the procedures.[249] *Miranda* was premised on the belief that police interrogations are inherently coercive and intimidating,[250] and the Court set up procedural safeguards to protect against police overreaching.[251]

247. *Miranda*, 384 U.S. at 444-45 (emphasis added).

248. Professor Kamisar has suggested that "*Miranda* was the first chapter in a book that was never written." BAKER, *supra* note 100, at 185.

249. Recent events such as the role of Mark Fuhrman in the O.J. Simpson trial and the police corruption probe in Philadelphia lend support to a healthy cynicism about the role of police officers in the criminal justice system. Colbert I. King, *Too Many Fuhrmans*, WASH. POST, Sept. 2, 1995, at A19; Brian McGrory, *Fear, Loathing on Streets: Probe of Police Roils Philadelphia*, BOSTON GLOBE, Sept. 24, 1995, at 1; Bill Miller, *Officers' Image Tarnished: Simpson Verdict Highlights Mistrust of Police*, WASH. POST, Oct. 5, 1995, at C01; Kevin Sack, *Racism of Rogue Officer Casts Suspicion on Police Nationwide*, N.Y. TIMES, Sept. 4, 1995 § 1, at 1.

Mark Fuhrman was quoted as saying, "[My partner] is so hung up on the rules and stuff. I get pissed sometimes and go, 'You just don't even [expletive] understand. This job is not rules. This is a feeling. [Expletive] the rules; we'll make them up later.'" Elizabeth Gleick, *The Crooked Blue Line*, TIME, Sept. 11, 1995, at 38. The police probe in Philadelphia has already resulted in the overturning of 66 criminal convictions, with 1500 other convictions in serious jeopardy. The FBI has also seized the records of almost 100,000 other arrests over a decade-long period. Stephane Bentura, *Police Racism, Corruption Shaking U.S. Justice System*, AGENCE FRANCE PRESSE, Sept. 11, 1995, *available in* LEXIS, Nexis Library, Wires Files.

250. *Id.* at 455.

251. *Id.* at 446-48.

The *Davis* Court has unequivocally renounced this premise. The unwavering belief in the good faith of officers leaves suspects unprotected against those officers who stray from the Court's ideal and abuse their power during custodial interrogations. As of this decision, police are free to give vague and inexact readings of the *Miranda* warnings,[252] fail to give the *Miranda* warnings entirely and still use the confession to impeach the suspect at trial,[253] deceive the suspect through trickery or misrepresentations into confessing,[254] ignore the suspect's questions regarding counsel,[255] and ultimately decide for suspects whether they have invoked their right to silence or counsel through their statements.[256] The Court has nearly overturned the scales in favor of the "other side of the *Miranda* equation,"[257] leaving suspects with few rights and almost no remedy.

The per se invocation standard presents a bright-line rule that is easy to apply and does not sacrifice suspects' rights for police efficiency. Given the inherently compelling atmosphere of a custodial interrogation, suspects should be afforded the benefit of the doubt in invoking their Fifth Amendment rights and obtaining the assistance of counsel. If courts are to be true to the spirit of the Fifth Amendment, this standard is the most just and egalitarian one to adopt.

VI. Conclusion

In *Davis*, the Court ignores the fundamental premise set forth in *Miranda* that custodial interrogations are inherently coercive and compelling. By failing to require, at the very least, clarification of a suspect's ambiguous statement, this decision further undercuts the constitutional rights of suspects in custody.[258]

Awareness of one's rights prior to a waiver is the cornerstone of the determination whether a confession was voluntarily or involunta-

252. *See* Duckworth v. Eagan, 492 U.S. 195, 202-03 (1989).

253. Harris v. New York, 401 U.S. 222, 224-25 (1971).

254. Moran v. Burbine, 475 U.S. 412 (1986); Frazier v. Cupp, 394 U.S. 731, 737-38 (1969); *see also supra* note 52 and accompanying text.

255. Davis v. United States, 114 S. Ct. 2350, 2356 (1994) (police need not clarify an ambiguous invocation of counsel); *see also* Lord v. Duckworth, 29 F.3d 1216 (7th Cir. 1994); People v. Crittenden, 885 P.2d 887, 913 (Cal. 1994); Higgins v. State, 879 S.W.2d 424, 428 (Ark. 1994); State v. Bailey, 889 P.2d 738, 747 (Kan. 1995).

256. *E.g.*, Davis v. United States, 114 S. Ct. 2350 (1994).

257. *Id.* at 2356.

258. Ironically, the United States Attorney General argued for the adoption of the clarification standard in *Davis*. *See id.* at 2359 n.2 (Souter, J., concurring). The Court went above and beyond this request in adopting the threshold-of-clarity standard.

rily given.[259] Cases following *Davis* clearly illustrate that many suspects who waive their rights have not fully understood the nature of their rights and the *Miranda* warnings alone are inadequate as notification.[260] This refutes the *Davis* plurality's assertion that the warnings themselves should constitute the "primary protection afforded suspects subject to custodial interrogation."[261] In fact, the *Miranda* Court warned against this, stating, "A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights."[262] Hence, the sole protection offered by the plurality to disadvantaged suspects fails to be truly protective.

The Fifth Amendment does not distinguish between those who can speak assertively and those who cannot, and neither should the Court. Nor should suspects who know and understand their rights gain an advantage over those who, for various reasons, might not understand their rights. These concerns were fundamental to the *Miranda* decision and remain fundamental today.

The cases[263] as they are unfolding show that Justice Souter's expectations are not coming to fruition and suspects are being required to "speak with the discrimination of an Oxford don"[264] to invoke their rights. Justice Souter's language is already being quoted in dissents,[265] indicating that courts are not "apply[ing the *Davis*] ruling sensibly."[266] Regardless of the Court's intention, the *Davis* standard is unleashing a devastating blow to the Fifth Amendment rights of suspects in custody.

259. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (holding a waiver is an "intentional relinquishment or abandonment of a *known right* or privilege") (emphasis added).

260. *See supra* section IV.

261. *Davis*, 114 S. Ct. at 2356.

262. Miranda v. Arizona, 384 U.S. 436, 469 (1966); *see also supra* note 125 and accompanying text.

263. *See supra* section IV.

264. *Davis*, 114 S. Ct. at 2364 (Souter, J., concurring).

265. *See, e.g.*, Coleman v. Singletary, 30 F.3d 1420, 1429 n.3 (11th Cir. 1994) (Johnson, J., dissenting).

266. *Davis*, 114 S. Ct. at 2364 (Souter, J., concurring).