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Criminal Law—Right to Counsel—*Davis v. United States*, 114 S. Ct. 2350 (1994)

The Fifth Amendment to the United States Constitution guarantees that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”¹ The United States Supreme Court has determined that implicit in this right against self-incrimination is a limited right to have the assistance of counsel prior to and during police custodial interrogation.² However, unlike the Sixth Amendment right to counsel,³ which “automatically attaches at the initiation of adversarial judicial proceedings,”⁴ the Fifth Amendment right to counsel is not self-executing and must be affirmatively claimed.⁵ Furthermore, since the Fifth Amendment right to counsel

1. U.S. CONST. amend. V.

2. See *infra* note 26 (discussing *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966)). Custodial interrogation, as defined by the *Miranda* Court, is “questioning initiated by law enforcement officers 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; see also Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 294 (1993) (“The *Miranda* Court determined that implicit within the Fifth Amendment right against self-incrimination is the right to have the assistance of counsel while being questioned in police custody.”); Jeff L’Hote, Note, *Duckworth v. Eagan: A Semantical Debate or the Continuing Debasement of Miranda?*, 39 CATH. U. L. REV. 1267, 1267 (1990) (“While [the self-incrimination] clause does not directly guarantee a criminal defendant the right to counsel, the United States Supreme Court interprets the self-incrimination clause of the Fifth Amendment to afford an accused a limited right to counsel prior to and during police interrogation.”).

3. The Sixth Amendment provides in part that “in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI.

4. Daniel C. Nester, *Distinguishing Fifth and Sixth Amendment Rights to Counsel During Police Questioning*, 16 S. ILL. U. L.J. 101, 108 (1991); see also *Michigan v. Jackson*, 475 U.S. 625, 633 n.6 (1986) (suggesting that the right to counsel does not depend upon such a request); *Powell v. Alabama*, 287 U.S. 45, 57 (1932) (holding that the Sixth Amendment right to counsel attaches only at or after the time that adversarial judicial proceedings have been initiated against the defendant); Rick Madden & Cheryl M. Miller, Project, *Twenty-Third Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1992-1993*, 82 GEO. L.J. 1007, 1007-08 (1994) (“The [Sixth Amendment] right to counsel attaches at the initiation of adversarial judicial proceedings . . . and no request for counsel need be made by the accused.”).

5. Ainsworth, *supra* note 2, at 295. The Fifth Amendment right to counsel also differs from the Sixth Amendment in purpose and scope. See Craig R. Johnson, Note, *McNeil v. Wisconsin: Blurring a Bright Line on Custodial Interrogation*, 1992 WIS. L. REV. 1643, 1658 (arguing that the Sixth Amendment is at the same time broader and narrower than the Fifth Amendment right to counsel); Kenneth P. Jones, Note, *McNeil v. Wisconsin: Invocation of Right to Counsel Under Sixth Amendment by Accused at Judicial Proceeding*

is implied rather than expressly stated in the Constitution, the Supreme Court has more latitude to interpret it.⁶

The Court's most recent cases have held that all police questioning must cease when a criminal suspect asserts clearly his Fifth Amendment right to counsel.⁷ Prior to *Davis v. United States*,⁸ the consequences of an ambiguous reference to counsel were uncertain.⁹ In an opinion delivered by Justice O'Connor,¹⁰ the Court held in

Does Not Constitute Invocation of Miranda Right to Counsel for Unrelated Charge, 26 GA. L. REV. 1049, 1050 (1992) ("Although the *Miranda* Fifth Amendment and Sixth Amendment rights to counsel sometimes overlap, they have essentially different purposes."). The purpose of the Sixth Amendment right to counsel is to provide assistance to the unaided layman during the "critical stages" of a criminal proceeding when he is "faced with the prosecutorial forces of organized society and immersed in the intricacies of substantive and procedural criminal law." *United States v. Gouveia*, 467 U.S. 180, 189 (1984) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). The Fifth Amendment right to counsel, however, is designed "to protect the suspect's expressed desire to communicate with the police only through counsel." *Johnson, supra*, at 1658. In essence, the Fifth Amendment right is not "actually a right to a lawyer in particular, but rather the right to have good advice during police interrogation so the privilege against self-incrimination will not be unwittingly surrendered." *Id.* Nevertheless, it is usually an attorney, skilled in the rules of evidence and criminal law, who can provide the most competent advice in such a situation. *Id.*; see also *Fare v. Michael C.*, 442 U.S. 707, 719 (1979) (emphasizing that the right to have counsel present during interrogation is indispensable because of the "special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process").

While the Fifth Amendment right to counsel arises in the context of any custodial interrogation once it is asserted, *Miranda*, 384 U.S. at 444-45, the Sixth Amendment is narrower in that it attaches only after the initiation of judicial proceedings, *United States v. Gouveia*, 467 U.S. 180, 189 (1984). However, the Sixth Amendment is broader in that it applies to situations beyond custodial interrogation, *Johnson, supra*, at 1658; see *Moran v. Burbine*, 475 U.S. 412, 428-29 (1986); *United States v. Henry*, 447 U.S. 264, 269-70 (1980); *Massiah v. United States*, 377 U.S. 201, 204-05 (1964), and it attaches automatically, *Nester, supra* note 4, at 108.

6. See *Arizona v. Roberson*, 486 U.S. 675, 688 (1988) (Kennedy, J., dissenting) (implying that because the Fifth Amendment right to counsel is not constitutionally mandated but was created by the Court, the Court has the power to expand or restrict it); *Michigan v. Tucker*, 417 U.S. 433, 443-44 (1974) (recognizing that the procedural safeguards in *Miranda* were not rights protected by the Constitution but were created by the Court to secure the privilege against self-incrimination).

7. See *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). Questioning can resume once counsel is made available to the suspect or if the suspect himself initiates further conversation. *Id.*; see also *infra* note 31.

8. 114 S. Ct. 2350 (1994).

9. See *Ainsworth, supra* note 2, at 298; *Ada Clapp, The Second Circuit Adopts a Clarification Approach to Ambiguous Requests for Counsel: United States v. Gotay*, 56 BROOK. L. REV. 511, 515-16 (1990).

10. *Davis*, 114 S. Ct. at 2350. Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas joined in Justice O'Connor's opinion. *Id.* Justice Scalia filed a separate concurring opinion, *id.* at 2357 (Scalia, J., concurring); see *infra* note 34, and Justice Souter filed an opinion concurring in the judgment, in which Justices Blackmun, Stevens, and

Davis that the privilege against further questioning does not extend to a suspect whose request for counsel is ambiguous.¹¹

The defendant, Navy sailor Robert L. Davis, was questioned by the Naval Investigative Service ("NIS") about the murder of a fellow sailor, Keith Shackleford.¹² At the beginning of the interview, the NIS officers informed Davis that he had a right to remain silent, and that he was entitled to speak with an attorney and to have an attorney present during questioning.¹³ Davis nonetheless waived his rights, both orally and in writing.¹⁴

Approximately ninety minutes into the interview, however, Davis declared, "Maybe I should talk to a lawyer."¹⁵ The interviewing agents momentarily stopped questioning Davis and made it clear to him that they did not want to violate his rights, and that they would stop the interrogation if he wanted a lawyer.¹⁶ Davis then responded, "No, I'm not asking for a lawyer," and "No, I don't want a lawyer."¹⁷ The agents, after again reminding Davis of his rights, continued the questioning.¹⁸ About an hour later, Davis said, "I think I want a lawyer before I say anything else,"¹⁹ whereupon the agents stopped the interview.²⁰

At his court-martial, Davis unsuccessfully moved to suppress statements made during the interview.²¹ Consequently, he was

Ginsburg joined, *Davis*, 114 S. Ct. at 2358 (Souter, J., concurring in the judgment); see *infra* notes 35-38, 67-69, 82-83, 93-95, and accompanying text.

11. *Id.* at 2355-57.

12. *Id.* at 2352-53.

13. *Id.* at 2353.

14. *Id.* The Court established the standard for waiver of one's constitutional right in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The *Johnson* Court pointed out that there is a presumption against the waiver of constitutional rights, and that, therefore, "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Id.* To determine whether "there has been an intelligent waiver of a right to counsel . . . the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused," must be considered. *Id.*

Although *Johnson* is a Sixth Amendment case, its test for the waiver of a constitutional right has been applied in Fifth Amendment cases. See, e.g., *Arizona v. Roberson*, 486 U.S. 675, 680-81 (1988); *Oregon v. Bradshaw*, 462 U.S. 1039, 1044-45 (1983); *Edwards v. Arizona*, 451 U.S. 477, 484 (1981); *North Carolina v. Butler*, 441 U.S. 369, 372-76 (1979); *Miranda v. Arizona*, 384 U.S. 436, 475-76 (1966).

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

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* The military judge held that "†the mention of a lawyer by [Davis] during the course of the interrogation [was] not in the form for a request for counsel and . . . the

convicted of murder, sentenced to life in prison, and dishonorably discharged.²² The convening authority,²³ the Navy-Marine Corps Court of Military Review, and the United States Court of Military Appeals all affirmed the sentence.²⁴ The Supreme Court granted certiorari.²⁵

Affirming the lower courts' decisions, the Supreme Court held that a "suspect must unambiguously request counsel" in order to invoke his *Miranda* right to counsel.²⁶ The majority required that the request for counsel be articulated clearly enough that "a reasonable officer in the circumstances would understand the

agents properly determined that [Davis] was not indicating a desire for or invoking his right to counsel." *Id.* (quotation omitted).

22. *Id.* The United States Court of Military Appeals held that Davis's comment was ambiguous and that the interrogating agents properly attempted to clarify Davis's reference to counsel before continuing with any further questions. *United States v. Davis*, 36 M.J. 337, 341-42 (1993), *aff'd*, *Davis v. United States*, 114 S. Ct. 2350 (1994).

23. The convening authority is the commissioned officer in command of a military unit that has the authority to convene a court-martial. See R.C.M. 504(a)-(b) (Manual for Courts Martial).

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

25. *Davis v. United States*, 114 S. Ct. 379 (1993).

26. *Id.* at 2355; see *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966). The *Miranda* Court "injected the fifth amendment privilege against self-incrimination into confession case analysis." Mathew W.D. Bowman, *The Right to Counsel During Custodial Interrogation: Equivocal References to an Attorney--Determining What Statements or Conduct Should Constitute an Accused's Invocation of the Right to Counsel*, 39 VAND. L. REV. 1159, 1165 (1986). The Court reasoned that the process of custodial interrogation contains inherent pressures that work to compel people to speak when they perhaps prefer to remain silent. *Miranda*, 384 U.S. at 467. The Court then held that "[i]n order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination," certain safeguards must be in place, including informing the accused that he has the right to the presence of an attorney. *Id.* If the suspect "indicates in any manner" that he wants an attorney, the interrogation must stop until an attorney is present. *Id.* at 444-45.

The *Miranda* Court limited custodial interrogations:

Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

Id.

statement to be a request for an attorney.”²⁷ If a statement is so unclear that it cannot reasonably be construed as a request for counsel, then no request for counsel is deemed to have been made²⁸ and questioning may continue.²⁹

The Court reasoned that requiring officers to stop questioning a suspect after a statement gave them a reasonable doubt as to whether the suspect wanted a lawyer would transform the *Miranda* safeguards “into wholly irrational obstacles to legitimate police investigative activity because [they] would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present.”³⁰ Furthermore, the majority believed that the ease of applying the bright-line test formulated in *Edwards v. Arizona*—“questioning must cease if a suspect asks for a lawyer”³¹—would be significantly eroded if officers had to decipher ambiguous statements.³² Though the Court conceded that this rule might harm suspects who are too intimidated to articulate clearly their request for counsel,³³ it nevertheless concluded that a complete understanding of the *Miranda* warnings would provide sufficient protection against whatever coercion is inherent in the questioning process.³⁴

27. *Davis*, 114 S. Ct. at 2355. The Court held that a statement is either a request for counsel or it is not; there is no middle ground. *Id.*

28. *Id.*

29. See *id.*

30. *Davis*, 114 S. Ct. at 2356 (quoting *Michigan v. Mosley*, 423 U.S. 96, 102 (1975)).

31. 451 U.S. 477, 484-85 (1981). In *Edwards*, the Court held that questioning must cease when a suspect has asserted his right to have counsel present during custodial interrogation. *Id.* The Court established that “an accused[,] . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless . . . [he] initiates further communication . . . with the police.” *Id.* The Court intended the rule established in *Edwards* to serve as a bright-line test indicating to law enforcement officers when they had to stop questioning a suspect. *Id.* As the Court noted in later cases, “the merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application,” *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990), and the “rule . . . provid[es] clear and unequivocal guidelines to the law enforcement profession,” *Arizona v. Roberson*, 486 U.S. 675, 682 (1988).

32. *Davis*, 114 S. Ct. at 2356 (citation omitted).

33. *Id.*

34. *Id.* Justice Scalia concurred with the Court’s decision, *id.* at 2357 (Scalia, J., concurring), but wrote separately to express his concern over the Court’s refusal to consider a federal statute, 18 U.S.C. § 3501 which governs admissibility of confessions in federal prosecutions. *Davis*, 114 S. Ct. at 2357 (Scalia, J., concurring). Section 3501 provides, in relevant part:

(a) In any criminal prosecution . . . a confession . . . shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall . . . determine any issue as to voluntariness.

Justice Souter, joined by Justices Blackmun, Stevens, and Ginsburg, concurred only in the Court's judgment.³⁵ Justice Souter argued that, "when law enforcement officers †reasonably do not know whether or not the suspect wants a lawyer[,] . . . they should stop their interrogation and ask him to make his choice clear."³⁶ The interrogators should not be able to ignore a suspect's statement that, although ambiguous, may still indicate a desire to consult with a lawyer.³⁷ Justice Souter concurred in the judgment because it appeared from the record that the interviewing agents did in fact stop and ask for clarification.³⁸

Despite the extensive number of cases that addressed the Fifth Amendment right to counsel,³⁹ the Supreme Court did not determine

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including . . . (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession. The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

18 U.S.C. § 3501 (1988). Even though the Department of Justice declined to raise the issue, *Davis*, 114 S. Ct. at 2357 (Scalia, J., concurring), Justice Scalia argued that the Court shirked its judicial responsibility by ignoring the statute, especially when confronted with *Miranda* issues that might be irrelevant under the statute. *Id.* at 2358 (Scalia, J., concurring). He pointed out that the executive, through the exercise of its prosecutorial discretion, can effectively nullify some provisions of law by merely failing to prosecute. *Id.* at 2358 (Scalia, J., concurring). Similarly, the executive "has the power . . . to avoid application of § 3501 by simply declining to introduce into evidence confessions admissible under its terms." *Id.* (Scalia, J., concurring).

35. *Davis*, 114 S. Ct. at 2358 (Souter, J., concurring in the judgment).

36. *Id.* (Souter, J., concurring in the judgment) (quoting *id.* at 2355).

37. *Id.* (Souter, J., concurring in the judgment).

38. *Id.* (Souter, J., concurring in the judgment).

39. *See, e.g.*, *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990) (holding that when a defendant requests counsel, officials must not only stop the interrogation, but may not reinitiate questioning without the presence of counsel, whether or not the defendant has consulted with an attorney); *Arizona v. Roberson*, 486 U.S. 675, 683 (1988) (holding that an assertion of the right to counsel, unlike an assertion of the right to remain silent, does bar later interrogation about another crime); *Smith v. Illinois*, 469 U.S. 91, 100 (1984) (holding that "where nothing about a request for counsel . . . renders it ambiguous . . . an accused's post-request responses to further interrogation may not be used to cast retrospective doubt upon the clarity of his initial request for counsel"); *New York v. Quarles*, 467 U.S. 649, 657 (1984) (permitting police officers to withhold the *Miranda* warnings whenever custodial interrogation concerns public safety); *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (holding that a suspect's initiation of further conversation does not waive his right to counsel but does lift the *Edwards* prohibition and allows police to

before *Davis* the legal significance of an ambiguous assertion of that right.⁴⁰ After *Miranda*, the Court reinterpreted and narrowed the scope of the Fifth Amendment right to counsel in several situations, indicating that it would favor a narrow interpretation of a suspect's request.⁴¹ Other post-*Miranda* decisions maintained the generous language of *Miranda*, however, and seemed to support a more liberal construction.⁴² This inconsistent judicial treatment created "conflicting messages for developing a standard to determine when an

continue questioning); *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (holding that questioning of a suspect must cease when he has clearly asserted his right to have counsel present during custodial interrogation); *Fare v. Michael C.*, 442 U.S. 707, 727-28 (1979) (holding that a juvenile's request for a probation officer was not a request for counsel); *North Carolina v. Butler*, 441 U.S. 369, 374 (1979) (holding that an explicit waiver was not necessary to find that a defendant has waived his right to counsel and that the question of waiver should be determined by the "particular facts and circumstances surrounding the case" (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938))); *Michigan v. Mosley*, 423 U.S. 96, 105-06 (1975) (holding that as long as a suspect who has expressed a desire to remain silent maintains his right to terminate questioning, the police can reinterrogate a suspect if a significant period of time has passed and the second interrogation focuses on a different crime); *Michigan v. Tucker*, 417 U.S. 433, 444-45 (1974) (holding that even though the defendant's Fifth Amendment right to counsel was violated when the police did not inform him that counsel could have been appointed for him, his right against compulsory self-incrimination was not infringed until any of his statements taken without the presence of counsel were used against him at trial); *Harris v. New York*, 401 U.S. 222, 224 (1971) (holding that prosecutors can use a defendant's confession obtained in violation of *Miranda* to impeach a his credibility if he chooses to testify).

40. See Charles R. Shreffler, Jr., *Judicial Approaches to the Ambiguous Request for Counsel Since Miranda v. Arizona*, 62 NOTRE DAME L. REV. 460, 460 (1987).

41. Clapp, *supra* note 9, at 515; see also *Quarles*, 467 U.S. at 657 (permitting the police to withhold *Miranda* warnings whenever custodial interrogation concerns public safety); *Edwards*, 451 U.S. at 485 (implying that a suspect's request must be clearly asserted); *Rhode Island v. Innis*, 446 U.S. 291, 292 (1980) (narrowing the definition of "interrogation"); *Fare*, 442 U.S. at 722-23 (defining "counsel" specifically to mean an attorney); *Mosley*, 423 U.S. at 103-04 (permitting the resumption of questioning after a suspect has exercised his right to remain silent); *Harris*, 401 U.S. at 224 (allowing prosecutors to use statements obtained in violation of *Miranda* to impeach a defendant's credibility if he chooses to testify).

42. Clapp, *supra* note 9, at 516; see also *Roberson*, 486 U.S. at 683-85 (barring further interrogation even when the questions were about a different crime); *Edwards*, 451 U.S. at 484-85 (adopting a per se rule against any further interrogation once the suspect has invoked his right to counsel); *Butler*, 441 U.S. at 373 (indicating that there should not be a requirement that the right to counsel be explicitly invoked).

Notably, however, there have been recent efforts to reinvigorate *Miranda*. Nelson G. Wolff, *Minnick v. Mississippi: The Supreme Court Reinforces a Suspect's Right to Have Counsel Present During Custodial Interrogation*, 56 MO. L. REV. 1157, 1181 (1991); see, e.g., *Minnick*, 498 U.S. at 153 (holding that when a defendant requests counsel, officials must not only stop the interrogation, but may not reinitiate questioning without the presence of counsel, whether or not the defendant has consulted with an attorney).

accused's ambiguous request for an attorney" is sufficient to trigger the Fifth Amendment right to counsel.⁴³

Before *Davis*, the Supreme Court expressly refused to decide what police officers should do when an initial request for an attorney is ambiguous.⁴⁴ Lower courts, however, developed three different positions on this question.⁴⁵ Under "the so-called threshold-of-clarity standard, . . . an attempted invocation of the right to counsel [had to] satisfy a certain threshold of clarity before it w[ould] be considered effective."⁴⁶ Another standard adopted by some lower courts was the "per se invocation standard."⁴⁷ Under this standard, any post-warning reference to an attorney by the suspect was considered a per se invocation of the right to counsel, and all police-initiated questioning had to stop.⁴⁸ The third approach was the clarification standard.⁴⁹ Some courts permitted the police to continue the interrogation to clarify the suspect's intent following an ambiguous invocation of the right to counsel.⁵⁰

43. Clapp, *supra* note 9, at 515; *see also* Shreffler, *supra* note 40, at 460 (arguing that by narrowing *Miranda*, the Court created new questions, including the effect of an ambiguous request for counsel).

44. *See* *Connecticut v. Barrett*, 479 U.S. 523, 530 n.3 (1987); *Smith v. Illinois*, 469 U.S. 91, 99-100 (1984).

45. *See* Shreffler, *supra* note 40, at 460.

46. Ainsworth, *supra* note 2, at 301; *see also, e.g.*, *People v. Krueger*, 412 N.E.2d 537, 540 (Ill. 1980) (holding that an accused's reference to an attorney must meet a threshold standard of clarity before a court will consider the statement to be an invocation of the right to counsel); *People v. Harper*, 418 N.E.2d 894, 896-97 (Ill. App. Ct. 1981) (holding that a defendant's request for his wallet containing his lawyer's business card was insufficient to invoke his right to counsel); *State v. Johnson*, 318 N.W.2d 417, 430 (Iowa 1982) (finding that a defendant had not effectively invoked his right to counsel when he asked his interrogators if he should have an attorney present); *State v. Phillips*, 563 S.W.2d 47, 53-54 (Mo. 1978) (finding the defendant had not invoked his right to counsel by stating that he did not know whether he should consult with an attorney).

47. Ainsworth, *supra* note 2, at 301.

48. *Id.*; *see, e.g.*, *People v. Superior Court*, 542 P.2d 1390, 1394-95 (Cal. 1975) (emphasizing that no particular form of words or conduct is necessary for a defendant to invoke the Fifth Amendment privilege against self-incrimination), *cert. denied*, 429 U.S. 816 (1976); *Ochoa v. State*, 573 S.W.2d 796, 800-01 (Tex. Crim. App. 1978) (finding a sufficient invocation of the right to counsel when the defendant stated that he thought he should talk to an attorney before answering any questions or signing anything).

49. Ainsworth, *supra* note 2, at 302.

50. *Id.*; *see also, e.g.*, *United States v. Fouche*, 776 F.2d 1398, 1404-05 (9th Cir. 1985) (finding that a previous indication of interest in talking with an attorney required the interrogating agent to stop all questioning except that necessary to clarify the equivocal request); *Thompson v. Wainwright*, 601 F.2d 768, 772 (5th Cir. 1979) (noting that the purpose of clarifying questions is to discern the intent of the suspect); *Nash v. Estelle*, 597 F.2d 513, 517 (5th Cir.) (holding that when an accused makes an equivocal reference to an attorney, the police may inquire further to clarify the accused's wishes), *cert. denied*, 444

The standard promulgated in *Davis* is similar to the threshold-of-clarity standard,⁵¹ which was consistent with some of the Court's prior decisions that narrowed *Miranda*.⁵² However, other Supreme Court decisions seem inconsistent with the standard adopted in *Davis*. The most obvious example is *Miranda* itself, in which the Court held that all questioning must stop once a suspect indicated "in any manner" that he wished to consult with an attorney.⁵³ The *Miranda* Court's language implied that it would liberally construe a suspect's request for counsel.⁵⁴ Furthermore, the *Miranda* Court's emphasis on the inherently coercive atmosphere of custodial interrogations⁵⁵ "suggest[ed] that the suspect should be given the benefit of the doubt in the interpretation of ambiguous requests for counsel."⁵⁶ The standard adopted in *Davis*, appears to violate both the language and spirit of *Miranda*.⁵⁷

U.S. 981 (1971).

51. See *supra* note 46 and accompanying text.

52. For example, *Edwards v. Arizona*, by prohibiting any further questioning of a suspect that had clearly asserted his right to counsel, 451 U.S. 477, 485 (1981), implied that an explicit invocation is required. Clapp, *supra* note 9, at 519; see also Ainsworth, *supra* note 2, at 299 (arguing that *Edwards* can be read to require an unambiguous or decisive assertion by the suspect). The decision in "*Edwards* shifted the burden of clarity . . . toward the defendant." Shreffler, *supra* note 40, at 465. By requiring the right to counsel to be clearly asserted, "the 'in any manner' language of *Miranda* was all but overruled." *Id.* at 465 (quoting *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1965)).

Similarly, in *Michigan v. Mosley*, by not giving the same practical effect to a request to remain silent as to a request for counsel, 423 U.S. 96, 100-04, the Court implied that if a suspect wants an attorney, he has to ask for one. Shreffler, *supra* note 40, at 463 n.18. Furthermore, the effect of *Fare v. Michael C.*, 442 U.S. 707 (1979), was to limit *Miranda*'s prohibition on further interrogation to explicit requests for an attorney. Shreffler, *supra* note 40, at 463; see also *Fare*, 442 U.S. at 722 (distinguishing a request for counsel from a request for a probation officer).

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

54. Ainsworth, *supra* note 2, at 299.

55. *Miranda*, 384 U.S. at 457-58, 467.

56. Ainsworth, *supra* note 2, at 298. *Miranda* has in fact been relied upon by many lower courts to require a "per se standard," under which any request for an attorney would be sufficient to invoke the suspect's Fifth Amendment right to counsel. Shreffler, *supra* note 40, at 468; see also, e.g., *Maglio v. Jago*, 580 F.2d 202, 205 (6th Cir. 1978) (relying on the "in any manner" language in *Miranda* to find that the suspect had invoked his right to counsel when he stated, "Maybe I should have an attorney.>").

57. See Clapp, *supra* note 9, at 545 ("[T]he spirit of *Miranda* favors a broad interpretation of invocation."). *North Carolina v. Butler*, 441 U.S. 369 (1979), also provides support for a broader approach to the interpretation of suspects' requests for counsel. See Clapp, *supra* note 9, at 522. In *Butler*, the Court held that since a waiver of one's right to counsel can be clearly inferred from the actions and words of the suspect, the invocation of that right should be similarly inferred. *Butler*, 441 U.S. at 373. *Butler* indicated that since the Court did not require an explicit waiver of the right to counsel, neither would it require an explicit invocation of that right. See Clapp, *supra* note 9, at

Whether supported by precedent or not, the *Davis* Court established a threshold-of-clarity standard for determining whether an ambiguous reference to an attorney is sufficient to invoke a suspect's Fifth Amendment right to counsel.⁵⁸ The Court adopted this threshold standard to avoid unduly hampering police investigations⁵⁹ by requiring officers to stop questioning a suspect who may not even wish to have counsel present.⁶⁰ Because the police are not required to stop questioning a suspect who has consented to answer questions in the absence of counsel, a broader standard might needlessly prevent them from gathering critical information.⁶¹

The Court was also interested in preserving the clear rule established in *Edwards v. Arizona*.⁶² The Court explained that "[t]he *Edwards* rule—[that] questioning must cease if the suspect asks for a lawyer—provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly

523.

Similarly, the decisions in *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Roberson v. Arizona*, 486 U.S. 675 (1988), also seem to favor liberal interpretations of requests for counsel. Clapp, *supra* note 9, at 520-21. *Edwards* adopted a per se rule that prohibited any further questioning of the accused once he had invoked his right to counsel, unless the accused himself initiated further conversation. *Edwards*, 451 U.S. at 484-85. *Roberson* barred interrogation after the accused had invoked his right to counsel, even if the questions were about a different and unrelated crime. *Roberson*, 486 U.S. at 682-85. Both of these holdings functioned to afford more protection to the accused's right to counsel during custodial interrogation. Clapp, *supra* note 9, at 521.

Justice Souter argued in *Davis* that the Court's decision was inconsistent with prior holdings. S. Ct. at 2361 (Souter, J., concurring in the judgment). He pointed out that, in the past, the Court had been dissuaded from "placing any burden of clarity upon individuals in custody" and had required that "requests for counsel be [give] a broad, rather than a narrow interpretation." *Id.* (Souter, J., concurring in the judgment) (quoting *Connecticut v. Barret*, 479 U.S. 523, 549 (1987)).

58. See *Davis*, 114 S. Ct. at 2355.

59. See *id.* at 2355-56; see also *supra* note 30 and accompanying text. As one commentator has argued, the current Supreme Court is hostile to perceived interferences with law enforcement. Jones, *supra* note 5, at 1068.

60. *Id.* at 2356. The Court also rejected a standard that would require the police to ask clarifying questions of a suspect who has made an ambiguous request for counsel. *Id.* at 2356. However, it does not appear that it rejected this standard because of any interference with police activity. In fact, the Court suggested it would "be good police practice for the interviewing officers to clarify whether or not [the suspect] actually wants an attorney." *Id.*

It should be noted that the *Davis* standard applies only after the suspect has unambiguously waived his right to counsel. See *Connecticut v. Barret*, 479 U.S. 523, 529 (1987); *North Carolina v. Butler*, 441 U.S. 369, 373-76 (1979). *Davis* had waived his right to counsel both orally and in writing before the NIS agents began the interview. *Davis*, 114 S. Ct. at 2353.

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

62. 451 U.S. 477 (1981); see *supra* note 31.

hampering the gathering of information.”⁶³ The Court noted that if it “were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, this clarity and ease of application would be lost.”⁶⁴ It adopted, therefore, a standard that allows the police to continue questioning until it appears reasonably clear that the suspect has requested counsel.⁶⁵

Contrary to the Court’s conclusion, the threshold-of-clarity standard may actually hamper police activity by failing to provide the police with clear guidelines.⁶⁶ As Justice Souter pointed out, the majority did not define when an assertion is clear and when it is not.⁶⁷ Thus, he argued, “every approach, including the majority’s, will involve some difficult judgment calls,”⁶⁸ and police judgment calls, according to the majority, would erode the bright-line test of *Edwards*.⁶⁹ Therefore, if the Court’s threshold-of-clarity standard still requires the police to make judgment calls concerning whether a suspect actually wants an attorney or not, then the “clarity and ease of application” of the *Edwards* rule will still be lost.

Not only may the *Davis* standard hamper police activity, it also may encourage improprieties by interrogating officers.⁷⁰ Faced with the knowledge that the interrogation must cease once the suspect

63. *Davis*, 114 S. Ct. at 2356; see also *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990) (“The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application.”).

64. *Davis*, 114 S. Ct. at 2356. The Court further stated that the bright-line rule would be eroded by a per se standard because “police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he hasn’t said so, with the threat of suppression if they guess wrong.” *Id.*

65. *Id.* at 2355-56.

66. Bowman, *supra* note 26, at 1190.

67. *Davis*, 114 S. Ct. at 2363 n.7 (Souter, J., concurring in the judgment). Justice Souter explained that “in the abstract, nothing may seem more clear than a ‘clear statement’ rule, but in police stations and trial courts the question, ‘how clear is clear?’ is not so readily answered.” *Id.* (Souter, J., concurring in the judgment). For example, in *Smith v. Illinois*, when the suspect responded, “Uh, yeah, I’d like to do that,” upon being told that he had a right to have a lawyer present during questioning, some members of the Court thought the statement was an unambiguous request for counsel, 469 U.S. 91, 97 (1984), while the dissent questioned the clarity of the statement, *id.* at 101 (Rehnquist, J., dissenting). See *Davis*, 114 S. Ct. at 2363 n.7 (Souter, J., concurring in the judgment).

68. *Davis*, 114 S. Ct. at 2363 (Souter, J., concurring in the judgment). Justice Souter argued for a standard that would require the police to clarify a suspect’s ambiguous request for counsel. *Id.* at 2359 (Souter, J., concurring in the judgment). Such an approach would assure that any judgment calls would “be made by the party most competent to resolve the ambiguity[.] . . . the individual suspect.” *Id.* at 2363 (Souter, J., concurring in the judgment).

69. See *id.* at 2356.

70. See Bowman, *supra* note 26, at 1190.

clearly invokes his right to counsel, officers may wrongly interpret assertions as too ambiguous to invoke the right to counsel.⁷¹ In other words, the police may be tempted to raise the requisite threshold of clarity to avoid having to end the interrogation.⁷² Because courts often will give deference to the police officer's interpretation of statements made during an interrogation,⁷³ the police would have the opportunity to manipulate the threshold to their advantage.

Aside from the effects the *Davis* standard may have on the activities of law enforcement officers, it may also have dire consequences for those suspects who "will not clearly articulate their right to counsel although they actually want to have a lawyer present."⁷⁴ As one commentator has argued,

[r]equiring an accused to meet a threshold standard of clarity may deny protection to the inarticulate, who fail to state clearly a desire for counsel; to the nervous, who cannot maintain sufficient composure to determine what is in their best interests or to ensure that police are truly receptive to their desires; and to the inhibited, who out of fear or ignorance fail to press their desire for counsel strongly enough.⁷⁵

Thus, those suspects who may be too timid or unsophisticated to clearly assert their right to counsel may be denied their Fifth Amendment right under the Court's threshold-of-clarity standard.⁷⁶

71. *Id.*

72. *Id.*

73. *See Davis*, 114 S. Ct. at 2363 n.7 (Souter, J., concurring in the judgment).

74. *Id.* at 2356.

75. Bowman, *supra* note 26, at 1188.

76. As Justice Souter pointed out, a substantial number of suspects will either lack a competent command of the English language, be "woefully ignorant," or become so overwhelmed by the interrogation process that they will not be able to speak assertively. *Davis*, 114 S. Ct. at 2360-61 (Souter, J., concurring in the judgment) (quoting *Miranda v. Arizona*, 384 U.S. 436, 468 (1966)).

The threshold-of-clarity standard has operated in some lower courts to deny the right to counsel to those who "rely on normal conversational implicature" to get their meaning across when talking with police. Ainsworth, *supra* note 2, at 305-06. For example, courts have held that suspects who said "I think," "I'd like to," "I wonder," "maybe," or "I feel like" in conjunction with attempting to request counsel, failed to assert their right sufficiently to invoke their Fifth Amendment right. *Id.* at 303-04. Furthermore, courts have also held that "suspects who seek confirmation that they are entitled to counsel, who ask their interrogators how they can get a lawyer, or who ask the police whether they need a lawyer," have not invoked their right to counsel. *Id.* at 304. These suspects are denied their right to counsel because the threshold-of-clarity standard "tends to operate without regard for inferences inherent in normal conversation, by emphasizing the literal meaning

The majority in *Davis* recognized that its opinion may disadvantage some suspects, but it dismissed this concern by reasoning that full comprehension of the *Miranda* warnings would provide sufficient protection for the suspect's Fifth Amendment rights.⁷⁷ However, such a dismissal of the rights of timid or unsophisticated members of the population appears inconsistent with the Court's prior concern with protecting the right to counsel.⁷⁸ Given the high standards that the Court has erected to determine when a suspect has asserted the right to counsel,⁷⁹ it is odd that the Court would make it easier to find that the suspect did not assert his right to counsel in the first place. Furthermore, the Court has often emphasized the importance of the right to have counsel present during police interrogations as a safeguard of the suspect's right against self-incrimination.⁸⁰ In the Sixth Amendment context, the Court itself has recognized that any ambiguity in a suspect's request for counsel should be resolved in his favor.⁸¹

of a suspect's words in preference to their indirectly implicated meaning." *Id.* at 302.

77. *Davis*, 114 S. Ct. at 2356 (citing *Moran v. Burbine*, 475 U.S. 412, 427 (1986)).

78. See *Edwards v. Arizona*, 451 U.S. 477, 481-85 (1981); *Miranda v. Arizona*, 384 U.S. 436, 469-79 (1966); see also *Powell v. Alabama*, 287 U.S. 45, 70-73 (1932) (recognizing that the right to the assistance of counsel is fundamental).

79. See *Brewer v. Williams*, 430 U.S. 387, 404 (1977) (placing the burden of establishing a valid waiver on the State); *Miranda*, 384 U.S. at 444 (holding that a waiver has to be made "voluntarily, knowingly, and intelligently"); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (pointing out that there is a presumption against waiver of fundamental constitutional rights). As the majority in *Davis* stated, "[t]he right to counsel recognized in *Miranda* is sufficiently important to suspects in criminal investigations . . . that it [requir[es] the special protection of the knowing and intelligent waiver standard." *Davis*, 114 S. Ct. at 2354 (quoting *Edwards*, 451 U.S. at 483).

80. See *Miranda*, 384 U.S. at 469 ("[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege."). The *Miranda* Court noted that the presence of counsel during interrogations may serve other functions as well. *Id.* at 470. The Court stated:

If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.

Id.; see, e.g., *United States v. Gouveia*, 467 U.S. 180, 188 n.5 (1984) ("[W]e required counsel in *Miranda* . . . in order to protect the Fifth Amendment privilege against self-incrimination."); *United States v. Wade*, 388 U.S. 218, 226 (1967) (stating that the right to the presence of counsel was "necessary to safeguard the privilege against self-incrimination from being jeopardized by . . . interrogation").

81. In *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court decided that, in the Sixth Amendment context, any ambiguity in the request for counsel should be resolved in favor of the accused. *Id.* at 633. The Court explained that a broad interpretation of a

As an alternative to the *Davis* majority's threshold standard, Justice Souter argued for a clarification standard.⁸² Rather than allowing the police to continue interrogating a suspect after an equivocal request for counsel, Justice Souter would require police officers, following an ambiguous statement, to ascertain whether the suspect actually wants an attorney.⁸³ This standard not only would ensure that a suspect may choose whether to deal with the police through counsel, but also would provide a workable solution to the misunderstandings that often arise between suspect and interrogator.⁸⁴

defendant's request is necessary because "we presume that the defendant requests the lawyer's services at every critical stage of the prosecution." *Id.* The Sixth Amendment right to counsel attaches at or after the initiation of adversarial judicial proceedings, *Powell v. Alabama*, 287 U.S. 45, 57 (1932), and the Court has long recognized the importance of counsel in that process, *see Johnson v. Zerbst*, 304 U.S. 458, 462 (1938); *Powell*, 287 U.S. at 68-69. As the *Powell* Court noted:

[E]ven the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Powell, 287 U.S. at 69.

The Fifth Amendment right to counsel, however, since it does not attach automatically, does not enjoy the presumption articulated in *Jackson*. *See Ainsworth, supra* note 2, at 294-95. However, the *Miranda* Court recognized that custodial interrogations were the actual beginning of the adversarial proceedings. *Gouveia*, 467 U.S. at 194 (Stevens, J., concurring in the judgment) (citing *Miranda*, 384 U.S. at 477). If that is so, then the concerns expressed in the Sixth Amendment cases about the uneducated layperson facing the adversarial system alone would seem to apply in the Fifth Amendment context as well. Thus, perhaps a suspect's Fifth Amendment request for counsel should be interpreted as broadly as a defendant's request for counsel under the Sixth Amendment.

82. *See Davis*, 114 S. Ct. at 2359 (Souter, J., concurring in the judgment).

83. *Id.* (Souter, J., concurring in the judgment). Justice Souter, however, did not believe that an ambiguous statement should bring an end to *all* questioning. He argued that "[w]hile it is plainly wrong . . . to continue interrogation when the suspect wants it to stop . . . the strong bias in favor of individual choice may also be disserved by stopping questioning when a suspect wants it to continue." *Id.* at 2364 (Souter, J., concurring in the judgment).

84. *Id.* at 2360; *see also Ainsworth, supra* note 2, at 311 (arguing that by permitting the police to continue the exchange with the suspect, while at the same time giving some legal effect to ambiguous requests for counsel, the clarification approach "appears to strike a reasonable balance between the desire of law enforcement to conduct suspect interrogations and the need to guarantee that individuals can exercise their constitutional right to counsel"); Bowman, *supra* note 26, at 1190 (suggesting that the clarification approach

The clarification standard, however, is not without problems of its own.⁸⁵ Like the threshold standard, a rule permitting clarifying questions also would conflict with *Miranda's* premise that all questioning must cease once a suspect indicates *in any manner* that he does not want to proceed without an attorney present.⁸⁶ Furthermore, the clarification approach arguably is "subjective and places too much discretion in the hands of the interrogating officers to interpret whether a suspect's request for counsel was equivocal and, thus, to determine whether subsequent questioning is permitted."⁸⁷ Even if interrogating officers decide that they must clarify a suspect's request, the clarifying questions could be used to dissuade the suspect from asserting his right to counsel.⁸⁸ Thus, "[i]n practice, the clarification approach is scarcely more generous in its protection of individual rights than is the threshold-of-clarity standard."⁸⁹

Justice Souter disagreed not only with the majority's standard, but also with the reasoning the majority used to reach its conclusion. The Court relied on *McNeil v. Wisconsin*⁹⁰ and *Edwards v. Arizona*⁹¹ in ruling that "if 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

"provides clear guidelines for interrogating officers and does not unduly burden legitimate criminal investigations").

85. See Ainsworth, *supra* note 2, at 311; Bowman, *supra* note 26, at 1189; Clapp, *supra* note 9, at 534.

86. Clapp, *supra* note 9, at 545; see also *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990) (holding that once counsel is requested, interrogation must cease and the police cannot reinstate interrogation); *Miranda v. Arizona*, 384 U.S. 436, 474 (1966) ("If the individual indicates in any manner, at any time prior to or during questioning . . . that he wants an attorney, the interrogation must cease.").

87. Bowman, *supra* note 26, at 1189.

88. Clapp, *supra* note 9, at 534. As Professor Clapp argued, the continued questioning associated with the clarification approach has a potentially coercive effect. *Id.* at 541.

89. Ainsworth, *supra* note 2, at 315. However, if a suspect has unambiguously requested counsel, his "postrequest responses to further interrogation may not be used to cast doubt on the clarity of his initial request for counsel." *Smith v. Illinois*, 469 U.S. 91, 91 (1984).

90. 501 U.S. 171 (1991). *McNeil* was a Sixth Amendment case in which the Supreme Court distinguished between the consequences of invoking one's Sixth Amendment right to counsel and one's Fifth Amendment right to counsel. *Id.* at 175-78. The Court held that the Sixth Amendment right to counsel is "offense-specific," meaning that when an accused asserts his Sixth Amendment right to counsel, the right attaches only with respect to the particular crime about which he currently is being questioned. *Id.* at 175. The police are free to elicit incriminating statements about other crimes. *Id.* at 176. Once a suspect invokes his Fifth Amendment right to counsel regarding one offense, he cannot thereafter be interrogated about *any* offense unless counsel is present. *Id.* at 177.

91. 451 U.S. 477 (1981); see also *supra* note 31.

suspect *might* be invoking the right to counsel," questioning does not have to stop.⁹² However, as Justice Souter observed, the *McNeil* Court "was not addressing the degree of clarity required to activate the counsel right."⁹³ He also asserted that the quoted passage from *Edwards* was not dispositive because that case did not decide the "legal consequences of a less than 'clear' statement."⁹⁴ Consequently, according to Justice Souter, the majority's holding was not mandated by any of the Court's prior decisions, and for the majority to assert otherwise was an erroneous application of precedent.⁹⁵

While it is not unusual for the Court to be concerned with maintaining effective law enforcement,⁹⁶ *Davis* may have taken this concern too far. To avoid interfering with criminal investigations and to preserve the bright-line rule of *Edwards* (which, arguably, was eroded by the Court's decision⁹⁷), the Court was willing to sacrifice the constitutional rights of those suspects who fail to assert clearly their right to counsel.⁹⁸ By denying the right to counsel to those individuals, the Court not only violated *Miranda's* "in any manner" language, but also contradicted "the prophylactic intent of *Miranda*."⁹⁹ The Court established the Fifth Amendment right to counsel in *Miranda* because of the inherently coercive nature of custodial

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

93. *Id.* at 2360 n.3 (Souter, J., concurring in the judgment).

94. *Id.* (Souter, J., concurring in the judgment).

95. *Id.* (Souter, J., concurring in the judgment). Justice Souter also pointed out that, had the issue been resolved by the prior decisions, there would have been no need for the Court to hear *Davis*. *Id.* (Souter, J., concurring in the judgment).

96. The Court has often articulated a concern over interfering with law enforcement. The decision in *Miranda* was specifically "not intended to hamper the traditional function of police officers in investigating crime." *Miranda v. Arizona*, 384 U.S. 436, 477 (1966). In *Escobedo v. Illinois*, the Court recognized the need to address the concerns that its decision would reduce the number of confessions that the police would be able to obtain. 378 U.S. 478, 488 (1964). In addition, the holding in *Michigan v. Harvey* showed a deference to law enforcement in allowing the prosecution to use statements which normally would be inadmissible for the purpose of impeaching the defendant. 494 U.S. 344, 345-46 (1990). As the Court noted in *Minnick v. Mississippi*, the fact that the *Miranda* rule specifically informs police officers what they may do during custodial interrogations is a benefit that "outweigh[s] the burdens that the decision in *Miranda* imposes on law enforcement agencies." 498 U.S. 146, 151 (1990).

97. See *supra* notes 66-69 and accompanying text.

98. See *Davis*, 114 S. Ct. at 2356.

99. Bowman, *supra* note 26, at 1188.

investigations.¹⁰⁰ To expect a suspect to clearly assert *anything* when faced with such coercion seems inconsistent.¹⁰¹

In defense of its effort to protect the legitimate activities of law enforcement, the Court reasoned that a rule requiring police to cease questioning upon any request for counsel would hamper them unduly.¹⁰² While this may be true, the Court did not address whether a clarification approach would pose the same burden.¹⁰³ Because the officers already would be engaged in asking questions, requiring them to ask a few more specifically designed to clarify the suspect's response would not increase the burden significantly. Furthermore, whatever burden may be imposed seems minimal when compared to the benefit of allowing individuals the power to exercise their constitutional right to counsel.¹⁰⁴

Perhaps the best solution would be to require police officers to ask a suspect, immediately after they read his *Miranda* rights, if he wants to talk with an attorney before answering any questions.¹⁰⁵

100. See *Miranda*, 384 U.S. at 447-70.

101. Arguably, the deep-seated fear of coercion that animated the *Miranda* Court is not what animated the Court in later decisions, given the number of cases that weakened the effect of *Miranda*. See *supra* note 41. But see *supra* note 42 (noting precedent supporting a more liberal construction of *Miranda*). However, as one commentator noted, the recent decision in *Minnick v. Mississippi*, 498 U.S. 146 (1990), reflects the Court's recent efforts to reinvigorate *Miranda*. Wolff, *supra* note 42, at 1181. The decision in *Michigan v. Harvey* also seems to indicate a concern about police coercion. See 494 U.S. 344, 350 (1990) (stating that the rule adopted in *Edwards v. Arizona* was "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights").

102. See *Davis*, 114 S. Ct. at 2355-56.

103. The majority's opinion in *Davis* recognized the benefit to both the suspect and the law enforcement officers of requiring the officers to ask clarifying questions when it stated: "Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel." *Davis*, 114 S. Ct. at 2356. However, without explanation, the majority refused to adopt such a rule. *Id.*

104. It may be true that these questions will hamper law enforcement by encouraging suspects to get a lawyer and thereby forcing the interrogation to cease until a lawyer is provided. However, as the *Miranda* Court pointed out, "the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged." *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). If a suspect, by requesting counsel and delaying his interrogation, is only doing what he is empowered to do under the Constitution, that is not an *undue* burden on law enforcement.

105. David Lavey, *United States v. Porter: A New Solution to the Old Problem of Miranda and Ambiguous Requests for Counsel*, 20 GA. L. REV. 221, 251 (1985). Not only could the question be posed immediately following the *Miranda* warnings, but also after any subsequent request for counsel that appears to be ambiguous.

Since the suspect would only have to answer "yes" or "no," this solution could eliminate ambiguous requests altogether.¹⁰⁶ A rule requiring this question would maintain the bright-line advantages of the *Edwards* rule, for it would provide clear guidelines for police conduct and would be easy for courts to apply, and would reflect more accurately the true intentions of the suspect.¹⁰⁷

The impact of *Davis* remains to be seen. Perhaps, as Justice Souter suggested, courts will apply the ruling sensibly and interrogators will continue to clarify suspects' ambiguous statements as a measure of "good police practice."¹⁰⁸ Undoubtedly, however, a case will arise in which interrogators do not stop to clarify an equivocal statement, and the Court will be faced with adjudicating the officers' judgment that the statement was not sufficient to invoke the right to counsel. The Court may then recognize that, given the variety of ambiguous statements that could be made and the vast number of circumstances in which they could occur, the bright-line rule that it purportedly tried to preserve in *Davis* does not exist in practice. The only way truly to know when the suspect is requesting counsel and, consequently, when the police must cease their interrogation, is to ask him. Until the Court adopts a clarification approach, police will continue guessing whether a suspect's ambiguous statement is an attempt to invoke his Fifth Amendment right to counsel. As a result, some individuals who actually desire counsel will be denied this protection.

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106. *Id.* at 252. If, however, the suspect still hesitates or seems confused, the interrogating officers could further explain his rights. *Id.*

107. *Id.* Such a test may have been appropriate in the present case. Although *Davis* allegedly stated that he did not want a lawyer when the officers attempted to clarify his initial, ambiguous statement, the interrogating officers had not asked him a simple "yes" or "no" question. See *Davis*, 114 S. Ct. at 2353. Even if *Davis* had answered "no," thus leading to the same result as in the instant case, the ambiguity would have been removed. The distinction may not seem significant, but the difference between asking someone to clarify his statement and asking him to answer a "yes" or "no" question may be crucial when the person is unsophisticated or intimidated by a custodial interrogation.

This author argues only that the standard adopted in *Davis*—not the result—was incorrect. It appears from the record that *Davis* was not requesting a lawyer, see *id.*, and thus, his statements should not have been excluded from his trial. See *supra* notes 16-21 and accompanying text.

108. *Davis*, 114 S. Ct. at 2364 (Souter, J., concurring in the judgment).