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THE SOUNDS OF SILENCE: RECONSIDERING THE INVOCATION OF THE RIGHT TO REMAIN SILENT UNDER *MIRANDA*

Marcy Strauss*

If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.¹

In 1966, the Supreme Court handed down one of its best-known decisions—*Miranda v. Arizona*.² In that decision, the Court attempted to strike the appropriate balance between law enforcement interests in obtaining a confession and a suspect's Fifth Amendment right not to incriminate himself.³ The opinion decreed that this balance is preserved by "giving the *defendant* the power to exert some control over the course of the interrogation."⁴ Thus, the decision mandated that the suspect be informed prior to any custodial interrogation that he has the right to remain silent and the right to an attorney and that no interrogation can occur until the suspect waives these rights. Moreover, the suspect can assert these rights at any point during the interrogation and, if he does, questioning must immediately cease.

Although these protections seem on first blush to effectively empower a suspect to choose whether to speak to the police, many have deemed *Miranda* a "spectacular failure."⁵ Although there are numerous critics of the *Miranda* decision and its

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¹ Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

² 384 U.S. 436 (1966); see Steven B. Duke, *Does Miranda Protect the Innocent or the Guilty?*, 10 CHAP. L. REV. 551, 551 (2007) ("*Miranda v. Arizona* is probably the most widely recognized court decision ever rendered."); Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 110 (1998). Virtually everyone is familiar with the *Miranda* warnings from television and movies. Marcy Strauss, *Silence*, 35 LOY. L.A. L. REV. 101, 142 (2001) (citing *Brogan v. United States*, 522 U.S. 398, 405 (1998) ("And as for the possibility that the person under investigation may be unaware of his right to remain silent: In the modern age of frequently dramatized 'Miranda' warnings, that is implausible.")).

³ *Miranda*, 384 U.S. at 439–42.

⁴ *Moran v. Burbine*, 475 U.S. 412, 426 (1986).

⁵ Sandra Guerra Thompson, *Evading Miranda: How Seibert and Patane Failed to "Save" Miranda*, 40 VAL. U. L. REV. 645, 645 (2006); see also Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309, 309–12 (2003); George C. Thomas III, *Miranda's Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091, 1092, 1094 n.16 (2003)

progeny on a variety of levels,⁶ what has received too little attention is whether the most basic protection of the *Miranda* decision operates effectively. That is, can a suspect effectively assert the right to remain silent, and, perhaps as importantly, do the police appropriately respect such an assertion?

This Article explores that question by considering what constitutes an assertion of the right to remain silent. Although *Miranda* suggested that “[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease,”⁷ subsequent cases have required a more explicit invocation of the desire not to speak. Relying on *Davis v. United States*,⁸ a Supreme Court decision addressing the invocation of the right to counsel, the bulk of lower courts currently require that a suspect unambiguously invoke the right to remain silent.⁹ Such a transposition of the requirements for asserting the right to remain silent with the right to counsel is wrong as a matter of law, unwise as a matter of policy, and threatens to eviscerate the core protection of *Miranda*.

This Article argues that the lower courts, by requiring that the right to remain silent be unambiguously asserted, have gone astray from what was intended in *Miranda*. The passage of time since *Miranda* and *Davis* has revealed one indisputable fact: rarely do suspects invoke their rights. Only twenty percent initially assert their rights rather than waive them; and almost no suspects assert their rights after a valid waiver.¹⁰

[hereinafter Thomas, *Miranda's Illusion*] (reviewing WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS* (2001)) (“[B]y most accounts, *Miranda* has been a spectacular failure.”). Although *Miranda*’s success or failure may be a subject of debate and dispute, most would agree that the Court, in the forty odd years since that decision has “restricted some of the generous language of *Miranda*.” Charles R. Shreffler, Jr., *Judicial Approaches to the Ambiguous Request for Counsel Since Miranda v. Arizona*, 62 NOTRE DAME L. REV. 460, 460 (1987) (making this comment with respect to the first twenty years). *But see* Lawrence Rosenthal, *Against Orthodoxy: Miranda Is Not Prophylactic and the Constitution Is Not Perfect*, 10 CHAP. L. REV. 579, 584–86 (2007).

⁶ Yale Kamisar, one of the most prominent criminal procedure scholars, wrote that “*Miranda* is probably the most criticized and most misunderstood criminal procedure case in American legal history.” Yale Kamisar, *How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice*, 3 OHIO ST. J. CRIM. L. 11, 26 (2005); *see also* Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781 (2006) (discussing some of the criticism); Joëlle Anne Moreno, *Faith-Based Miranda?: Why the New Missouri v. Seibert Police “Bad Faith” Test Is a Terrible Idea*, 47 ARIZ. L. REV. 395 (2005) (criticizing the Court’s recent post-*Miranda* decision: *Seibert v. Patane*). One recent, persistent, and fairly successful cry for reform involves the use of videotaping confessions. Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619 (2004).

⁷ *Miranda*, 384 U.S. at 473–74 (emphasis added) (footnote omitted).

⁸ 512 U.S. 452 (1994).

⁹ *See infra* notes 58–70 and accompanying text.

¹⁰ *See infra* note 199 and accompanying text.

While some suspects undoubtedly waive their rights because they affirmatively want to talk to the police, this Article maintains that these statistics have a more nefarious explanation: court decisions have made it extremely difficult for suspects who wish to assert their rights to do so. Judges have gone to extraordinary lengths to classify even seemingly clear invocations as ambiguous invocations which can be ignored by the police. Once a suspect's attempted invocation is ignored, moreover, the chance that he subsequently will more clearly and forcefully assert his rights during the interrogation is substantially reduced. As a result, *Miranda's* promise that suspects freely determine whether and when they wish to submit to custodial interrogation is an empty one.

In Part I of this Article, I explore the basic principles in *Miranda* and subsequent case law concerning the invocation of the right to remain silent and the right to counsel. Although no Supreme Court case after *Miranda* explicitly addressed the invocation of the right to remain silent, in Part II I describe how the lower courts have, with few exceptions, applied *Davis* to require that the right to remain silent can only be invoked by an unambiguous statement and that the police need not cease questioning nor pose clarifying questions in the face of an ambiguous invocation. As a result, suspects who use modal verbs like "maybe," "might," or "could," or hedge a request by saying things like "I think I want to stop talking," or that "they want to leave," or even that they don't want to talk *now* have not unambiguously invoked a right to remain silent and these statements can be effectively ignored. In Part III, I argue that *Davis* should not be applied to invocations of the right to remain silent. First, *Davis* was wrongly decided and should be overturned. Second, even if *Davis* is not overturned, it should not be extended to the right to remain silent. As a matter of law, the right to counsel and the right to remain silent are separable and distinct rights that should not be equated. Moreover, applying the clear invocation rule of *Davis* to the right to remain silent is wrong as a matter of policy because it undermines the central goal of *Miranda*: to ensure that a suspect makes a free choice to speak to the police. Finally, even if *Davis* applied to the right to remain silent, it should be limited to post-waiver invocations only.

In the last Part, I briefly sketch and discuss an alternative approach to that in *Davis*: a version of the stop-and-clarify approach for ambiguous invocations in conjunction with some modification of the *Miranda* warnings. While a rule requiring that all interrogation must cease at *any* invocation, clear or not, is most faithful to the language and values of *Miranda*, such a position is unlikely to be adopted. Thus, this Article urges that at a minimum, the courts should require that any ambiguous or equivocal request be clarified prior to continued questioning of a suspect. Moreover, the *Miranda* warnings should be altered to include an explicit reminder to the suspect they can assert their right to remain silent at any time, and that such an assertion would not be used against them.

I. THE DEVELOPMENT OF THE *MIRANDA* RIGHTS

The *Miranda* decision was an attempt to establish clear, bright-line rules to protect a suspect from police coercion during custodial interrogation.¹¹ Prior to 1966, the law of interrogations was largely governed by the Due Process Clause of the Fourteenth Amendment, which employed a “totality of circumstances approach” to condemn police misconduct that overbore the will of the suspect.¹² While such an approach ensured that the most egregious police behavior—such as physical abuse—was condemned, “it left largely uncontrolled a myriad of other practices that did not reflect physical abuse but operated to coerce a suspect into making a statement.”¹³ Believing that law enforcement officers were becoming more sophisticated in their interrogation tactics and that coercion was often difficult to ascertain, the Court shifted from a due process approach to one that emphasized the Fifth Amendment privilege against self-incrimination.¹⁴

In the four cases that were consolidated in *Miranda*, the Court ruled that the Fifth Amendment privilege against self-incrimination protected a suspect during custodial interrogations which contain “inherently compelling pressures” that could undermine a suspect’s right to remain silent.¹⁵ To protect a person’s opportunity to exercise his privilege, the Court developed the now-famous set of warnings: the suspect must be told he has a right to remain silent and that anything said may be used against him;¹⁶ the suspect must be informed he has a right to have an attorney present during questioning, and that an attorney will be appointed if the person cannot afford one.¹⁷ These

¹¹ See Weisselberg, *supra* note 2, at 113 (stating that pre-*Miranda* rules were difficult for the courts to follow and the police to apply and that *Miranda* recognized the need for clear rules).

¹² See, e.g., *Leyra v. Denno*, 347 U.S. 556 (1954); *Lisenba v. California*, 314 U.S. 219 (1941); *Chambers v. Florida*, 309 U.S. 227 (1940); *Brown v. Mississippi*, 297 U.S. 278 (1936).

¹³ Marcy Strauss, *Reinterrogation*, 22 HASTINGS CONST. L.Q. 359, 364 (1995).

¹⁴ In between the Court flirted with a right to counsel approach. See *Escobedo v. Illinois*, 378 U.S. 478 (1964); see also Thomas, *Miranda’s Illusion*, *supra* note 5, at 1113 n.91.

¹⁵ *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

¹⁶ Some commentators have persuasively argued that several additional warnings should be provided, including a statement that if you do not talk it will not be held against you and reminding the suspect that he or she can assert these rights at any time in the interrogation. See *infra* note 204 and accompanying text.

¹⁷ Of course, most suspects who invoke the right to an attorney will not be provided with an attorney during interrogation. Since police officers know that any attorney worth her salt would simply advise her client to stop talking, providing an attorney during interrogation is generally seen as a waste of money and time. See Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 734–35 (1992) (“Virtually any competent lawyer would advise his client in the strongest possible terms to remain silent . . .”). Thus, once a suspect invokes the right to counsel, questioning simply ceases. Timothy P. O’Neill, *Why Miranda Does Not Prevent Confessions: Some Lessons from Albert Camus, Arthur Miller and Oprah Winfrey*, 51 SYRACUSE L. REV. 863, 874 n.100 (2001) (“In reality, the *Miranda* promise of a right to

warnings must be provided even if the suspect is otherwise aware of his rights because the “warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere.”¹⁸ Once the warnings have been provided, the “subsequent procedure is clear”.¹⁹

If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.²⁰

Alternatively, if interrogation continues, a “heavy burden” rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.²¹

Despite the length of the *Miranda* decision, significant questions remained on virtually every aspect of the decision.²² It would be left to subsequent courts to sort

counsel is somewhat illusory. If a suspect asks for counsel, police will usually end all attempts at interrogation. Since the police know that an attorney will simply tell the suspect not to answer questions, it is easier to simply stop attempts to interrogate.”). Of course, the Sixth Amendment guarantees the suspect the actual provision of an attorney at critical stages in the proceeding, including interrogation, once judicial proceedings have been initiated. *Brewer v. Williams*, 430 U.S. 387 (1977); *Massiah v. United States*, 377 U.S. 201 (1964).

¹⁸ *Miranda*, 384 U.S. at 468. *But see* *Duckworth v. Eagan*, 492 U.S. 195, 202–05 (1989) (holding that warnings need not be given in the exact form provided by the *Miranda* decision).

¹⁹ *Miranda*, 384 U.S. at 473.

²⁰ *Id.* at 473–74 (footnote omitted).

²¹ *See generally* *Johnson v. Zerbst*, 304 U.S. 458 (1938) (setting forth the waiver rule generally employed in *Miranda*). Post-*Miranda* cases have made clear that the burden is not as heavy as originally envisioned. *See* *Moran v. Burbine*, 475 U.S. 412, 427–28 (1986) (holding that a suspect need not be provided with flow of information to help calibrate decision to waive, and thus suspect need not be told that an attorney would like to see him); *North Carolina v. Butler*, 441 U.S. 369 (1979) (holding an implied waiver valid).

²² Indeed, the number of decisions elaborating upon the various principles set forth in *Miranda* is vast, and many believe that most post-*Miranda* decisions have weakened the original safeguards. *See, e.g.,* Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators’ Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397, 402–07 (1999) (noting that “[a]s a result of the Burger and Rehnquist Court’s post-*Miranda* decisions, *Miranda* is no longer one case” but a group of them imposing “less strict safeguards than the original decision”). Professor Yale Kamisar noted that he considers this comment “an understatement.” Yale Kamisar, *On the Fortieth Anniversary of the Miranda*

out the meaning of “custody” and “interrogation”—the prerequisites before warnings are even required.²³ Most important for this discussion, both the meaning of invocation and the consequences of invoking rights remained grist for further development. It was the latter issue—the precise consequences of invoking the right to remain silent or the right to counsel—that engaged the courts first. Almost a decade after the *Miranda* decision, the Supreme Court considered whether the police could resume questioning a suspect after he asserted his right to remain silent.²⁴ Although *Miranda* clearly stated that once a person invokes the right to remain silent any questioning must immediately cease, the Court provided no real guidance beyond this rather minimalist provision. Does this mean that questioning must cease *forever*?

In *Michigan v. Mosley*, the Court rejected the notion that a suspect who invokes his right to remain silent is forever barred from being interrogated.²⁵ In that case, the defendant was arrested for several robberies and was provided his *Miranda* warnings prior to custodial interrogation. After waiving his rights and answering some initial questions, the interrogation stopped when Mosley stated that he did not want to discuss the robberies any longer. About two hours later, different detectives approached Mosley and questioned him at a different location about a fatal shooting that had occurred during a different robbery than the ones that were the subject of the earlier interrogation. Mosley was issued new *Miranda* warnings, and he agreed to talk about the murder. After fifteen minutes of questioning, Mosley confessed to the murder after being told that a confederate had implicated him as the shooter.²⁶

Mosley's confession was admitted at trial and he was convicted of murder.²⁷ On appeal, Mosley argued that his Fifth Amendment rights had been violated when the government re-questioned him after he had asserted his right to remain silent. The Supreme Court disagreed.²⁸ The Court held that *Miranda*'s admonition that interrogation must immediately cease upon assertion of the right cannot “sensibly be read to create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject.”²⁹ Such a reading would “transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity. . . .”³⁰ On the other hand, the Court recognized that repeated rounds of questioning after a defendant has stated his desire to remain silent will almost certainly undermine a

Case: *Why We Needed It, How We Got It—And What Happened to It*, 5 OHIO ST. J. CRIM. L. 163, 178 n.69 (2007).

²³ For a sampling of cases dealing with the issue of custody, see *Berkemer v. McCarty*, 468 U.S. 420 (1984), and *Oregon v. Mathiason*, 429 U.S. 492 (1977) (per curiam). For the meaning of interrogation, see *Rhode Island v. Innis*, 446 U.S. 291 (1980).

²⁴ *Michigan v. Mosley*, 423 U.S. 96 (1975).

²⁵ *Id.* at 102–03.

²⁶ *Id.* at 97–98.

²⁷ *Id.* at 98–99.

²⁸ *Id.* at 104.

²⁹ *Id.* at 102–03.

³⁰ *Id.* at 102.

suspect's free will; such an occurrence would convey to the suspect that the police were not prepared to honor his invocation. Hence, the Court held that a determination must be made whether, considering the totality of circumstances, a suspect's right to cut off questioning was "scrupulously honored."³¹

The Court concluded that Mosley's rights were scrupulously honored even though questioning resumed. In so holding, the Court emphasized six factors. First, the questions immediately ceased after Mosley initially asserted his right to remain silent. Second, there was some passage of time between the invocation of the right and the second interrogation. Third, the officers re-read the *Miranda* warnings, reminding the suspect of his rights and their willingness to adhere to them. Fourth, the second interrogation was conducted by different officers than the first one. Fifth, the new interrogation involved a different topic than the earlier one. Sixth, and finally, the second interrogation occurred at a new location than the first one.³² In these circumstances, the Court held, a suspect would not feel that he was being subjected to one continuous interrogation or that his will was being worn down. Nor would he feel that his original request to remain silent was being ignored and that, therefore, re-asserting his rights would be futile. Rather, a suspect in these circumstances would feel that his right to remain silent had been scrupulously honored.³³

Since *Mosley*, lower courts have provided different weight to the six factors noted there. Nonetheless, most agree that the first three factors are inviolate.³⁴ A suspect would not believe that his right to remain silent had been respected if the interrogation did not immediately cease, if some (undefined) time period did not pass, and if new rights were not provided.³⁵ The other three factors (new officers, new location, new topic) are not essential and seem to "play off" against the passage of time.³⁶ That is, the longer the passage of time between the invocation of the right to remain silent and the new interrogation, the less these three factors are needed. The shorter the passage of time, the more important one or more of them might be to dispelling any indicia of one continuous interrogation. Thus, in *Mosley*, which involved a relatively short passage of time (only about two hours), these other elements were important factors that militated against the interrogation seeming like one continuous interrogation.

³¹ *Id.* at 104 (citation omitted).

³² *Id.* at 104–05.

³³ *Id.* at 104–07.

³⁴ See *infra* notes 35, 168 and accompanying text.

³⁵ Cf. *State v. Jackson*, 640 A.2d 863, 873 (N.J. Super. Ct. App. Div. 1994) (stating that the re-issuance of *Miranda* warnings is a bright-line, inflexible, minimum requirement).

³⁶ See, e.g., *People v. Wellhausen*, No. 258286, 2006 WL 1083906, at *2–3 (Mich. Ct. App. Apr. 25, 2006) (per curiam) (holding that police scrupulously honored defendant's rights when, twelve to fourteen hours after invoking his right to remain silent, police approached him again, police read him his rights, and he waived those rights); *Commonwealth v. Tyree*, No. 2484-00-2, 2001 WL 379131, at *3 (Va. Ct. App. Apr. 17, 2001) ("[P]olice did not properly honor defendant's rights by resuming interrogation with respect to an offense then subject to his right to silence exercised only three hours previously.").

In a case where the same officer approaches the suspect about the same crime but does so several days later, the absence of these factors likely would be insignificant.

Mosley, of course, involved the invocation of the right to remain silent. What if the suspect invokes the right to an attorney instead? Should the courts utilize the "scrupulously honored" standard employed in the right to remain silent? Six years after *Mosley*, the Court addressed this question and rejected the *Mosley* test in favor of a bright-line rule that made re-interrogation more difficult once a suspect asks for an attorney rather than requests to remain silent. In *Edwards v. Arizona*, the Supreme Court adopted a per se proscription upon further questioning of indefinite duration after the suspect invokes the right to counsel; only if the suspect initiated conversation and then waived his rights would interrogation outside the presence of counsel be permissible.³⁷

In *Edwards*, the defendant was arrested for burglary, robbery and first degree murder.³⁸ After being read his *Miranda* rights at the police station, he waived his rights and agreed to talk. After being told that another suspect had implicated him in the crimes, Edwards sought to "make a deal."³⁹ When the officer told him he did not have the authority to deal, Edwards then stated: "I want an attorney before making a deal."⁴⁰ At this point, questioning stopped, and Edwards was taken to jail.⁴¹

Early the next morning, two different detectives came to the jail to speak to Edwards. While initially Edwards resisted seeing the detectives, he was told that he "had to"; after being read his rights again, Edwards agreed to talk so long as he could hear the taped statement of the accomplice who had fingered him.⁴² After listening to the tape, Edwards agreed to make a statement so long as it was not on tape. He then implicated himself in the crime.⁴³ His confession was introduced at trial and he was convicted.⁴⁴ On appeal, Edwards argued that his *Miranda* rights had been violated when the police officers interrogated him after he had invoked his right to counsel, and the Supreme Court agreed:

[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right

³⁷ 451 U.S. 477, 478, 484-85 (1981).

³⁸ *Id.* at 478.

³⁹ *Id.* at 479.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Edwards was tried without the confession and convicted. A retrial was ordered (on different grounds) and on the day he was to be retried, Edwards pled guilty in return for a fifteen-year sentence. Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 460 n.62 (1987) (citing Interview by Stephen J. Schulhofer with Michael J. Meehan, Attorney for Edwards (Feb. 18, 1987)).

cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. . . . [A]n accused, such as Edwards, 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 the accused himself initiates further communication, exchanges, or conversations with the police.⁴⁵

In sum, the Court adopted more stringent protection when a suspect invokes the right to counsel than when the suspect “only” invokes the right to remain silent. A suspect’s assertion of the right to remain silent needs to be scrupulously honored, but the passage of time—even as short as two hours—could allow subsequent attempts to re-interrogate in appropriate circumstances. A suspect’s invocation of the right to counsel, on the other hand, operates as an absolute bar to any police-initiated interrogation. A waiver after fresh warnings, the passage of time, questioning on a new crime—all are irrelevant; the waiver is presumptively invalid in the absence of evidence that the suspect initiated the conversation.

Although by the early 1980s the Supreme Court had established that the implication of invoking the right to counsel is different than asserting the right to remain silent, it was not for another thirteen years that the Court considered the threshold question of what constitutes an invocation in the first place. In 1994, the Supreme Court considered whether a suspect who ambiguously asked for an attorney had “invoked” his right to counsel under *Miranda*.

Prior to this time, the lower courts were split among three different approaches. Some courts had held that if the suspect makes any request that can be construed as a request for counsel, ambiguous or not, any interrogation must immediately cease. In other words, even an ambiguous request for counsel constituted an invocation of the right to counsel.⁴⁶ Other courts took the exact opposite approach: the police may ignore any ambiguous requests for an attorney, and need stop interrogations only if the request is clear and unequivocal.⁴⁷ Most courts, however, took a middle approach: when faced with an ambiguous request for counsel, the police may ask

⁴⁵ *Edwards*, 451 U.S. at 484–85. For a discussion of the standards for initiation, see *Oregon v. Bradshaw*, 462 U.S. 1039, 1045–46 (1983), where the Court held that a suspect initiates under *Edwards* by saying something related to the investigation as opposed to a comment made incident to being in custody. As the Court explained, initiation occurs by an inquiry that can “be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation.” *Id.* at 1045. Asking for a drink of water or to use the telephone would not constitute initiation because they are “routine incidents of the custodial relationship.” *Id.*; see also *infra* note 171.

⁴⁶ See, e.g., *Maglio v. Jago*, 580 F.2d 202 (6th Cir. 1978).

⁴⁷ See *People v. Kendricks*, 459 N.E.2d 1137, 1140 (Ill. App. Ct. 1984); *State v. Moore*, 744 S.W.2d 479 (Mo. Ct. App. 1998).

questions, but only to clarify whether the suspect does or does not want the presence of an attorney during interrogation. If the suspect unambiguously indicates a desire for counsel, then all questions must cease. If the response to the clarifying questions indicates that the suspect is willing to speak without an attorney present, the interrogation may proceed.⁴⁸

Almost thirty years after *Miranda* had been decided, the Supreme Court, in *Davis v. United States*, finally addressed this critical question: what exactly triggers the protections set forth in *Miranda* and *Edwards*?⁴⁹ Davis, a member of the U.S. Navy, was accused of killing a fellow officer over a game of pool. He was arrested, brought to an interrogation room, and read his rights. Davis waived his rights both orally and in writing. After more than an hour of questioning, Davis said, "Maybe I should talk to a lawyer."⁵⁰ At this point, the agents testified that

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."⁵¹

After a short break and after a re-reading of the *Miranda* rights, the interrogation resumed. About an hour later, Davis made some incriminating statements, and then said, "I think I want a lawyer before I say anything else."⁵² At this point, all questioning ceased.

At his court-martial, Davis's motion to suppress the statements made during the interrogation was denied. The statements were admitted, Davis was convicted of unpremeditated murder, and he was sentenced to life in prison.⁵³ After his conviction had been affirmed up the military chain of appeals, the Supreme Court granted certiorari to decide how law enforcement officers should respond when faced with an ambiguous request for counsel during custodial interrogation.⁵⁴

Justice O'Connor, writing for the majority, held that after suspects waived their *Miranda* rights, law enforcement officers may continue questioning them unless they clearly and unequivocally request an attorney.⁵⁵

⁴⁸ See *Nash v. Estelle*, 597 F.2d 513 (5th Cir. 1979) (en banc), cert. denied, 444 U.S. 981 (1979).

⁴⁹ 512 U.S. 452 (1994).

⁵⁰ *Id.* at 455.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 454.

⁵⁵ *Id.* at 459.

[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. . . .

Rather, the suspect must unambiguously request counsel.⁵⁶

The test set forth by the Court for determining whether a request is unambiguous is an objective one. “Although a suspect need not ‘speak with the discrimination of an Oxford don,’ he 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.”⁵⁷ Here, the Court accepted the lower court’s conclusion that Davis’s statement, “Maybe I should talk to a lawyer,” was not a reasonably clear request for counsel.⁵⁸ Thus, the Naval Investigative Service agents did not have to cease questioning Davis, and his subsequent statements were admissible in court.⁵⁹

In embracing this approach, O’Connor emphatically rejected the alternative suggested by some lower courts that any invocation, ambiguous or not, constitutes an invocation of the right to counsel under *Edwards*. As the Court noted:

[I]f we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney . . . [p]olice officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong. Such an approach “would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity.”⁶⁰

The “stop-and-clarify approach” received a more favorable review; O’Connor suggested that it might be good police practice to ask clarifying questions when the

⁵⁶ *Id.* (citations omitted).

⁵⁷ *Id.* (citation omitted).

⁵⁸ *Id.* at 462.

⁵⁹ Interestingly, later courts often rely heavily on this part of the decision to conclude that statements like this are ambiguous. However, the Supreme Court assumed, without discussion, that the statement was ambiguous. *Id.* (“The courts below found that petitioner’s remark to the NIS agents ‘maybe I should talk to a lawyer’ was not a request for counsel, and we see no reason to disturb that conclusion.”). The petitioner wanted to argue that the statement was not ambiguous; the government argued that the issue was not properly before the court because it was not included within the questions to which the Court granted certiorari. See Jane M. Faulkner, Note, *So You Kinda, Sorta, Think You Might Need a Lawyer?: Ambiguous Requests for Counsel After Davis v. United States*, 49 ARK. L. REV. 275, 296 & n.134 (1996) (citing Respondent’s Brief at 81, *Davis*, 512 U.S. 452 (No. 92-1949)).

⁶⁰ *Id.* at 460 (citation omitted) (internal quotation marks omitted).

suspect makes an ambiguous comment or request for an attorney. Nonetheless, such a practice is not required and police are free to ignore ambiguous invocations of the right to counsel.⁶¹

II. IMPORTING *DAVIS*: REQUIRING THAT THE RIGHT TO REMAIN SILENT BE ASSERTED UNAMBIGUOUSLY

Davis involved a post-waiver invocation of the right to counsel; no Supreme Court decision has explicitly or implicitly applied the reasoning in that case to invocations of the right to remain silent. Nonetheless, those lower courts that have considered the question have almost unanimously done so. With few exceptions, the majority of jurisdictions have imported the ruling in *Davis* beyond its terms to apply to both *Miranda* rights.⁶² This section explores that phenomenon in two ways. First, a precise description of the case law is provided: a listing of which jurisdictions have embraced the *Davis* rule for the right to remain silent, which have rejected it, and which had not yet decided as of February, 2008 is provided. Second, the practical effect of utilizing the “unambiguous invocation” standard for the right to remain silent is explored. In other words, this section considers the types of statements that have been deemed ambiguous versus those that constitute explicit assertions.

A. Adopting *Davis*: A Score from the Federal and State Courts

In both the federal courts and the states, a majority of courts have held that the rule in *Davis*, although devised for invocations of the right to counsel, also applies to the right to remain silent.

1. The Federal Courts

In the federal courts, nine out of the eleven circuits and the District of Columbia have either expressly held that a suspect must unambiguously invoke the right to remain silent⁶³ or that it would not be an unreasonable application of clearly established

⁶¹ *Id.* at 461.

⁶² Indeed, many secondary sources state the rule as an established principle of criminal law. See, e.g., *Thirty-Sixth Annual Review of Criminal Procedure: Investigation and Police Practices: Custodial Interrogation*, 36 GEO. L.J. ANN. REV. CRIM. PROC. 183 (2007) (“If the invocation of the right to remain silent is ambiguous or equivocal, further questioning is permissible.” (footnotes omitted)); see also 2 LAFAYETTE ET AL., CRIMINAL PROCEDURE § 6.9(g) (3d ed. 2007) (describing the stop-and-clarify position with respect to the right to remain silent as debatable now in light of *Davis*).

⁶³ Sixth Circuit: *McGraw v. Holland*, 257 F.3d 513, 519 (6th Cir. 2001) (applying *Davis* and finding request unambiguous); *United States v. Hurst*, 228 F.3d 751, 760 (6th Cir. 2000). Seventh Circuit: *United States v. Sherrod*, 445 F.3d 980, 982 (7th Cir. 2006), *cert. denied*, 549 U.S. 1230 (2007) (holding that a defendant’s statement did not constitute unambiguous assertion of right to remain silent); *United States v. Mills*, 122 F.3d 346, 350 (7th Cir. 1997),

federal law to apply *Davis* to the right to remain silent.⁶⁴ One circuit—the Second Circuit—assumed that *Davis* applied to the right to remain silent, although it did not hold that it did so.⁶⁵ No appellate court has yet held that *Davis* is limited to invocations of the right to counsel and should not be employed to determine whether a suspect has invoked his right to remain silent. Thus, as the Tenth Circuit recently noted, “[E]very circuit that has addressed the issue squarely has concluded that *Davis* applies to both components of *Miranda*, the right to counsel and the right to remain silent.”⁶⁶

cert. denied, 522 U.S. 1033 (1997); *United States v. Banks*, 78 F.3d 1190, 1197 (7th Cir. 1996). Eighth Circuit: *Simmons v. Bowersox*, 235 F.3d 1124, 1131 (8th Cir. 2001), *cert. denied*, 534 U.S. 924 (2001). Tenth Circuit: *United States v. Nelson*, 450 F.3d 1201, 1211–12 (10th Cir. 2006), *cert. denied*, 549 U.S. 937 (2006). Eleventh Circuit: *Valle v. Sec’y for the Dep’t of Corr.*, 459 F.3d 1206, 1213–15 (11th Cir. 2006); *United States v. Del Rio*, 168 F. App’x 923, 927 (11th Cir. 2006), *cert. denied*, 549 U.S. 853 (2006); *United States v. Acosta*, 363 F.3d 1141, 1154–55 (11th Cir. 2004). District of Columbia: *United States v. Anderson*, No. 95-3048, 1996 U.S. App. LEXIS 7286, at *5 (D.C. Cir. Feb. 16, 1996) (per curiam) (applying the *Davis* rule).

⁶⁴ For many of the cases, the case is heard in federal court as a habeas petition under the Antiterrorism and Effective Death Penalty Act (AEDPA). Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254 (1996). Under this statute, federal courts review state judgments only to determine whether those judgments construe or apply federal law in a manner that is contrary to or an “unreasonable application of” the Supreme Court’s “clearly established” precedent. *See, e.g.*, *Bui v. DiPaolo*, 170 F.3d 232, 239 (1st Cir. 1999). Courts taking this approach include the First, Fourth, Fifth, and Ninth Circuits. First Circuit: *James v. Marshall*, 322 F.3d 103, 108 (1st Cir. 2003). Fourth Circuit: *Burket v. Angelone*, 208 F.3d 172, 200 (4th Cir. 2000) (noting that although the Fourth Circuit had not yet determined whether *Davis* is applicable to invocations of the right to remain silent, under the AEDPA, the court need only decide whether the Virginia Supreme Court’s decision to admit the suspect’s statement was contrary to clearly established federal law as determined by the Supreme Court; in light of *Davis* “we cannot say that it was”), *cert. denied*, 530 U.S. 1283 (2000). Fifth Circuit: *Hopper v. Dretke*, 106 F. App’x 22, 229–31 (5th Cir. 2004), *cert. denied*, 544 U.S. 914 (2005) (applying, without discussion, *Davis*). *But see* *Soffar v. Cockrell*, 300 F.3d 588, 593–94 & n.5 (5th Cir. 2002) (stating that it was not addressing whether the *Davis* standard applies but nonetheless finding that the defendant did not invoke his right because it was not a clear invocation). Ninth Circuit: *Arnold v. Runnels*, 421 F.3d 859, 866 & n.8 (9th Cir. 2005) (finding that suspect unambiguously asserted right to remain silent and thus again left open the question of whether *Davis* applies equally to the invocation of the right to silence); *Evans v. Demosthenes*, 98 F.3d 1174, 1176 (9th Cir. 1996), *cert. denied*, 521 U.S. 1108 (1997). *But see* *Monzano v. Pliier*, 192 F. App’x 605, 606 (9th Cir. 2006), *cert. denied*, 549 U.S. 1099 (2006) (finding that the California Court of Appeals decision that the defendant did not unambiguously invoke his right to remain silent was not contrary to nor involved an unreasonable application of clearly established federal law and therefore the defendant was not entitled to habeas relief on this claim and citing *Davis* and stating that *Runnels*, 421 F.3d 859, had applied *Davis* to the right to remain silent).

⁶⁵ *United States v. Ramirez*, 79 F.3d 298, 305 (2d Cir. 1996), *cert. denied*, 519 U.S. 850 (1996).

⁶⁶ *United States v. Nelson*, 450 F.3d 1201, 1211–12 (10th Cir. 2006).

Although the majority of courts may have applied *Davis* to the right to remain silent, they did so perfunctorily. None of the courts provided any detailed explanation for why that Supreme Court decision transcended the right to counsel and applied as well to the right to remain silent. For example, the Tenth Circuit simply referred to the weight of authority applying *Davis* to both components of *Miranda* (the right to counsel and the right to remain silent) and stated: "We agree with this reasoning."⁶⁷ Even when some analysis is provided, it is extraordinarily cursory. Typical is the approach of the Eleventh Circuit, which recited the justifications provided in *Davis* and simply concluded that because the justifications apply "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."⁶⁸ The Seventh Circuit explained its decision to follow *Davis* this way:

If an ambiguous request for counsel—a request that, if it were more clear, would amount to a per se invocation of Fifth Amendment rights—does not require the cessation of all questioning, we do not believe that *Davis* permits our imposing such a rule on any other ambiguous invocation of the right to silence.⁶⁹

2. The State Courts

State court decisions follow a similar pattern to the federal: the vast majority of states that have considered the question have applied the *Davis* rule to the right to remain silent.⁷⁰ No state that adopted *Davis* as the prevailing doctrine for the right to counsel rejected it for the right to remain silent. In other words, only a few states did not adapt *Davis* for invoking all *Miranda* rights; those states either have not yet considered the issue or are the few states that rejected *Davis* altogether under their state constitution.⁷¹

⁶⁷ *Id.* at 1212.

⁶⁸ *Coleman v. Singletary*, 30 F.3d 1420, 1424 (11th Cir. 1994), *cert. denied*, 514 U.S. 1086 (1995); *see, e.g., United States v. Stepherson*, 152 F. App'x 904, 906 (11th Cir. 2005).

⁶⁹ *United States v. Banks*, 78 F.3d 1190, 1198 (7th Cir. 1996).

⁷⁰ *People v. Arroya*, 988 P.2d 1124, 1131 (Colo. 1999) ("In so doing we follow the majority of other states that have considered the application of the 'clear articulation rule' to the right to remain silent."). See Appendix I for a listing of each state and the rules followed.

⁷¹ The following states do not require that an invocation of counsel must be made unambiguously because their state constitutions provide greater rights to a suspect than the Federal Constitution. Hawaii: *State v. Wallace*, 94 P.3d 1275, 1286 (Haw. 2004); *State v. Hoey*, 881 P.2d 504, 523 (Haw. 1994). Minnesota: *State v. Risk*, 598 N.W.2d 642, 648–49 (Minn. 1999). New Jersey: *State v. Chew*, 695 A.2d 1301, 1317–18 (N.J. 1997). West Virginia: *State v. Farley*, 452 S.E.2d 50, 59 n.12 (W. Va. 1994). But *see State v. Bradshaw*, 457 S.E.2d 456, 470 (W. Va. 1995) (any doubt created by an ambiguous statement would be resolved in favor of the police), *cert. denied*, 516 U.S. 872 (1995).

Similar to the federal cases, the adoption of *Davis* by the state courts is typically fairly perfunctory.⁷² With one exception, the courts did not address any of the possible reasons why the rights perhaps should be treated differently.⁷³ Rather, the approach of the Supreme Court of Vermont was representative, when it simply declared, “Without doubt, [the holding in *Davis*] applies equally to situations in which a defendant who has waived his *Miranda* rights ambiguously invokes the right to remain silent during the subsequent interrogation.”⁷⁴

B. Application of Davis—What Constitutes an Ambiguous Assertion?

How has the mandate to follow *Davis* been implemented? In other words, what kind of statements have the courts found to be ambiguous and what kind of statements have the courts found to invoke the right to remain silent? On the one hand, if the courts have been “generous” in drawing the line between ambiguous and non-ambiguous statements by finding many statements to be assertions of the right, there may be less reason to lament the application of *Davis*. If, however, the courts have not been sympathetic to uncertain, indirect language that is often employed in intimidating settings, then the use of *Davis* is of greater concern. Moreover, if the courts have been inconsistent in the determination of whether a statement is ambiguous, there is also cause for alarm.

There are familiar patterns in the cases where the suspect’s statements are found to be ambiguous assertions of the right to remain silent.⁷⁵ Statements made by suspects

⁷² See, e.g., *State v. Gaspard*, 709 So. 2d 213, 220 (La. Ct. App. 1998) (“If the invocation of the right to counsel must be unambiguous, then certainly the invocation of the right to remain silent must also be unambiguous.”).

⁷³ One obvious exception was the analysis of the Wyoming Supreme Court, which expressed significant doubts about the application of the *Davis* rule to the right to remain silent similar to those articulated in this Article, but ultimately determined that it need not decide the issue since the officers here properly clarified the ambiguous invocation. *Peña v. State*, 98 P.3d 857, 866–68 (Wyo. 2004).

⁷⁴ *State v. Bacon*, 658 A.2d 54, 65 (Vt. 1995), cert. denied, 516 U.S. 837 (1995).

⁷⁵ For a similar analysis with respect to the invoking the right to counsel, see Marcy Strauss, *Understanding Davis v. United States*, 40 LOY. L.A. L. REV. 1011 (2007) [hereinafter Strauss, *Understanding Davis*]. In many ways, though, classifying and analyzing the right to remain silent presented a more difficult challenge. At a minimum, virtually every comment in the right to counsel cases involved the use of the word lawyer or attorney or counsel, and the only question is whether that was sufficiently clear to constitute an invocation. In the right to silence cases, that is not true—there are no magic words like “attorney or lawyer” that signal a possible assertion, and the statements involve an almost infinite range of ideas, including requests to be somewhere else or silence. Moreover, at times it may be difficult to determine whether the suspect is invoking the right to counsel or the right to remain silent—and perhaps the suspect may not be certain as well. For example, is a suspect who says, “I’m asserting my rights,” asserting both? Most courts would likely find that to be an assertion only of the right to remain silent (at best). See *Medley v. Commonwealth*, 602 S.E.2d 411, 417–18 (Va. Ct.

typically fit into one of the following categories: (1) questions concerning the right; (2) use of modal verbs like maybe, might, or could; (3) hedges; (4) simply silence; (5) requests to do something else besides talking; (6) temporally vague comments about the willingness to talk; (7) comments that indicate a desire not to talk about specific topics or not to say something incriminating; (8) comments that become ambiguous because of other statements or conduct.

1. Questions Concerning the Right

One type of possible invocation of the right to counsel occurs when the suspect asks about the right rather than directly asserting it. At times, the suspect appears to be seeking the advice of the police: the suspect may ask if they think they should remain silent or obtain a lawyer.⁷⁶ But at other times the question appears to be a fairly clear substitute for a direct assertion of the right. For example, the suspect may ask: "I have the right to stop don't I . . . answering questions?"⁷⁷ Or, instead of saying that they don't want to talk at this time, a suspect may "ask" if they could talk later.⁷⁸ Using questions, or even making statements with the voice raised at the end is a frequent form of elocution for persons who find themselves in an intimidating position or who feel powerless.⁷⁹ And in everyday parlance, using a question to make a request is commonplace. For example, a school child might raise her hand and ask, "Can I go the bathroom?" While it is possible that that child does not really want to go the bathroom, and may be simply assessing if it is possible, virtually all would assume that a "yes" answer would cause the child to leave the room. In other words, it would appear clear to most that the child is saying, "I want to go to the bathroom—is that ok?"

App. 2004). Of course, most suspects are totally unaware of the significant different consequences of invoking one right versus the other. *See Farley*, 452 S.E.2d at 59–60 & n.11.

⁷⁶ *See, e.g., Gilbert v. State*, 198 S.W.3d 561, 566 (Ark. Ct. App. 2004) (holding that the statement, "Do I need a lawyer or something?" was an ambiguous invocation of the right to remain silent).

⁷⁷ *People v. Moore*, No. 239242, 2003 WL 21771296, at *4 (Mich. Ct. App. July 31, 2003) (holding that "So what do I have to do to get out of here? Cause I haven't sleep [sic] all day" was not a request, let alone an unambiguous request to remain silent).

⁷⁸ *See Smith v. State*, 236 S.W.3d 282, 289–90 (Tex. App. 2007) (holding that the statement, "Could I go upstairs because I'm hungry?" was ambiguous); *see, e.g., Martin v. Wainwright*, 770 F.2d 918, 923–24 (11th Cir. 1985) (finding, in a pre-*Davis* decision, that the request, "Can't we wait until tomorrow," invoked the right to cut off questions), *modified in respects not relevant*, 781 F.2d 185 (11th Cir. 1986), *cert. denied*, 479 U.S. 909 (1986).

⁷⁹ Peter M. Tiersma & Lawrence M. Solan, *Cops and Robbers: Selective Literalism in American Criminal Law*, 38 L. & SOC'Y REV. 229, 251–52 (2004). Professors Tiersma and Solan point out that in other contexts, when the police phrase statements as questions, even ambiguous questions, courts will view it as clear requests. *Id.* at 255. For example, in *Schneloth v. Bustamonte*, the Supreme Court "held that the police officer, by asking 'Does the trunk open?' had requested consent to search the trunk." *Id.*

In the context of the interrogation room, however, questions like that are usually deemed ambiguous. Take for example, the approach of the Minnesota Court of Appeals involving a suspect, Gilmer, and the interrogator, Carlson:

Gilmer: Can I go?

Carlson: Uh?

Gilmer: Can I go?

Carlson: Sure you can. Cause—I have one more question I wanted to ask you. About do you remember making a comment how lucky that cop was?⁸⁰

Gilmer then continued to answer questions and eventually told Carlson that he called the police officer lucky because he would have shot him if he had a gun.⁸¹

The court held that Gilmer's requests to leave—twice saying, "Can I go?"—were not unambiguous and unequivocal invocations of the right to silence. This conclusion was buttressed by Gilmer's behavior after he asked to leave; because Gilmer continued to answer questions, "he did not demonstrate a 'general refusal to answer any of the questions the detective wanted to ask.'"⁸²

2. Use of Modal Verbs like Maybe, Might or Could

As predicted by critics of *Davis*, many suspects subjected to the intimidation inherent in custodial interrogation employ modal verbs—indirect, tentative speech patterns. Thus, suspects might say things like "I might not want to talk," or "Maybe I'll stay quiet." Although there are not many cases along these lines, courts invariably find these kinds of statements to be ambiguous. For example, one court found the statement, "I'm not sure what I want to do," was ambiguous and thus, not an invocation of the right to remain silent.⁸³ Another found that a suspect's comment, "I want to give ya'll [sic] a statement but I don't . . . I'd rather not be doing it. Another time if we could man," was ambiguous and allowed the police to continue questioning.⁸⁴

⁸⁰ State v. Gilmer, No. CO-03-82, 2004 WL 333137, at *2 (Minn. Ct. App. Feb. 24, 2004).

⁸¹ *Id.*

⁸² *Id.* at *3. This conclusion appears contrary to law—the subsequent answering of questions after a possible invocation should not be used as evidence that the invocation was ambiguous. Rather, it is a testament to the ability of the police, once they ignore an invocation, to obtain the suspect's cooperation since most suspects would then believe they have no real option. Of course Gilmer talked—he had twice asked to leave and was essentially ignored. I discuss this phenomenon elsewhere as well. See *infra* Part III.A.3.

⁸³ State v. Morris, 880 P.2d 1244, 1253 (Kan. 1994); see *People v. Furness*, No. B183779, 2006 WL 2005481, at *4 (Cal. Ct. App. July 19, 2006) (holding that the statement, "I'm thinking I might just want to keep my mouth shut . . . I don't know," was ambiguous; police also asked clarifying questions); *State v. Hassel*, 696 N.W.2d 270, 274 (Wis. Ct. App. 2005) (holding that the statement, "I don't know if I should speak to you," was ambiguous).

⁸⁴ State v. Reed, 809 So. 2d 1261, 1273–74 (La. Ct. App. 2002).

Perhaps the oddest interpretation of a modal verb involves one court's analysis of the use of the word "can't." In a strange use of linguistic logic, the Michigan Court of Appeals found that the trial court did not err in finding that a suspect, who, after viewing a video, said, "I can't say anything more now, because that's blowing my mind away," did not assert his right to remain silent.⁸⁵ The court's reasoning:

[D]efendant's expression of his inability to respond to the allegation based on shock and disbelief is not an unequivocal assertion of the right to remain silent. Further, the fact that defendant referred to his ability to respond to the allegations using the word "can" [sic] and referenced his shock as the reason for being unable to speak further support the trial court's finding that defendant was referring not to his desire to remain silent but to his *inability* to respond to the charges in light of his shock.⁸⁶

The problem with the court's analysis is that the motive for the suspect in invoking the right to remain silent is irrelevant. It could be from a "desire" not to speak or it may not. In other words, a suspect who says, "I really, really want to speak to you, but I won't," should be deemed to be invoking his right. The motive for not speaking—be it a desire not to, the advice of attorney, fear, or even "shock"—is irrelevant.

3. Hedges

"'Hedges' are lexical expressions that function to attenuate the emphasis of a statement, or to make it less precise."⁸⁷ As will be discussed more fully later, Janet Ainsworth and other scholars predicted that women and members of certain cultures particularly use hedges when in custodial settings because they are not used to demanding outright and directly what they desire.⁸⁸ Similarly, Professors Tiersma and Solan noted that people use hedges not only when they are uncertain about something, but also as a means of expressing politeness or being deferential.⁸⁹ Thus, a person might say things like "I think I should stop talking," or "I guess I won't talk," or "maybe I shouldn't talk" rather than say directly that they are not going to answer any questions or "demanding" their rights. Although my survey of the case law was not able to assess whether women are more likely to speak like this than men, it did

⁸⁵ *People v. Anderson*, No. 265959, 2007 WL 1429631, at *1 (Mich. Ct. App. May 15, 2007).

⁸⁶ *Id.*

⁸⁷ Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 *YALE L.J.* 259, 276 (1993); see Strauss, *Understanding Davis*, *supra* note 75, at 1041.

⁸⁸ Ainsworth, *supra* note 87.

⁸⁹ Tiersma & Solan, *supra* note 79, at 249–50.

establish that whoever used these expressions was likely to be found to be making an ambiguous request. For example, the Kansas Court of Appeals found that the statement, "You all are scaring me I think, yeah, I shouldn't—say . . . anymore," was constitutionally indistinguishable from the ambiguous comment in *Davis*.⁹⁰ Another court found that the suspect's statement, "I don't think I can talk. . . . I guess I don't want to discuss it right now," was ambiguous.⁹¹ Similarly, a suspect who, when asked if he wanted to talk said, "Naw, I don't think so," was held to be making an ambiguous request.⁹²

Another way suspects could "hedge" their comments without using terms like "think," or "guess," is to "blame" the desire to remain silent on others. Again, the court often deems these to be ambiguous requests. For example, one defendant, after talking for a bit said, "from here on, I'm not supposed to talk about it. Mr. Stanfield told me not to talk about the rest of this."⁹³ The court held that the subsequent statements were admissible because the prior statement was ambiguous (which the police officers clarified).⁹⁴

⁹⁰ *State v. Morfitt*, 956 P.2d 719, 725 (Kan. Ct. App. 1998); *accord* *People v. Stitely*, 108 P.3d 182, 195–96 (Cal. 2005) (holding that the statement, "*I think it's about time for me to stop talking.*" is ambiguous), *cert. denied*, 546 U.S. 865 (2005).

⁹¹ *People v. Peracchi*, 102 Cal. Rptr. 2d 921, 924–27 (Cal. Ct. App. 2001), *cert. denied*, 534 U.S. 901 (2001).

⁹² *People v. Patterson*, No. A103263, 2005 Cal. App. LEXIS 9594, at *37 (Cal. Ct. App. Oct. 21, 2005); *see* *Burket v. Angelone*, 208 F.3d 172, 200 (4th Cir. 2000) (holding that the statements, "I just don't think that I should say anything," and, "I need somebody that I can talk to," did not constitute an unequivocal request to remain silent), *cert. denied*, 530 U.S. 1283 (2000); *State v. Holmes*, 102 P.3d 406, 414, 419–20 (Kan. 2004). In *Holmes*, after the suspect said, "I think I'll just quit talking, I don't know," the police officer moved the interrogation in another direction, thinking the suspect was just uneasy talking about a particular subject. He asked, "would you like to talk about something else?" and the suspect said, "Yes." The Court held the statement was ambiguous—it could be construed as not wanting to talk but not knowing if he should stop, or as an invocation. Here, it was appropriate to clarify. *Id.*; *see also* *State v. Garbow*, No. A04-149, 2005 WL 221676, at *1, *3 (Minn. Ct. App. Feb. 1, 2003) (holding that the statement, "I don't know," when asked if a suspect wanted to speak was inherently ambiguous); *State v. Wright*, No. 07AP-154, 2007 WL 4564247, at *6–7 (Ohio Ct. App. Dec. 31, 2007) (holding that the statement, "You know, man, I really don't even want to keep going through these questions and stuff man, because you all getting ready to charge me with something. I don't know, man. You know what I am saying?" was ambiguous, and police asked appropriate clarifying questions like "You don't want to answer any more questions?"); *cf.* *State v. Deen*, 953 So. 2d 1057, 1058–59 (La. Ct. App. 2007) (holding that defendant's statement, "Okay, if you're implying that I've done it, I wish to not say any more. I'd like to be done with this. Cause that's just ridiculous. I wish I'd . . . don't wish to answer any more questions," was ambiguous because it was conditioned on police officer's implying that he committed the brutal assault).

⁹³ *Alvarez v. State*, 890 So. 2d 389, 393 (Fla. Dist. Ct. App. 2004).

⁹⁴ *Id.* at 393–94. While "clarifying," the police also told the suspect that this would be his only opportunity to tell his side of the story. *Id.*

4. Simply Silence

What if the suspect simply stays silent? Is that an invocation of the right? In one way, it could be deemed the ultimate invocation—not only is the person saying what they want to do, they are also doing it! On the other hand, the conclusion is complicated because a person may pick and choose what to respond to, so it may be that they have not yet found a topic they want to discuss. Not surprisingly, then, the courts have reached conflicting conclusions with respect to silence. For example, one district court held that the suspect had invoked the right to remain silent when he did not answer any of the first set of questions in a twenty-minute period.⁹⁵

Most courts, however, seem to deem silence, even lengthy silence, as ambiguous. For example, a court of appeals held that the trial court was not clearly erroneous when it held that a thirty- to forty-minute period of silence did not express an “unwillingness to continue the questioning, but rather ‘a time used by [the suspect] to redevelop his strategy and decide how he wished to respond to the discovery of the receipt for the bag of lime.’”⁹⁶ Similarly, a court held that the suspect’s statement that he would not confess to something he did not do, that the police should “buckle up for the long ride,” accompanied by the suspect turning his chair away, closing his eyes, and remaining silent for two-and-one-half hours did not constitute a clear and unambiguous assertion of the right to remain silent.⁹⁷

5. Requests to Do Something Besides Talk

One of the difficult aspects of analyzing cases involving the right to remain silent is the myriad of almost limitless ways to invoke the right. For example, a person may inform the police that they do not want to talk by saying that they want to do something else instead.⁹⁸ Or they may ask to speak to someone else—a mom, another suspect—before speaking to the police.⁹⁹ Almost invariably, the courts have found

⁹⁵ *State v. Rossignol*, 627 A.2d 524, 525–27 (Me. 1993).

⁹⁶ *Commonwealth v. Sicari*, 752 N.E.2d 684, 695–96 (Mass. 2001), *cert. denied*, 534 U.S. 1142 (2002).

⁹⁷ *Green v. Commonwealth*, 500 S.E.2d 835, 837–38 (Va. Ct. App. 1998); *see State v. Ross*, 552 N.W.2d 428, 432 (Wis. Ct. App. 1996) (“[S]uspect’s silence, standing alone, is insufficient to unambiguously invoke the right to remain silent.”).

⁹⁸ *See, e.g., State v. Gaspard*, 709 So. 2d 213, 218, 220 (La. Ct. App. 1998) (holding that the statement, “I’m ready to go [to jail],” did not unambiguously invoke the right to remain silent); *State v. Curren*, No. 04 CA 8, 2005 WL 1995101, at *2–3 (Ohio Ct. App. Aug. 16, 2005) (holding that a request to reschedule the conversation for another time, which was denied by the police who said they “wanted the matter cleared up that day” did not constitute an unambiguous invocation of the right to remain silent).

⁹⁹ *See, e.g., Davis v. State*, No. AP-74393, 2007 WL 1704071, at *4–6 (Tex. Crim. App. June 13, 2007) (holding that when a suspect asked to speak to his mom, to go home for an hour, and then return and tell the truth was ambiguous and satisfied by police getting mom on phone

these statements to be ambiguous. Thus, the Kansas Supreme Court held ambiguous the suspect's statement: "And since we're not getting anywhere I just ask you guys to go ahead and get this over with and go ahead and lock me up and let me go and deal with Sedgwick County, I'm ready to go to Sedgwick County, let's go."¹⁰⁰ Such a statement, according to the court, did not constitute an unequivocal statement that he wished to remain silent.¹⁰¹ Similarly, the Florida Court of Appeals held that the suspect, who three times said, "Just take me to jail," was making an ambiguous assertion of the right to remain silent, and therefore the police did not have to stop questioning.¹⁰² Another court held that a female suspect who said, "Then put me in jail. Just get me out of here. I don't want to sit here anymore, alright? I've been through enough today," was ambiguous.¹⁰³ In so doing, the court indicated the high threshold level it was establishing:

[A] suspect's claimed unequivocal invocation of the right to remain silent must be patent. The *Ross* rule allows no room for an assertion that permits even the possibility of reasonable competing inferences: there is no invocation of the right to remain silent if any reasonable competing inference can be drawn.¹⁰⁴

Under such a standard, it is not surprising that the court held that the suspect's ostensibly clear assertion was ambiguous. The court conceded that a reasonable interpretation of the statement is that the suspect was invoking her right to remain silent, but concluded that an equally reasonable interpretation was "that she was merely fencing with [her interrogator] as he kept repeatedly catching her in either lies or at least differing versions of the events."¹⁰⁵

Finally, and perhaps most disturbing, a court found no assertion of the right to remain silent despite the persistent requests throughout the interrogation from a suspect with diminished mental abilities to go home—"I want to go home to the house,

because suspect just wanted to reassure himself that his mom felt OK before continuing); see also *Draper v. State*, No. 147, 2000, 2002 Del. LEXIS 51, at *3, *6-10 (Del. Jan. 28, 2002) (holding that when a suspect requested to speak to his mom before he talked to the police was an ambiguous statement, but under Delaware law, the court held police must clarify, not interrogate, which they did not do, thus the statements elicited after this comment were suppressed).

¹⁰⁰ *State v. Speed*, 961 P.2d 13, 24 (Kan. 1998).

¹⁰¹ *Id.*; see *Smith v. State*, 236 S.W.3d 282, 289-90 (Tex. App. 2007) (holding that the statements, "Man. Whatever's gonna happen, cause I'm just ready to go up there and eat . . . Could I go upstairs because I'm hungry?" indicated only that the suspect was hungry and not that he wanted to end the interrogation).

¹⁰² *Ford v. State*, 801 So. 2d 318, 319-20 (Fla. Dist. Ct. App. 2001), *review denied*, 821 So. 2d 292 (Fla. 2002), *cert. denied*, 537 U.S. 1010 (2002).

¹⁰³ *State v. Markwardt*, 742 N.W.2d 546, 548 (Wis. Ct. App. 2007).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 556-57.

man. . . . I'll come up to talk to you later because, man, I don't have time to think. . . . I gotta go home. . . . Can I go home now?"¹⁰⁶ The court concluded:

His statements more accurately reflect a desire to have time to formulate answers or an inquiry as to whether he would be allowed to go home if he confessed rather than a request to terminate the interview. At most, Delao's statements are ambiguous as to his desire to terminate the interview.¹⁰⁷

6. Temporally Vague Comments

Some suspects append a time limitation to their invocations. Thus, a suspect may say, "I don't want to talk *now*." The word "now" is read by many courts as rendering the invocation ambiguous. These courts have allowed further interrogation after a "short break" because, these courts conclude, the suspect never demonstrated an overall desire not to speak to the police.¹⁰⁸ It was as though the suspect said, "hold on a second, I'm happy to talk to you after I clear my throat."

This conclusion seems inexplicable to me because, given *Mosley*,¹⁰⁹ every invocation of the right to remain silent is temporal. Even a suspect who says, "I am invoking my rights under *Miranda* and do not want to talk to you at all ever again," has an implicit "now" attached to that statement, because *Mosley* allows the police to try again. There is an inherent assumption that the suspect is invoking "for the moment," but that nonetheless, it is *still* an invocation. Thus, questioning should cease and any subsequent interrogation should be analyzed under *Mosley*.

Instead, many courts considering comments like "I don't want to talk now," have determined that the invocation itself was equivocal or momentary and thus no sort of *Mosley* analysis is even necessary since the interrogation can simply continue (although it's nice to give the suspect a quick break!).¹¹⁰ For example, a recent court of appeals

¹⁰⁶ Delao v. State, No. 10-05-00323-CR, 2006 WL 3317718, at *4-5 (Tex. App. Nov. 15, 2006), *cert. denied*, 128 S. Ct. 1128 (2008).

¹⁰⁷ *Id.* at *5.

¹⁰⁸ See, e.g., State v. Gilmer, No. CO-03-82, 2004 WL 333137, at *2-3 (Minn. Ct. App. Feb. 24, 2004).

¹⁰⁹ See *supra* notes 24-33 and accompanying text.

¹¹⁰ See Anderson v. Terhune, 467 F.3d 1208, 1210-13 (9th Cir. 2005), *rev'd en banc*, 516 F.3d 781 (9th Cir. 2008), *cert. denied sub nom.* Cate v. Anderson, 129 S. Ct. 344 (2008) (holding that the state court's decision that the following statement was ambiguous was not unreasonable: "I don't even wanna talk about this no more. We can talk about it later or whatever. I don't want to talk about this no more. . . . I plead the fifth"). According to the appellate court in *Anderson*, the police here also engaged in clarification, not continued interrogation, by asking the suspect: "Plead the fifth. What's that?" *Id.* In another case, the suspect said, "I really can't say no more right now. . . . My head is splitting. . . . I need some rest. I really do," and the court held this statement did not invoke the right to remain silent, but simply that the defendant felt that he was physically unable to continue. Dowthitt v. State, 931 S.W.2d

held that a suspect's comment, "Not right now," was ambiguous as to whether the suspect wants to talk after a "quick break."¹¹¹ Thus, the re-interrogation after a short period was held valid, not under *Mosley* or some other theory, but because there was no clear invocation; the statement was ambiguous as to whether the suspect wanted to speak at that point.¹¹² Similarly, the Rhode Island Supreme Court held that the defendant's statement, "I don't want to talk about it right now," operated to limit the defendant's invocation of his right to remain silent to the moment and was equivocal.¹¹³

Other courts similarly have found angry outbursts that included the intent not to say anything indicated only a temporary—and thus ambiguous—assertion of the right to remain silent. For example, when the suspect, after getting upset with the police officer, said, "I'm not going to talk. . . . That's it. I shut up," the court concluded that this statement "reflect[ed] only momentary frustration and animosity toward" one of the officers and not an invocation of the right to remain silent.¹¹⁴ Likewise, the Minnesota Supreme Court held that the suspect's statement, "I don't have to take any more of your bullshit," accompanied by his walking out of the interview room did not invoke the right to remain silent.¹¹⁵ Rather, the court sanctioned the re-interrogation that occurred after a "cooling off period" because the suspect did not specifically state that he wanted to stop answering questions.¹¹⁶

244, 253, 257 (Tex. Crim. App. 1996). Thus, the court found no problem with the police response when the suspect said he could say no more: "Yes, you can. . . . It's got to come out. It's going to kill you if it doesn't." *Id.* at 253; *see also* State v. Galli, 967 P.2d 930, 935 (Utah 1998) (holding that the only reasonable interpretation of the suspect's statement, "I can't even talk right now," was that "his emotions had temporarily overcome his ability to speak," and thus it was not an unambiguous assertion of right to remain silent); *accord* Franks v. State, 90 S.W.3d 771, 786–87 (Tex. App. 2002) (holding that when a suspect with low IQ said, "I don't want to talk anymore. I'm tired," it was ambiguous).

While most courts appear to find such statements ambiguous, not all reach that conclusion. *See, e.g.,* State v. Nelson, No. 9801001490, 1998 Del. Super. LEXIS 477, at * 11, *15–16 (Del. Super. Ct. Jan. 23, 1998) (holding that the statement, "I have nothing else to say now," was an unambiguous invocation); State v. Astello, 602 N.W.2d 190, 196 (Iowa Ct. App. 1999) (holding that the statements, "Well. I'm done. You're just repeating the same questions. . . . Well, you're done. I gotta go. I gotta go eat. . . . I'm done," were unambiguous but an admission of subsequent statements was harmless error); State v. Hukowicz, No. M1999-00073-CCA-R9-CD, 2000 WL 1246430, at *3 (Tenn. Crim. App. Aug. 18, 2000) ("[A]lthough the defendant did not stand mute or assert that he did not want to answer any questions, we find ample evidence to support the trial court's finding that the defendant invoked his right to remain silent [when he told the detective] that he could not comment, and that although he wanted to comment, 'he knew better.'").

¹¹¹ State v. Bieker, 132 P.3d 478, 481–82 (Kan. Ct. App. 2006).

¹¹² *Id.*

¹¹³ State v. Sabetta, 680 A.2d 927, 932 (R.I. 1996).

¹¹⁴ People v. Jennings, 760 P.2d 475 (Cal. 1988), *cert. denied*, 539 U.S. 958 (2003).

¹¹⁵ State v. Williams, 535 N.W.2d 277, 282, 284 (Minn. 1995).

¹¹⁶ *Id.* at 285; *see also* State v. Gilmer, No. CO-03-82, 2004 WL 333137, at *2–3 (Minn. Ct. App. Feb. 24, 2004).

7. Statements Indicating a Desire Not to Talk About Certain Subjects or with a Particular Person

In a similar vein, some courts interpret what looks like an unambiguous invocation to be ambiguous because it did not indicate a generalized wish to remain silent but rather simply suggested a desire to change subjects or interrogators.¹¹⁷ For example, one court held that a defendant's statement, "I don't want to talk about it any more, it hurts too much," was not invoking the right to remain silent but expressing a desire not to continue talking about the murder.¹¹⁸ Such a conclusion is especially likely to be reached if the suspect says something like "I don't want to talk about *that* or *it*."¹¹⁹ But even when the comment seems more encompassing, courts often suggest

¹¹⁷ See, e.g., *State v. Golphin*, 533 S.E.2d 168 (N.C. 2000), *cert. denied*, 532 U.S. 931 (2001). There, the suspect's statement that "he didn't want to say anything about the jeep. He did not know who it was or he would have told us" was not unambiguously invoking right to remain silent. *Id.* at 225. Rather the suspect was suggesting that if he knew he would have said and thus further questioning on the jeep was perfectly acceptable. *Id.* Of course, even a change of subject does not offer much protection to the suspect. For example, in one case when the suspect said he "had nothing to say" to the detective, the detective interpreted that as a desire not to say anything on the subject asked about (a particular robbery). *Smith v. State*, 915 So. 2d 692, 693 (Fla. Dist. Ct. App. 2005). The detective then asked him if he had committed any other robberies, and the defendant responded, "[N]o other than the one today." *Id.* at 693 n.1. The court held the statement inadmissible on the ground that the suspect had invoked his rights. *Id.* at 693.

¹¹⁸ *State v. Fritschen*, 802 P.2d 558, 567–68 (Kan. 1990); *accord State v. Jackson*, 839 N.E.2d 362, 373 (Ohio 2006) (holding that the statements "I don't even like talking about it man . . . cause you know what I mean, it's fucked for me, man, . . . I told you . . . what happened, man, . . . I mean, I don't even want to, you know what I'm saying, discuss no more about it, man. . . ." were ambiguous), *cert. denied*, 547 U.S. 1182 (2006); *cf.* *People v. Troutman*, 366 N.E.2d 1088 (Ill. App. Ct. 1977) (finding a suspect's statement that she was not going to confess did not invoke the right to remain silent but just indicated that she did not want to incriminate herself); *Vargas v. State*, No. 01-03-00870-CR, 2005 WL 729460, at *3–4 (Tex. App. Mar. 31, 2005) (holding that when a fifteen-year-old said twice, "I don't want to do this," the statement was ambiguous because it was reasonable to believe it meant that he did not want to relive the gruesome details of the death); *Milburn v. State*, No. 03-02-00458-CR, 2004 WL 210620, at *5 (Tex. App. Feb. 5, 2004) (holding that "I don't have nothing to say" was ambiguous), *cert. denied*, 543 U.S. 1064 (2005). *But see* *United States v. Poole*, 794 F.2d 462, 465–67 (9th Cir. 1986) (holding pre-*Davis* that when a defendant stated he had "nothing to talk about" he invoked his right to remain silent); *United States v. Stewart*, 51 F. Supp. 2d 1136, 1142–45 (D. Kan. 1999) (holding that a defendant invoked his right to remain silent when he said he did "not want to talk about a robbery," and "I don't want to talk to any of you motherfuckers"), *aff'd*, 215 F.3d 1338 (10th Cir. 2000).

¹¹⁹ See, e.g., *People v. Silva*, 754 P.2d 1070, 1083–84 (Cal. 1988) (holding that the statement, "I really don't want to talk about that," did not amount to an invocation of *Miranda*, but instead was an unwillingness to talk about certain subjects); *Owen v. State*, 862 So. 2d 687 (Fla. 2003) (holding that when a suspect said, "I'd rather not talk about it. . . . I don't want to talk about it," the statement was ambiguous); *State v. Marden*, 673 A.2d 1304, 1309–10

it is just in response to the most immediate question. For example, a court held that the suspect's statement, "I'm not saying anything right now," was ambiguous because the statement "only indicated an unwillingness to talk about certain subjects. At most it sought to alter the course of the detective's questions, not stop the interview altogether."¹²⁰ In another case, the suspect who answered a lengthy question, and then concluded, "So that's all I got to say," was deemed ambiguous because "[i]t could

(Me. 1996) (holding that the defendant's response of "no comment" to several questions was ambiguous—"[h]is responses viewed individually only indicated his desire not to answer the particular question asked, not that he wanted the questioning to stop"); *State v. Crawford*, No. A04-566, 2005 WL 757582, at *3 (Minn. Ct. App. Apr. 5, 2005) (holding that the defendant's statement, "I don't know nothin' about it, so I don't got nothin' to say about it," in response to whether he sold amphetamines was not an assertion of the right to remain silent, but was instead a denial that he sold drugs); *Ramos v. State*, No. 04-04-00784-CR, 2006 WL 1232896 (Tex. App. May 10, 2006), *rev'd*, 245 S.W.3d 410 (Tex. Crim. App. 2008) (holding that the statement, "I don't want to talk about it," was ambiguous because it could just be a desire not to talk about a particular subject); *State v. Bacon*, 658 A.2d 54, 66 (Vt. 1995) ("A defendant may express an unwillingness to discuss certain subjects without indicating a desire to terminate an interrogation already in progress."); *Hale v. Commonwealth*, No. 2382-04-4, 2005 WL 2738306, at *1 (Va. Ct. App. Oct. 25, 2005) (holding the statement, "that's probably really all I can say," was ambiguous); *State v. Fitzgerald*, No. 56952-0-I, 2007 WL 1241518, at *2 (Wash. Ct. App. Apr. 30, 2007) (determining that a suspect's comment, "I'd rather not answer *that*," and subsequent silence in response to questions and turning away from police officers, did not "indicate that he wished to remain silent generally"). *But see* *United States v. Reid*, 211 F. Supp. 2d 366, 372 (D. Mass. 2002) ("I have nothing else to say" was a sufficiently "pellucid invocation of [the defendant's] right to remain silent. . ."); *United States v. Stewart*, 51 F. Supp. 2d 1136, 1142-45 (D. Kan. 1999) (holding that "Not want[ing] to talk about a robbery," and "I don't want to talk to you mother-fucker" were unambiguous), *reconsidered in part*, 51 F. Supp. 2d 1147 (D. Kan. 1999), *aff'd*, 215 F.3d 1338 (10th Cir. 2000); *State v. Day*, 619 N.W.2d 745, 750 (Minn. 2000) (holding that the statement, "I don't want to tell you guys anything to say about me in court," was an unambiguous and unequivocal invocation of the right to remain silent); *People v. Douglas*, 778 N.Y.S.2d 622, 623 (App. Div. 2004) (holding that the statement, "I have nothing further to say," was an invocation of rights); *Commonwealth v. Chen*, No. K101486, 2002 WL 31803389, at *3 (Va. Cir. Ct. Nov. 7, 2002) (holding that "'I do not want to talk about it' cannot be viewed as anything other than an invocation of his right to remain silent" when stated in the context where follow up questions were about same topic). *Cf.* *State v. Teidemann*, 162 P.3d 1106, 1111 (Utah 2007) (holding that the statement, "I don't want to talk about it," was a clear invocation with respect to questions concerning a female murder victim; all of the defendant's responses to police questions concerning the female victim were inadmissible).

¹²⁰ *People v. Bates*, No. D045113, 2005 WL 3462243, at *5 (Cal. Ct. App. Dec. 19, 2005); *cf.* *State v. King*, 708 A.2d 1014, 1016 (Me. 1998) (holding that when a defendant said that he did not want to talk without a particular detective present, then said, "I'm just saying, you know, . . . I ain't saying nothing," it was ambiguous); *Zelaya v. State*, No. 06-05-00251-CR, 2006 WL 2689911, at *4 (Tex. App. Sept. 21, 2006) (holding that when suspect was asked if he wanted to talk and he said, "No, I'll listen, okay?" and "listen to you now but I have to see," it was ambiguous and simply meant that he would decide whether to answer particular questions).

just have easily been interpreted as a statement that he had finished his explanation of the matter."¹²¹

Other times, the courts depict the statement as ambiguous because it merely indicates a desire to speak to someone else, not to stop talking altogether. Thus, a suspect's comments, "Well, man you guys, do I have to talk to you guys?" was described by the court as indicating only unease with the trend of the questioning or an unwillingness to respond to a particular interrogator.¹²²

The problem with such an interpretation is that it makes it almost impossible for a suspect to assert the right to remain silent after the waiver of rights. A suspect in the midst of an interrogation who decides that he no longer wants to talk—a choice embraced in *Miranda*—will almost always make this request in response to a question.¹²³ If a suspect's statement after being asked a question—"Ok, that's it, I'm done talking"—will inevitably be interpreted as only expressing a desire not to answer that *particular* question, the police are then free to ignore the comment by asking about something else (and working their way back to that topic!).¹²⁴ A suspect who felt he had asserted his right to end the interrogation but was ignored will now be convinced that any further attempt to assert his rights will be futile. No wonder suspects so often not only continue to respond to questions, but often soon thereafter make incriminating statements.¹²⁵

¹²¹ *State v. McCorkendale*, 979 P.2d 1239, 1247 (Kan. 1999). The police officer ignored the statement and continued questioning. *See id.*

¹²² *People v. Lopez*, No. A101889, 2004 WL 2378396, at *3 (Cal. Ct. App. Oct. 22, 2004). *But see* *United States v. Stewart*, 51 F. Supp. 2d 1136, 1143 (D. Kan. 1999) (holding that a defendant invoked his right to remain silent when he said that he did not want to talk about a robbery and stated, "I don't want to talk to you mother-fuckers"), *reconsidered in part*, 51 F. Supp. 2d 1147 (D. Kan. 1999), *aff'd*, 215 F.3d 1338 (10th Cir. 2000); *Ramos v. State*, 245 S.W.3d 410, 416 (Tex. Crim. App. 2008) (holding that any reasonable police officer would construe suspect's statement—"I don't want to talk to you . . . I don't want to talk about it anymore"—as unambiguous).

¹²³ *See, e.g., Lopez*, 2004 WL 2378396, at *3.

¹²⁴ That is assuming the courts even require the police to change the subject. That is not at all clear, although a change certainly seems to assuage the reviewing court. Of course, the police then can easily work their way back to the subject after an appropriate period of time.

¹²⁵ *See, e.g., State v. Erdahl*, No. 01-0830, 2002 WL 31529174, at *4 (Iowa Ct. App. Nov. 15, 2002). In *Erdahl*, the court held that the statement, "I don't want to talk about it," was not an invocation of the right to remain silent, but was a desire not to talk about his relationship with his father, which was the topic at the time; the police officer was therefore free to ignore it and the officer here did. The police officer asked, "You are sorry, though, aren't you?"; Erdahl said he was and then confessed to sexual abuse, stabbing, and mutilation. *Id.* The ease with which suspects can be persuaded to change their minds is also demonstrated by the behavior described in *Dooley v. State*, 743 So. 2d 65 (Fla. Dist. Ct. App. 1999). The defendant, after being read his rights was asked if he wanted to waive them. *Id.* at 67. He said, "Um, I don't wish to waive my rights." *Id.* The police then continued saying:

By waiving your rights now doesn't mean that you waive them in the future. All you're saying here now is that you're talking to me without

Judge McKeown, dissenting in *Anderson v. Terhune*, recognized the potentially devastating impact that finding an invocation is limited to a specific topic can entail.¹²⁶ In *Anderson v. Terhane*, a panel of the Ninth Circuit had held that the police properly treated the suspects comment, “I plead the Fifth,” to be ambiguous, and that the police in any event were justified in asking clarifying questions to determine what precisely the suspect wanted to talk about.¹²⁷ Judge McKeown first rejected the notion that “I plead the Fifth” was ambiguous: “Nothing was ambiguous about the statement This effort to keep the conversation going was almost comical. The officer knew what ‘I plead the Fifth’ meant.”¹²⁸ Moreover, and most significant, the judge criticized the notion of “clarifying” questions on the assumption that “I plead the Fifth” only applied to a particular topic:

[E]very time a suspect unequivocally invokes the right to remain silent, the police can ask follow-up questions to clarify whether he really, *really* wants to invoke the right and to parse the subject matter—“what specifically do you not want to talk about?” The majority’s holding allows the police to turn the Fifth Amendment into a game of “twenty questions,” permitting the police to continue the interrogation and forcing the suspect to take a multiple choice quiz. Such a practice is tantamount to endless re-interrogation. . . . The net result is that . . . [it] allow[s] “the authorities through badgering or overreaching . . . [to] wear down the accused and persuade him to incriminate himself.”¹²⁹

Upon reargument before the Ninth Circuit en banc, Judge McKeown’s arguments prevailed.¹³⁰ In February of 2008, Judge McKeown wrote the majority opinion reversing the original appellate decision.¹³¹ “I plead the Fifth” was finally found to plead the Fifth.¹³²

the presence of an attorney. If one is required later on, if that’s your wish, one can be appointed to you. Do you understand that?

Id. Suspect then said, “Right. Um, I’m going to talk to you.” *Id.* The questioning continued and the suspect soon confessed. *Id.* The court held that *Davis* only applies post-waiver, *see infra* notes 186–87 and accompanying text, and that here there was no valid waiver. *Dooley*, 743 So. 2d at 68–69. But it aptly demonstrates how easily the police can “persuade” a suspect to change his or her mind.

¹²⁶ *Anderson v. Terhune*, 467 F.3d 1208, 1217 (9th Cir. 2006) (McKeown, J., dissenting), *rev’d en banc*, 516 F.3d 781 (9th Cir. 2008), *cert. denied sub nom.* *Cate v. Anderson*, 129 S. Ct. 344 (2008).

¹²⁷ *Id.* at 1210, 1213 (majority opinion).

¹²⁸ *Id.* at 1216.

¹²⁹ *Id.* at 1217–18 (quoting *Smith v. Illinois*, 469 U.S. 91, 98 (1984)).

¹³⁰ *Anderson*, 516 F.3d 781.

¹³¹ *Id.* at 784.

¹³² *Id.*

8. Comments That Are Seemingly Clear but Become Ambiguous Given Other Comments or Conduct

Some courts have held that a seemingly clear, direct invocation was ambiguous under the circumstances. For example, in one case, a suspect responded, “no sir,” when asked if he was willing to speak to the interrogating officer during the final taped interview.¹³³ The interrogators tried to clarify the response, and the suspect then agreed to talk. The trial court held that the attempt to clarify was unlawful because the invocation was clear and unambiguous.¹³⁴ The court of appeals disagreed:

Since Pitts had just agreed to talk with them, the officers would understandably be surprised or confused by the “no sir” response. When viewed in the context of Pitts’ *immediately preceding* agreement to talk with the officers, a “reasonable police officer in the circumstances” would have been justified in believing either that Pitts had misunderstood the question, that Pitts had misspoken in response to the question, or that the officer had misunderstood the response. The ambiguity or uncertainty arose not from the words of the response—which in themselves admittedly are not ambiguous—or from Pitts’ “*subsequent* responses to continued police questioning” but from “the circumstances leading up to” Pitts’ utterance of that response.¹³⁵

¹³³ State v. Pitts, 936 So. 2d 1111, 1120–21 (Fla. Dist. Ct. App. 2006).

¹³⁴ *Id.* at 1122.

¹³⁵ *Id.* at 1130–31 (citations omitted); accord *Medina v. Singletary*, 59 F.3d 1095, 1102 n.5 (11th Cir. 1995); *State v. Murphy*, 747 N.E.2d 765, 779 (Ohio 2001) (holding that the statement, “I’m ready to quit talking, and I’m ready to go home, too,” was ambiguous; although the first part could seem like an unambiguous invocation, the second part made it equivocal because it meant that the suspect really just wanted to be released which might require that he keep talking to persuade the police of his innocence). But see the cases where “no” means “no.” In *Green v. State*, the defendant said, “I don’t want to talk.” *Green v. State*, 570 S.E.2d 207, 210 (Ga. 2002). In response, the police officer tried to persuade him to talk, saying, “Just hear me out. It’s gonna get to a point where you’re gonna be going, ‘Shit, maybe I should have said this, and maybe I should have said that.’” *Id.* The defendant did start to talk. The trial court had found that there had been no assertion of rights; the suspect had engaged in “mere banter” with the police! *Id.* The Supreme Court of Georgia reversed. *Id.*; see also *People v. Hernandez*, 840 N.E.2d 1254, 1257 (Ill. App. Ct. 2005) (holding that a defendant invoked the right when, after being read his rights and asked if he wanted to talk to them now, he said, “No, not no more”); *State v. Marshall*, 642 N.W.2d 48, 53 (Minn. Ct. App. 2002) (holding that the defendant saying, “No. I don’t wish to say anything,” after being read her *Miranda* rights was unequivocal); *Simpson v. State*, 227 S.W.3d 855, 858 (Tex. App. 2007) (holding that the statement, “No. I don’t even want to talk about it’ll because—it’ll really tell,” was unambiguous and questions should have immediately ceased).

Some courts, moreover, have used the fact that the suspect proceeded to answer questions to establish that the suspect's "invocation" was ambiguous. For example, the Supreme Court of North Dakota held that a suspect's repeated comments during an interrogation—"You can't make me say nothing," and "Do I need to get a lawyer?"—were ambiguous.¹³⁶ "Danielle's inquiry about an attorney was, at best, ambiguous. It could have been seeking advice from the officers, rather than a request for counsel. Similarly, her comments about not saying anything were equally unclear, *especially since she continued to respond to the officers' questions.*"¹³⁷ If the fact that the suspect continued to answer questions after an invocation casts retrospective doubt on the nature of the invocation, the right to remain silent becomes an empty one. The police could render virtually any invocation ambiguous by ignoring it, since most suspects would likely keep responding once their attempt to remain silent was unsuccessful.

A similarly troubling approach was taken by the court in *State v. Whipple* when it held that a suspect's statement, "I don't wanta say man . . . I don't wanta say that, I don't want to. . . NO MORE, NO MORE," was ambiguous in light of all the circumstances, including the fact that the suspect had voluntarily come to the station house:

[T]he Court is abundantly satisfied that defendant was not invoking or attempting to invoke any right to silence . . . His words

¹³⁶ *State v. Greybull*, 579 N.W.2d 161, 163 (N.D. 1998).

¹³⁷ *Id.* (emphasis added); *accord* *State v. Griffith*, No. 2001-T-0136, 2003 WL 22994540, at *5 (Ohio Ct. App. Dec. 22, 2003) (holding statements like "I'm done," and "You got what you wanted. Okay?" were ambiguous assertions and that such ambiguity was confirmed when the suspect continued to answer questions); *see* *Cuervo v. State*, 929 So. 2d 640, 641–42 (Fla. Dist. Ct. App. 2006), *decision quashed*, 967 So. 2d 155 (Fla. 2007). The defendant said, "No, I do not want to declare anything. I just—I do not want to declare anything," after being read his rights and was asked if he wanted to talk about the matter. The court used subsequent discussion to render this statement ambiguous. *Id.*; *see also* *State v. Robertson*, 712 So. 2d 8, 31 (La. 1998) (holding defendant's, "uh huh," when police officer said, "[S]o you don't want to say no more about what happened over there at them old people's house," was not an invocation of right to remain silent; defendant was willing to talk to authorities as indicated by the fact that he continued to answer questions), *cert. denied*, 525 U.S. 882 (1998); *State v. Chesson*, 856 So. 2d 166, 183 (La. Ct. App. 2003) (holding that when a police officer said, "Are you telling me you don't want to talk to me any more, John?" and John said, "Not right now. Y'all tryin' to pressure this on me," was not an invocation of the right to remain silent but a statement that he had no more to say and that he continued to speak freely with the police); *Hargrove v. State*, 162 S.W.3d 313, 319 (Tex. App. 2005) (holding that the statement, "Let's just terminate it . . . Why should we go on because I'll be spinning my wheels. You're spinning your wheels," was ambiguous because defendant never explicitly answered police officer's question whether he wanted to stop now and continued answering questions); *Mitchell v. Commonwealth*, 518 S.E.2d 330, 333 (Va. Ct. App. 1999) (holding that the statement, "I ain't got shit to say to y'all," was ambiguous when the defendant later volunteered information); *Commonwealth v. Cupp*, Nos. 30688, 30689, 30690, 2004 WL 2391944, at *2 (Va. Cir. Ct. Oct. 21, 2004) (stating that defendant's, "no," after being asked whether he wanted to make a statement could mean that he didn't want to make a statement, not that he'd be unwilling to answer questions).

clearly appear to be . . . an expression of disbelief in the events of the day, of an unwillingness, albeit passing, to confront reality. Further, it is inconsistent that defendant would present himself to the Sheriff's Office, request an audience with an officer, ramble for an hour, and then say he did not want to talk to anybody.¹³⁸

Such a position as that expressed by these courts is troubling on a number of grounds. *Miranda* clearly protects the suspect's right to talk and then change his mind.¹³⁹ It is emphatically not inconsistent to agree to talk and then, after talking, decide to stop. That is the essence of the *Miranda* right granting to the suspect some control over the interrogation. Under the courts' reasoning, a clear invocation after a waiver would always be deemed ambiguous because it is inherently inconsistent with the fact that the suspect had agreed at one point to talk.¹⁴⁰

III. A MISTAKEN APPLICATION: THE PROBLEMS WITH APPLYING *DAVIS* TO THE RIGHT TO REMAIN SILENT

Drawing upon the descriptions of how courts have applied the "clear invocation" rule, this section argues against the application of that rule to the right to remain silent for several reasons. First, the rule in *Davis* is simply wrong and should be overruled

¹³⁸ *State v. Whipple*, 5 P.3d 478, 483 (Idaho Ct. App. 2000); see *Marshall v. State*, 210 S.W.3d 618, 628 (Tex. Crim. App. 2006) (holding that a suspect's, "No sir," in response to a question as to whether suspect agreed to talk to police was ambiguous because suspect had contacted the police about talking), *cert. denied*, 128 S. Ct. 87 (2007).

Not only did the court in *Whipple* misconstrue *Miranda*, it also indulged in some pop psychology:

[W]e conclude that an objective view of the facts would lead a reasonable police officer to conclude that Whipple was merely having a difficult catharsis . . . needing to express himself, but not having an easy time coming to grips with the reality that he had bludgeoned his wife to death with a hammer.

Whipple, 5 P.3d at 484. The willingness of the courts to take a seemingly clear invocation and use "pop psychology" to recast it as ambiguous was also evident in a recent decision of the Seventh Circuit. See *United States v. Sherrod*, 445 F.3d 980 (7th Cir. 2006), *cert. denied*, 549 U.S. 1230 (2007). In that case, a suspect told the police that he was "not going to talk about nothin'." *Id.* at 982. The court dismissed it as ambiguous: "[It was] as much a taunt—even a provocation—as it [was] an invocation of the right to remain silent." *Id.* What makes this a taunt—and what would ever differentiate any assertion of a desire to remain silent from such a "taunt"—is never made clear. *Accord* *State v. Lockhart*, 830 A.2d 433, 443 (Me. 2003) ("I don't know," "I can't do this," "I can't, don't ask, don't," "I want to go to sleep"—could be . . . understood to express Lockhart's internal conflict and pain in being asked to recount what had happened.").

¹³⁹ See *Whipple*, 5 P.3d at 482 (citing *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966)).

¹⁴⁰ *Id.*

whether with respect to asserting the right to counsel or the right to remain silent. Second, even if *Davis* may be appropriate for determining invocation of the right to counsel, it is an inappropriate standard for determining whether a valid assertion of the right to remain silent has been made. Both as a matter of law and as a matter of policy, courts should not apply the *Davis* rule to the right to remain silent. The application of *Davis*, in conjunction with other rules regarding the right to remain silent, has a synergistic effect that is undesirable. In other words, the combination of *Davis* with *Mosley* and some other post-*Miranda* decisions eviscerates the protections of *Miranda*. Finally, even if *Davis* is appropriate for assessing invocations of both *Miranda* rights, it should only be applied to post-waiver invocations.

A. Davis Was Wrongly Decided: Interpreting Ambiguous Invocations as No Invocation at All Is Inconsistent with the Premise of Miranda

The Court in *Davis* construed ambiguity as the functional equivalent of saying nothing—of no invocation at all. Given that no one can be certain as to the meaning of an unclear or indirect invocation, the question really becomes, what are the costs of assuming it is an assertion of the right versus the risks of assuming it is not? Where, in other words, should the presumption lie: in potentially protecting someone who may not desire protection, or in not extending protection to someone who is trying to assert their rights?

There are three reasons why the presumption might favor viewing an ambiguous statement as an irrelevancy and, thus, allow the police to continue with the interrogation. First, that position may accurately reflect what the suspect wants. In other words, the ambiguous statement most likely reflects true equivocation—a person is unsure, unclear, and undecided about whether to make up their mind. The suspect has not yet decided that he wants to remain silent. Thus, continued questioning is not inconsistent with his desires. Second, if we are uncertain about what a statement means, law enforcement interests dictate that the interrogation should proceed. Requiring police officers to construe every ambiguous request as an invocation would thwart the effort to solve crime by obtaining incriminating statements. Third, the costs of construing an ambiguous statement as an invocation outweigh any benefit that might be incurred if the ambiguous invocation is deemed an assertion of a *Miranda* right. There are no significant consequences to ignoring such comments—to treating such comments as though the suspect were asking for a glass of water. After all, if the suspect ever makes up his mind to remain silent, he can unambiguously and clearly assert his rights.

None of these arguments are persuasive when closely examined. As more fully developed below, the most reasonable (or at least as reasonable) interpretation of an ambiguous statement is that it reflects an attempt by the suspect, to the best of their ability given the inherently intimidating circumstances, to assert his or her rights.

Moreover, the cost of treating an ambiguous statement as an invocation is minimal, at least with respect to the right to remain silent. Finally, the costs of ignoring a possible invocation are grave for any possible protection of the suspect's right. Thus, I think the answer was evident at the time of *Miranda* and even clearer now: in the face of ambiguity, the presumption should lie in favor of protecting the suspect's rights. An ambiguous invocation should not be ignored; it should either constitute an invocation of rights or, at worst, be clarified.

1. An Ambiguous Statement Most Likely Reflects the Suspect's Intent to Assert the Right to Remain Silent

Courts reasonably could decide that ambiguity should not count as an invocation of rights because it isn't intended to be; persons who ambiguously "talk" about a lawyer, or make some comment about not talking do not really intend to assert those rights and should not be treated as though they did. Consideration of this first issue requires a careful probing about the likely meaning of an ambiguous statement. Ambiguity in the context of a custodial interrogation means one of three things:

- (a) The person is uncertain and truly does not know what he wants to do;
- (b) The person wants a lawyer or wants to remain silent, but, because of the inherently intimidating circumstances or because of his cultural background, is unable to convey that intent in a more clear-cut fashion;
- (c) The person wants to assert the right, but is afraid of the repercussions, and, thus, hedges his comments.

The *Davis* majority, and those courts that apply it for the right to remain silent, implicitly embrace the first possibility.¹⁴¹ It is not only acceptable but also desirable to ignore an ambiguous statement because such a statement is merely the suspect "thinking out loud" about something that he has not yet committed to. It is just as likely that such a person does not want a lawyer or wants to keep talking, and thus to construe it as an invocation is unjustified.

But it is at least as plausible, if not more plausible, that a suspect who ambiguously invokes his or her rights is, albeit imperfectly, attempting to invoke one or more rights.¹⁴² The ambiguity does not reflect uncertainty, but rather is a function of the cultural background of the suspect, combined with the inherent pressures of interrogation.

¹⁴¹ *Davis v. United States*, 512 U.S. 452, 459 (1994).

¹⁴² See, e.g., David Aram Kaiser & Paul La Flein, *Reconstructing Davis v. United States: Intention and Meaning in Ambiguous Requests for Counsel*, 32 HASTINGS CONST. L.Q. 737, 758 (2005) (noting that the kind of statement required in *Davis* "is the sort of formulistic statement no actual person other than a lawyer would ever utter. In ordinary life, of course, statements of desire are considered perfectly clear even when they are much less blunt. . . . [In actual linguistic practice, statements like] '[m]aybe I should talk to a lawyer' may in reality simply reflect the way ordinary people are inclined to express requests, particularly requests directed to persons in authority").

Numerous experts have voiced fear that *Davis*'s requirement would operate to the disadvantage of many criminal suspects who, because of culture, youth, gender, or inexperience, refrain from making specific demands of the police. As Justice Souter noted in his concurrence in *Davis*:

[C]riminal suspects . . . "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures," would seem an odd group to single out for the Court's demand of heightened linguistic care. A substantial percentage of them lack anything like a confident command of the English language, many are "woefully ignorant" and many more will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that the ability to speak assertively will abandon them.¹⁴³

Justice Souter's concerns have been echoed by scholars who prophesied that the *Davis* rule would have a disproportionate effect on minorities, women, and the powerless. Most prominent is the work of Professor Janet Ainsworth whose research cogently supports the second hypothesis: that a person ambiguously asserts his rights because cultural factors and/or an intimidating environment inherently lead to equivocation.¹⁴⁴ As Professor Ainsworth wrote:

discrete segments of the population—particularly women and ethnic minorities—are far more likely than others to adopt indirect speech patterns. An indirect mode of expression is characteristic of the language used by powerless persons, both those who are members of certain groups that have historically been powerless within society as well as those who are powerless because of the particular situation in which they find themselves. Because criminal suspects confronted with police interrogation may feel powerless, they will often attempt to invoke their rights by using speech patterns that the law currently refused to recognize.¹⁴⁵

¹⁴³ *Davis*, 512 U.S. at 469–70 (Souter, J., concurring) (citations omitted).

¹⁴⁴ Ainsworth, *supra* note 87, at 261.

¹⁴⁵ *Id.*; see C. Antoinette Clarke, *Say It Loud: Indirect Speech and Racial Equality in the Interrogation Room*, 21 U. ARK. LITTLE ROCK L. REV. 813, 820–21 (1999); Floralynn Einesman, *Confessions and Culture: The Interaction of Miranda and Diversity*, 90 J. CRIM. L. & CRIMINOLOGY 1, 32–33 (1999); Adam G. Finger, Comment, *How Do You Get a Lawyer Around Here? The Ambiguous Invocation of a Defendant's Right to Counsel Under Miranda v. Arizona*, 79 MARQ. L. REV. 1041, 1061–62 (making a similar argument that the use of indirect language is preferred in Asian society: "[A] member of an Asian society would be much less likely to assert his rights in the face of authority. To do so would be in contravention

In sum, it is inevitable that people react to custodial interrogation with some degree of intimidation.¹⁴⁶ It is normal to respond to intimidation by sounding meek or tentative rather than precise, clear, and assertive.¹⁴⁷ The tendency to use equivocal language during custodial interrogation is reinforced by cultural and gender norms that make such tentative elocution especially likely for certain groups.¹⁴⁸ Thus, it is not surprising that studies demonstrate that the people who are most likely to clearly assert their rights are “hardened” criminals who may be less intimidated and more accustomed to the custodial interrogation setting.¹⁴⁹

The examples provided in Part II demonstrate how suspects are likely to use hedges, modal verbs, or imprecise statements rather than assert their rights in an unambiguous manner during custodial interrogation. Although in a small proportion of cases the courts found the assertion unambiguous, in the vast majority of cases reported, no assertion was found.¹⁵⁰ Of course, drawing definitive empirical conclusions from studying appellate decisions is not only difficult but misleading because it may be that the invocations that are truly clear—“I am asserting my right to remain silent and do not want to answer any questions of any kind”—never make their way into the case law.¹⁵¹ “[S]ince very few cases go to trial and fewer still are appealed, the pool of appellate cases is unlikely to be a representative sample.”¹⁵² But my “rough”

of a societal standard that is firmly ingrained within the Asian culture. . . . The use of an indirect method of speech is preferred in Asian society and is considered sophisticated”); Samira Sadeghi, Comment, *Hung up on Semantics: A Critique of Davis v. United States*, 23 HASTINGS CONST. L.Q. 313, 330 (1995).

¹⁴⁶ Indeed, I make the argument elsewhere that simply interacting with the police, even in a non-custodial situation is inherently intimidating and coercive. See Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211 (2001).

¹⁴⁷ See Ainsworth, *supra* note 87, at 283.

¹⁴⁸ See *id.* at 284–85.

¹⁴⁹ “There is evidence that suspects with felony records are much more likely to invoke silence than those whose records are clear.” Duke, *supra* note 2, at 558 n.30; see Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 286 (1996).

¹⁵⁰ Of course, the mere fact that different courts reach such different conclusions in seemingly similar situations is troubling; suspects should not be treated differently with respect to these critical rights depending on what court or police department evaluates the request. My recent study of the ways in which people invoke the right to counsel also lends support to the scholarly conclusion that persons subject to custodial interrogation tend to phrase things in indirect, equivocal fashion. See Strauss, *Understanding Davis*, *supra* note 75. For example, the use of modal verbs like “maybe,” “might,” or “could,” are commonly employed when referencing the right to counsel. Even more common is the use of hedges—“lexical expressions that function to attenuate the emphasis of a statement, or to make it less precise.” Ainsworth, *supra* note 87. Thus, a person might say, “I think I want an attorney,” or “I guess I shouldn’t say anything.” Or a person might phrase a request as a question: “Can I get a lawyer?” These are routinely treated by the courts as ambiguous requests. See Strauss, *Understanding Davis*, *supra* note 75, at 1040–47.

¹⁵¹ George C. Thomas III, *Stories About Miranda*, 102 MICH. L. REV. 1959, 1962–64 (2004).

¹⁵² *Id.* at 1962.

conclusion based upon a reading of the cases is buttressed by the clearly established empirical evidence that very few people assert their rights, and almost no one invokes the right to remain silent after a waiver.¹⁵³

Thus, my point is that in many, perhaps even most, of the cases described in Part II, where the court found the assertion to be ambiguous, the suspects were attempting to invoke their right to remain silent.¹⁵⁴ Scientific data and experts in linguistics support such a conclusion.¹⁵⁵ Common sense, moreover, also compels such an interpretation. The use of hedges or modal verbs and even questions in most everyday situations are typically treated as unambiguous. For example, if a customer tells a waitress, "I think I'll take a tuna sandwich," virtually all would interpret that as a clear enough request for a tuna sandwich. Indeed, it would be deemed the epitome of rudeness if the waitress treated it as an ambiguous request and responded, "Well, do you want one or not?" A boss who asks her secretary for coffee by stating, "can I get a cup of coffee?" would assume that coffee was forthcoming without further clarification.¹⁵⁶ Yet, in the hostile, frightening environment of an interrogation setting, the police can ignore such comments or treat them as though the suspect asked about the weather.

In addition to cultural and background factors explaining why an intended assertion of rights may be phrased ambiguously, suspects may also equivocate out of fear of repercussions. Although clearly related to the second theory, I am referring here to a slightly different phenomenon, especially with respect to the right to remain silent. One of the problems with the *Miranda* warnings is that they fail to inform the suspect that if the suspect invokes his right to remain silent, no adverse inferences will be drawn.¹⁵⁷ Suspects are never told (or at least are not required to be told) that their refusal to talk cannot be used against them in a court of law.¹⁵⁸ In other words, suspects are informed that *if* they talk, what they say can be used against them, but are

¹⁵³ See *infra* notes 199–201 and accompanying text.

¹⁵⁴ See, e.g., *United States v. Banks*, 78 F.3d 1190 (7th Cir. 1996); *State v. Gaspard*, 709 So. 2d 213, 218 (La. Ct. App. 1998) (holding that defendant's statement that he was "ready to go" was insufficient to invoke his right to remain silent).

¹⁵⁵ See generally Strauss, *Reconstructing Consent*, *supra* note 146; Strauss, *Silence*, *supra* note 2.

¹⁵⁶ See *State v. Dumas*, 750 A.2d 420, 425 & n.5 (R.I. 2000) ("In normal parlance, this syntactic phraseology is an acceptable and reasonable way to frame a request. . . . [A] customer at a restaurant may ask the server, 'Can I get a cup of chowder?' An impatient shopper might ask a sales clerk, 'Can I get some service over here?' In each case, it is clearly understood that the speaker is making a request for a particular desired object or action.").

¹⁵⁷ *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (delineating requirements for substance of "*Miranda* warnings").

¹⁵⁸ A suspect's pre-arrest, pre-*Miranda* silence can be used against a suspect. In *Fletcher v. Weir*, 455 U.S. 603 (1982), the Court allowed a suspect's silence after his arrest to impeach his trial claim of self-defense. But post-*Miranda* warning silence cannot be used against the defendant (unless the defendant puts his silence into issue) because such silence may be nothing more than the arrestee's exercise of his or her rights. *Doyle v. Ohio*, 426 U.S. 610 (1976). See generally Strauss, *Silence*, *supra* note 2.

never told that if they *do not* talk, that failure to cooperate *cannot* be used against them. Thus, some individuals might be tentative in requesting their rights out of fear that this assertion will actually harm them or be construed in an adverse manner.¹⁵⁹ The ambiguity does not reflect uncertainty or lack of desire; the suspect truly wants to remain silent but fears the consequences of invoking that right. That fear causes the suspect to employ tentative, uncertain language or state the invocation as a request or a question. Thus, a suspect may say something like “I can’t talk now if that’s ok,” or “I’d like to go home now and come back later,” out of a belief that such a request is less likely to sound uncooperative or confrontational and hence, less likely to engender the anger or retribution of the authorities.

The fear that asserting their rights may be used against them, moreover, may become magnified when a suspect, after making a tentative attempt to remain silent, is either ignored by the officer, or, perhaps worse, responded to by an officer trying to convince her to talk. For example, when a suspect indicates in some imprecise manner that she wants to remain silent, and the police officer says something like “are you sure, this is your only chance to tell your side,” or, “that might not look too good for you, if you have something to say, you should say it now,”¹⁶⁰ the belief that staying silent will somehow “hurt” her is reinforced.

My point thus far is simple: of the three possible explanations for an ambiguous statement described above, it is at least as reasonable, if not more reasonable, to believe that the ambiguity reflects a person’s best attempt, given the circumstances, to invoke the right to remain silent. The kind of requests that courts routinely treat as ambiguous are a normal, rational way of invoking the right to remain silent given the suspect’s characteristics and the inherently intimidating custodial environment. It is an inevitable type of phrasing when the invocation itself may be viewed as costly or risky. In other words, it is highly likely that, for a variety of reasons, what is deemed an ambiguous invocation is intended by the suspect as a clear assertion of her rights.

But what if some of the ambiguity does reflect true uncertainty? For example, a suspect who says, “maybe I should stay quiet, I don’t know what to do,” may truly be experiencing conflicted emotions. Or what if there is really no way to know what

¹⁵⁹ See, e.g., O’Neill, *supra* note 17, at 873 (discussing that one explanation for high *Miranda* warning waivers is that silence seems like it will be used against them); Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1828 (1987) (“My clients and my colleagues’ clients often report that, notwithstanding the warnings, they believed either that their silence could be used against them as evidence of guilt or, more frequently, that by remaining silent they would forfeit their opportunity to be released on bail.”).

¹⁶⁰ See, e.g., *State v. Mares*, No. 02-0847-CR, 2003 WL 1993005, at *6–7 (Wis. Ct. App. May 1, 2003) (holding that when police told suspect who said he did not want to talk that “it was in his best interest” to speak to them and that he would “feel better and get a weight off his chest if he explained his side of the incident,” these were invalid promptings after the suspect invoked his right to remain silent).

an ambiguous statement reflects? The question then becomes, what are the risks and costs of assuming it is an assertion of the right versus the risks of assuming it is not.

2. The Cost Calculus: Treating an Ambiguous Assertion as Invoking the Right to Remain Silent (or Right to Counsel) Would Not Thwart Effective Law Enforcement

One of the concerns clearly animating the *Davis* majority was the desire not to hamper law enforcement by foreclosing a valuable opportunity to question a suspect.¹⁶¹ The Court in *Davis*, however, incorrectly calculated the costs that would incur if an ambiguous invocation required clarification or even cessation of questions. A true “costs” analysis would reveal that the costs of stopping the interrogation are minimal because the value of the interrogation must be discounted by the concern over false confessions. In other words, confessions should be viewed with skepticism rather than awe, especially when dealing with an unwilling or confused suspect who believes that the police are not honoring her rights. Moreover, the “cost” of stopping the interrogation is minimal because any suspect who is truly willing to speak to the police can easily do so by initiating further conversation. Finally, even if the suspect does not re-initiate contact, the police still can attempt to re-interrogate a suspect who previously invoked his right to remain silent.¹⁶² Each of these arguments are discussed in turn.

First, the value of information obtained by interrogation must be considered with at least with some skepticism. The core of the *Miranda* decision reflects a belief that confessions, though a potentially important tool for law enforcement, should not be pursued at all costs. Not all crimes are solved by confessions; physical evidence may render a statement by the suspect unnecessary. And when physical evidence is weak or non-existent, reliance on a confession—particularly one obtained by ignoring a potential invocation by a vulnerable, non-sophisticated suspect—is wrought with problems.¹⁶³

The notion that confessions should be viewed with some skepticism has garnered additional scientific support in the last forty years. Research has shown that innocent people do falsely confess. And the advent of DNA testing has made clear that innocent people are convicted on the basis of false confessions. In one study, twenty-five percent of those exonerated by DNA evidence were convicted largely on the basis of a confession.¹⁶⁴

¹⁶¹ See *Davis v. United States*, 512 U.S. 452, 473–74 (1994) (Souter, J., concurring).

¹⁶² See *Michigan v. Mosley*, 423 U.S. 96, 106 (1975) (citations omitted).

¹⁶³ “Confessions are less important where there is strong corroboration and much more important where there is little, and it is in the latter case that the primary risk of false confession exists.” Duke, *supra* note 2, at 568 n.85.

¹⁶⁴ John Wilkens, *Untrue Confessions*, SAN DIEGO UNION-TRIB., Apr. 15, 2004, available at http://www.signonsandiego.com/uniontrib/20040415/news_lz1c15confess.html; see Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational*

My claim, of course, is not that all confessions are false nor that confessions are worthless or not worth pursuing. Clearly, interrogation remains an important part of the law enforcement arsenal.¹⁶⁵ Rather, my point is that the benefits of interrogation should be put in the proper perspective. Not all interrogations successfully lead to confessions, not all confessions are necessary to the solving of crimes, and not all confessions are reliable. The incidence of false confessions is not insignificant, and “[t]here is no greater injustice than the conviction of an innocent person.”¹⁶⁶ Moreover, those persons most likely to falsely confess—those who are highly suggestible or highly compliant, mentally handicapped, cognitively impaired, children, mentally ill and those particularly vulnerable to the pressures of police interrogation¹⁶⁷—are precisely the group least capable of directly and unambiguously asserting their rights.

Action, 74 DENV. U. L. REV. 979 (1997) (asserting that police tactics cause “normal” people to falsely confess); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105 (1997). And, of course, the ones we know about are just the tip of the iceberg. Thomas H. Maugh II, *Glendale Case Raises Issue of Reliability of Confessions*, L.A. TIMES, Apr. 2, 1998, at A1. Part of the problem is that a confession is viewed by the jury as a virtually “irrefutable presumption of guilt.” See Richard Leo, *False Confessions: Causes, Consequences, and Solutions*, in WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 36, 45 (Saundra D. Westervelt & John A. Humphrey eds., 2001); see also Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 253 (“The Central Park jogger case shows that once a jury is exposed to a confession of guilt it is difficult for jurors to put it aside, even when it is uncorroborated or flatly contradicted by other evidence.”). And the police are notoriously poor judges of whether a suspect’s confession is reliable. Saul Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381 (2007); Drake Bennett, *The War in the Mind*, BOSTON GLOBE, available at Nov. 27, 2005, http://www.boston.com/news/globe/ideas/articles/2005/11/27/the_war_in_the_mind.

The advent of DNA testing and other scientific development may also render less pressing the need for a suspect’s confession. See Thomas, *Miranda’s Illusion*, *supra* note 5, at 1116 (noting that “DNA testing can remove the vast majority of [innocent] suspects from the system sooner rather than later” and will only be more useful over time as tests become more sophisticated (footnote omitted)). The growth in scientific technology may render it less essential for law enforcement agencies to center an investigation on information “cajoled” from a suspect, especially in the most serious of crimes like murder and rape.

¹⁶⁵ The concern that law enforcement will be hampered by imposing a “clarification” rule is one of the main justifications for the *Davis* rule and its application to the right to remain silent. See *State v. Owen*, 696 So. 2d 715, 719 (Fla. 1997) (“To require the police to clarify whether an equivocal statement is an assertion of one’s *Miranda* rights places too great an impediment upon society’s interest in thwarting crime.”).

¹⁶⁶ Boaz Sangero, *Miranda Is Not Enough: A New Justification for Demanding “Strong Corroboration” to a Confession*, 28 CARDOZO L. REV. 2791, 2792 (2007).

¹⁶⁷ Richard A. Leo et al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 517–18; see also Dale E. Ives, *Preventing False Confessions: Is Oickle up to the Task?*, 44 SAN DIEGO L. REV. 477, 481–83 (2007).

Thus, the risk that suspects who ambiguously assert their rights but are ignored by police will falsely confess may well be greater than that of the average suspect.

Second, even if confessions are deemed a reliable and valuable law enforcement tactic, treating ambiguous assertions as invocation of rights does not necessarily preclude police questioning. My argument here is simple: a suspect who truly wishes to talk to the police—who did *not* want to invoke his rights when he has made an ambiguous comment—can talk to the police even if his request is treated as an invocation of rights. That is, any suspect who wants to tell his story can affirmatively initiate conversation with police at any time and waive his rights.¹⁶⁸ Thus, if a suspect who said, “I don’t want to talk now,” meant only to ask for a momentary pause in the conversation, he can, after what *he decides* is a sufficient passage of time, say to the officers, “Ok, I’m ready to talk,” and the interrogation can proceed. The only difference between this scenario and the one allowed by *Davis* is that the suspect controls the interrogation process—precisely the result anticipated in *Miranda*.¹⁶⁹

Finally, and most significantly, even if a suspect does not initiate further contact with the police, the police can attempt to re-question the suspect. Under *Mosley*, an invocation of the right to remain silent does not preclude later police-initiated interrogation—even potentially only two hours later, according to *Mosley* itself.¹⁷⁰ *Mosley* requires only that the suspect’s rights be “scrupulously honored.”¹⁷¹ Although the

¹⁶⁸ The facts of the case in *Bui v. DiPaolo*, 170 F.3d 232 (1st Cir. 1999), aptly demonstrate this. The suspect, a Vietnamese immigrant was read his rights. *Id.* at 238. The police officer asked him if he had anything to say about his arrest. The suspect said no. *Id.* He then added, “Who said I did this?” *Id.* At this point interrogation continued. *Id.* The court held that “no” was ambiguous, in part due to his continued talking. *Id.* at 241. Instead of using subsequent comments to cast doubt on the clarity of his invocation in order to conclude that the petitioner did not unequivocally assert his right, (or reading the entire event as a waiver of rights), the “no” should have been deemed an invocation of the right to remain silent, but the question which immediately followed it should be deemed an initiation by the suspect which allows for a waiver and subsequent interrogation. The police could talk to the suspect under all approaches described above, but analyzing it under the initiation doctrine avoids setting a precedent that “no” does not mean “no,” or that subsequent statements can render an invocation ambiguous. The point is, the ability of the police to interrogate a willing suspect is not hampered even if the “no” were viewed as unambiguous. It only prevents talking to those suspects who really do not want to talk and whose free will is thus subverted by the police. *See also* *State v. Aleksey*, 538 S.E.2d 248, 254 (S.C. 2000) (holding that the statement, “That’s all I’ve got to say,” was ambiguous because it could simply be the end of the story; even if it wasn’t, the suspect shortly thereafter initiated a conversation by asking about the status of some people involved in the crime, and thus further interrogation was permissible), *cert. denied*, 532 U.S. 1027 (2001); *Davis v. State*, No. 06-05-00222-CR, 2007 WL 858782, at *3 (Tex. App. Mar. 23, 2007) (holding that a suspect who said, “I really don’t want to talk about it,” and then followed it up with “I mean, I ain’t the one who did it,” did not unambiguously invoke his rights and even if he did, his latter statement reinitiated interrogation).

¹⁶⁹ *Miranda v. Arizona*, 384 U.S. 436, 467–69 (1966).

¹⁷⁰ *Michigan v. Mosley*, 423 U.S. 96, 104–05 (1975).

¹⁷¹ *See supra* notes 24–33 and accompanying text; *see also* *Commonwealth v. Brant*, 395 N.E.2d 1320 (Mass. App. Ct. 1979) (holding that a fourteen-minute period between questioning

Supreme Court noted six factors to consider in determining whether a suspect's rights were scrupulously honored, most courts only require three: that the original interrogation immediately cease, that there be a significant passage of time, and that the suspect be afforded a fresh set of *Miranda* warnings.¹⁷² Clearly none of these pose onerous obstacles to a resumption of police-initiated questioning.

was not insignificant given that the defendant had initiated the resumption of questioning), *rev'd*, 406 N.E.2d 1021 (Mass. 1980), *cert. denied*, 449 U.S. 1004 (1980). *But see* Commonwealth v. Taylor, 374 N.E.2d 81, 85–86 (Mass. 1978) (holding that a five-minute interval between questioning concerning the same crime was not sufficient).

¹⁷² See State v. Mares, No. 02-0847-CR, 2003 WL 1993005, at *6 (Wis. Ct. App. May 1, 2003) (“[T]he presence or absence of the *Mosley* . . . factors is not controlling and the factors do not establish a test that can be ‘woodenly’ applied . . .”). What is imperative under *Mosley* is that the defendant receive the message that “all he needs to do to foreclose or halt questioning is to give a negative response when asked if he will submit thereto. . . . [T]o communicate this message . . . the interrogation [must] stop for some period of time.” *Latimer v. State*, 433 A.2d 1234, 1237 (Md. Ct. Spec. App. 1981); see State v. Culp, Nos. IK98-08-0027, IK98-08-0028, 1999 Del. Super. LEXIS 369, at *6 n.14 (Del. Super. Ct. Aug. 2, 1999) (holding that the standard that “police may later resume questioning after the passage of a significant period of time and after the accused has [received new warnings]” was not met here because not enough time passed—only a bathroom break—and there was no re-issuance of warnings); *People v. Nielson*, 718 N.E.2d 131, 142–43 (Ill. 1999) (holding that a defendant’s right to remain silent was scrupulously honored when the first interview halted immediately after the suspect invoked his right to remain silent, there was about two-and-a-half hours between interviews, and the suspect received new *Miranda* warnings; the fact that the questions concerned the same crime was not determinative). *But see* State v. Rossignol, 627 A.2d 524, 527 (Me. 1993) (requiring that subsequent questions be about a different topic); cf. *Freeman v. State*, 857 A.2d 557 (Md. Ct. Spec. App. 2004) (honoring scrupulously rights when there was a reasonable time lapse—three hours—and a different interrogator, although it was the same locale and same topic); *State v. Bucklew*, 973 S.W.2d 83, 88–89 (Mo. 1998) (holding *Mosley* was met by the passage of five days even though the interrogation was about the same crime), *cert. denied*, 525 U.S. 1082 (1999).

The most lenient application of *Mosley* that I discovered was that undertaken by a court of appeals in Michigan. See *People v. Jackson*, No. 269071, 2007 WL 1864946 (Mich. Ct. App. June 28, 2007) (per curiam). A suspect had expressed some confusion about his rights, and the police had clarified and explained them. *Id.* at *3. The court held that even if the suspect’s comments constituted an unequivocal assertion of the right to remain silent, that right was scrupulously honored by the clarification questions. *Id.* Although there was no meaningful passage of time, and the questioning was by the same officers in the same location on the same topic, the court held:

Although courts have enumerated relevant considerations in determining whether questioning after an assertion of the right to remain silent is proper, the “scrupulously honored” standard does not require that any mandatory criteria be satisfied. . . . “[T]he ultimate inquiry is whether the police have ‘scrupulously honored’ a defendant’s assertion of the (right to cut off questioning.)”

Here, the detectives’ questions merely sought to make sure that defendant truly understood what the assertion of the right to silence entailed given that defendant had just waived his right to counsel and

Concededly, the cost of invoking the right to counsel under *Davis* and *Edwards* appears greater: interrogation must cease and police-initiated interrogation is not possible.¹⁷³ Even under *Edwards*, however, re-interrogation is possible, albeit on the suspect's terms.¹⁷⁴ That is, a suspect who desires to tell her story can initiate a conversation with the police (and waive her rights) or talk to them with a lawyer present. Given the fairly broad reading of initiation, moreover, this possibility is not an obscure one.¹⁷⁵ Of course, even without initiation by the suspect, the police can

had asked a question about his right to remain silent. . . . [W]hen the detectives' comments are placed in their proper context, they cannot be reasonably construed as an attempt to "wear down defendant's resistance" . . . or even as an attempt to "communicate to the defendant that the detectives would not honor his assertion of the privilege." Rather, [they] "just wanted to be sure whether or not defendant wanted to talk to them" Thus, it cannot be said that the detectives did not "scrupulously honor" defendant's assertion of his "right to cut off questioning."

Id. (citations omitted). *But see* *Ramos v. State*, 245 S.W.3d 410, 419 (Tex. Crim. App. 2008) (holding that *Mosley* is not satisfied when police attempted to re-question a suspect only five minutes after he invoked his rights). One court permitted an eight-minute gap between invocation and re-interrogation on the same topic under *Mosley*, but the court conflated the *Mosley* test with initiation: "While only a short period of time passed after Appellant invoked his right to remain silent, it was Appellant and not the officers who initiated the conversation." *Urias v. State*, No. 08-01-00355-CR, 2006 WL 2516361, at *6 (Tex. Crim. App. Aug. 31, 2006).

¹⁷³ *Davis v. United States*, 512 U.S. 452, 458 (1994); *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981).

¹⁷⁴ *Edwards*, 451 U.S. at 484.

¹⁷⁵ *See Oregon v. Bradshaw*, 462 U.S. 1039 (1983). The precise definition of initiation is unclear. The plurality in *Bradshaw* stated that initiation occurs when the suspect makes statements or inquiries evincing a desire for a "more generalized discussion relating directly or indirectly to the investigation" as opposed to inquiries or statements relating to routine incidents of the custodial relationship. *Id.* at 1045 (plurality opinion). The plurality held that initiation in that case occurred when the suspect asked, "Well, what is going to happen to me now?" while being driven back to jail. *Id.* at 1040. Many criticize the Court's conclusion that this comment constituted initiation even under the Court's own test. *See, e.g.,* LAFAVE ET AL., *supra* note 62, § 6.9, at 849. Although the four-Justice plurality test is the one employed by most lower courts, at least one court suggested that it was free to choose the test set forth by the four-person dissent in *Bradshaw*. *See State v. Hambly*, 745 N.W.2d 48 (Wis. 2008), *cert. denied*, 129 S. Ct. 177 (2008). The dissent in *Bradshaw* suggested a more stringent test: that initiation occurs when the suspect starts a dialogue specifically and directly focused on the investigation. *Id.* at 67 (citing *Bradshaw*, 462 U.S. at 1053 (Marshall, J., dissenting)). The Wisconsin Supreme Court held that under either test, the defendant initiated conversation when the suspect told the detective that he did not understand why he was under arrest. *Id.* at 69–70; *see also* *Commonwealth v. LeClair*, 770 N.E.2d 50, 56 & n.11 (Mass. App. Ct. 2002) (discussing *Bradshaw* plurality and dissent). *But see State v. Chew*, 695 A.2d 1301, 1318 (N.J. 1997) (acknowledging that there are separate tests set forth by the plurality and the dissent and that it had not yet chosen between the two, but deciding that the court "perceive[d] little difference between the tests . . ."), *cert. denied*, 528 U.S. 1052 (1999). For various applications of the rule, *see United States v.*

approach a suspect to try to obtain a waiver of rights when the suspect has his lawyer present.¹⁷⁶

3. Treating an Ambiguous Invocation as Irrelevant Has Great Cost to the Individual's Privilege Against Self-Incrimination

Against this diminished value of confessions and the recognition that re-interrogation can occur with a willing defendant must be weighed the harm to an individual's free choice that the *Davis* rule entails. While the *Davis* Court overestimated the cost to law enforcement if ambiguous invocations were treated as invocations (or required to be clarified), they underestimated (or ignored) the significant costs to the objectives of *Miranda*—ensuring a free and voluntary choice to submit to police interrogation.¹⁷⁷ Ignoring an ambiguous request for counsel or to remain silent and permitting further interrogation almost certainly interferes with an individual's determination whether to ever invoke his or her rights.¹⁷⁸ Assume, for a minute, that an ambiguous request reflects a suspect's cultural background or intimidation in the circumstance or fear of reprisal, as suggested earlier. Thus, the suspect who says, "well, I think I might like to stay silent," is trying politely, albeit hesitantly, to invoke the right to remain silent. Or take the suspect who says, "I don't want to talk now." If the police ignore such

Thongsophaporn, 503 F.3d 51, 56 (1st Cir. 2007) (holding that a defendant's question of police agent who had been sitting silently for a bit over five minutes, "what was going on[?]" constituted an initiation), *cert. denied*, 128 S. Ct. 1294 (2008); *Vann v. Small*, No. 99-55-84, 1999 WL 439400, at *1-2 (9th Cir. June 18, 1999) (holding that Vann initiated further conversation with police in a patrol car by asking, "What is going to happen to me? What do you think I should do?"), *cert. denied*, 529 U.S. 1088 (2000); *United States v. Debrew*, No. 93-5766, 1994 WL 637245, at *2 (4th Cir. Nov. 14, 1994) (holding that the statement, "Look man, I'll tell you about it," reinitiated conversation); *Robbins v. Maass*, No. 91-35726, 1992 WL 170952, at *1-2 (9th Cir. July 22, 1992) (holding that a suspect's comment, "Exactly what is the charge here?" initiated conversation); *State v. Montejo*, 974 So. 2d 1238, 1246-47 (La. 2008) (holding that after invoking right to counsel, suspect initiated by saying, "No, come here, come here," even though that followed the police officer's comments: "Dude, you don't want to talk to us no more, you want a lawyer, right? I trusted you and you let me down"); *LeClair*, 770 N.E.2d at 56 (holding that defendant's statement that "he was in a lot of trouble" and his inquiry into "whether he needed counsel, evinced a desire for more generalized conversation at least sufficient to permit further inquiry about whether the defendant continued to stand by his earlier invocation of his right to counsel"); and *Henderson v. Commonwealth*, No. 0653-05-4, 2006 WL 1459974, at *1 (Va. Ct. App. May 30, 2006) (holding that a suspect initiated by saying, after the detective started to leave, "[M]aybe I'll make the letter of apology").

¹⁷⁶ *Edwards*, 451 U.S. at 484-85.

¹⁷⁷ *Miranda v. Arizona*, 384 U.S. 436, 469 (1966) ("Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process.").

¹⁷⁸ See *People v. Jones*, No. 273193, 2007 WL 292532, at *4 (Mich. Ct. App. Feb. 1, 2007) (seeing that his requests for a lawyer were futile because the police simply continued speaking to him, defendant elected to speak to the police without a lawyer and confessed to the crime).

a request and continue questioning, the suspect likely would never bother to invoke again, even if that remains a continuing or ever-growing desire as the interrogation continues. After all, his initial attempt to invoke his rights was met with disdain, reinforcing all his fears and concerns in the first place. The belief that such a person would then be capable of unequivocally and clearly invoking their rights at some point in the interrogation seems naïve at best.

And what about a person who truly is uncertain about what they want? Again, the officers' response likely reinforces any hesitancy against invocation. After all, the police can ignore the invocation, but they can also emphasize the desirability of talking to them without an attorney. In other words, because they do not have to cease interrogation immediately, they can attempt to subtly—or not so subtly—dissuade the person from asserting the right to remain silent or from seeking counsel. For example, if in response to a suspect's comment, "I think I should see a lawyer," the police officer says, "Well, then you won't be able to tell us your side and we'll be left wondering what you have to hide," or says, "Only the guilty get a lawyer," or simply continues the interrogation, the likelihood that the suspect will believe that they truly have a free choice in the future to invoke their right to counsel is greatly diminished.

Similarly, if in response to a suspect's comment, "I probably shouldn't talk," the police simply continue questioning, or express incredulity that the suspect would not want to help himself by giving his side of the story, the chance that a suspect will attempt to assert his right to remain silent in the future is remote. After all, the suspect does not say to himself, "Oh yes, I must say it more clearly, that's why they ignored me. Next time I'll say, 'I am invoking my right to remain silent' and all will be well." Rather, the police officer's response reinforces those feelings of hopelessness and intimidation that caused the ambiguous request in the first place. In other words, police officers can subtly, or even overtly, convince a suspect to continue talking after an ambiguous invocation. And in so doing, of course, police will reinforce the suspect's common fear discussed earlier, that if he invokes his rights, it will in some way harm him.

4. Conclusion

Davis was wrongly decided and should be overturned. First, in too many cases, ambiguous comments about the right to remain silent or the right to counsel will represent an attempt to invoke the rights rather than true ambivalence or uncertainty. For these people, then, the goal of *Miranda*—giving individuals the tools to counter inherently coercive pressure by asserting their right not to deal with the police alone or at all—is thwarted. Moreover, it is subverted for no good reason. Police investigations will not be unduly hampered. The importance of police interrogation may well be overstated and, most significantly, individuals who want to talk to the police can still do so by initiating conversation (and waiving their rights). Even if no initiation occurs, at least when the right to remain silent is invoked the police can simply attempt

to re-question later. Further, even if the number of confessions is diminished, that price may not be so costly. Physical evidence may be available to convict the suspect, and the reliability of confessions, particularly in the absence of substantial physical evidence, should be of some concern. Finally, even if a suspect was truly uncertain when voicing a potential request for counsel or to remain silent, if the police simply ignore it, or use the opportunity to convince the suspect that invoking his rights would be detrimental, the likelihood of a suspect subsequently invoking his rights and curtailing the interrogation is drastically diminished. That suspect would likely feel he has no real choice at any stage in the interrogation process but to continue talking. For all these reasons, the conclusion that the right to counsel and the right to remain silent must be unambiguously asserted is in error.

B. Davis Should Not Be Applied to the Right to Remain Silent

Even if *Davis* was correctly decided, it applied by its terms only to the right to counsel and it should not be expanded to encompass the right to remain silent. I reach this conclusion for two reasons. First, as a matter of law, the two rights need not be treated alike. Second, as a matter of policy, the rule in *Davis* should not apply to the right to remain silent.

1. As a Matter of Law

In some ways, it is ironic that courts would, without explanation, import the *Davis* rule concerning the right to counsel to the right to remain silent because in virtually every other aspect of the rules, the courts go out of their way to develop distinct standards.¹⁷⁹ Most obvious, of course, are the divergent rules that govern re-interrogation after invocation of the respective rights. Police can re-question suspects after an invocation of the right to remain silent so long as the suspects' rights are scrupulously honored; re-questioning after the invocation of the right to counsel requires that the suspects initiate the conversation and waive their rights.¹⁸⁰ Given that in this most basic and fundamental way, the rights are not treated the same, it is not clear why courts, with no real explanation, determine that the *Davis* rule applies to invocations of the right to remain silent.

¹⁷⁹ See *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990) (holding that the opportunity to consult with an attorney does not change *Edwards*; emphasizing, unlike *Mosley*, the need for a bright-line, clear rule); *Arizona v. Roberson*, 486 U.S. 675, 683 (1988) (questioning of a suspect by law enforcement about a different offense does not alter *Edwards* rule). See generally Wayne D. Holly, *Ambiguous Invocations of the Right to Remain Silent: A Post-Davis Analysis and Proposal*, 29 SETON HALL L. REV. 558 (1998) (discussing the distinction between the right to counsel and the right to remain silent).

¹⁸⁰ See *supra* notes 24-43 and accompanying text.

Moreover, the right to remain silent is the transcendent right protected by *Miranda*.¹⁸¹ The right to counsel exists only to protect the right to remain silent—the right to be free from compelled self-incrimination. After all, a suspect does not *really* have a right to an attorney under *Miranda*; *Miranda* is not violated if the suspect is never provided an attorney so long as no interrogation occurs in the absence of such an appointment.¹⁸² Thus, even if the Court decides that a suspect must invoke the right to counsel in a particular manner, there is no inherent reason why the right to remain silent needs to be asserted in precisely the same way. To a large extent, the Court in *Davis* recognized this distinction between the transcendent constitutional right in *Miranda*—the right to remain silent—and the right to counsel, which is there to protect the right not to self-incriminate. As the Court in *Davis* held, “[W]e are unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer. Unless the suspect actually requests an attorney, questioning may continue.”¹⁸³

Finally, the *Miranda* decision itself suggests that an ambiguous invocation is sufficient to invoke the right to remain silent. When discussing the right to remain silent, the Court suggested that “[i]f the individual indicates *in any manner*, at any time prior to or during questioning, that he wishes to remain silent . . . the interrogation must cease.”¹⁸⁴ It is difficult to imagine the meaning of “in any manner” if not to include ambiguous invocations.¹⁸⁵ Thus, at a minimum, the *Miranda* decision itself suggests

¹⁸¹ See *Miranda*, 384 U.S. at 439 (concerning the necessity for procedures to ensure an individual is “accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself”). Thomas, *Miranda’s Illusion*, *supra* note 5, at 1094–95 (“Reading *Miranda* now, 36 years after it was written, one is struck by the Court’s genuflection in the direction of suspect ‘free choice’—a locution that, in one variation or another, appears at least nine times in the majority opinion.”). But see *State v. Williams*, 535 N.W.2d 277, 284–85 (Minn. 1995) (using *Edwards* and the greater procedural protections afforded when a suspect invokes the right to counsel as proof that the right to counsel is of pre-eminent concern); *State v. Owen*, 696 So. 2d 715, 718 n.6 (Fla. 1997) (“If anything, requests for counsel have been accorded greater judicial deference than requests to terminate interrogation.”). Interestingly, studies show that suspects are slightly more likely to invoke the right to counsel than the right to silence. Welsh S. White, *Deflecting a Suspect from Requesting an Attorney*, 68 U. PITT. L. REV. 29, 36 (2006).

¹⁸² See *supra* note 7 and accompanying text.

¹⁸³ *Davis v. United States*, 512 U.S. 452, 462 (1994).

¹⁸⁴ *Id.* at 471–72 (Souter, J., concurring in the judgment) (emphasis added) (citation omitted). There is no similar language in that paragraph about the right to counsel. Instead the Court stated simply, “If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.” *Id.* at 474. Whether this divergence is intentional or inadvertent is not clear. Other places in the opinion, however, use similar language with respect to the right to counsel. *Id.* at 444–45.

¹⁸⁵ See, e.g., Matthew W. D. Bowman, Note, *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, 1187 (1986).

some leeway should be accorded a suspect who might want to stay silent in the face of police questioning.

2. As a Matter of Policy

Most of the policy justifications for not employing the *Davis* rule with respect to the right to remain silent were discussed above.¹⁸⁶ Most significant, the fact that police questioning can easily resume after an invocation of silence is made, unlike a request for counsel, strongly suggests that a different rule for asserting the right to remain silent is in order. In other words, even if *Davis* was a viable decision with respect to the right to counsel because the ramification of such an invocation is so severe, that same concern does not exist with respect to the right to remain silent. Given the relative ease with which new questioning can occur, there is no corresponding need for a stringent rule governing assertion of the right to remain silent.¹⁸⁷

Indeed, given the rules governing the right to remain silent and re-questioning, there is a strong argument that a stringent rule is not only unnecessary, it is wholly inappropriate. In some ways, the combination of *Davis* and *Mosley* stacks the deck for the state. If a suspect ambiguously invokes the right to remain silent, the police can ignore such comments and continue questioning. In the remote chance that the suspect makes an unambiguous invocation, the police can re-question later under the fairly undemanding standards of *Mosley*. Hence, the application of *Davis*, in conjunction with other rules regarding the right to remain silent, has an undesirable synergistic effect.¹⁸⁸ The police are, in many ways, placed in a win-win situation. If *Davis* is

¹⁸⁶ See *supra* Part III.A.

¹⁸⁷ See *Holly*, *supra* note 179, at 573 (“The perceived obstacle to police interrogations imposed by *Edwards* simply does not exist in the same degree under *Mosley* and the right-to-silence context.”); see also *Peña v. State*, 98 P.3d 857, 868 (Wyo. 2004) (acknowledging that the difference between *Edwards* and *Mosley* raised a significant question of whether *Davis* should apply to the right to remain silent, but declining to resolve the issue since police here properly clarified the ambiguous invocation).

¹⁸⁸ This argument, moreover, can be expanded to include Court decisions elaborating upon other aspects of the *Miranda* decision which many criticize as unfairly pro-police. For example, some contend that the definition of custody has come to favor the police. Craig M. Bradley & Joseph L. Hoffmann, “Be Careful What You Ask for”: *The 2000 Presidential Election, the U.S. Supreme Court, and the Law of Criminal Procedure*, 76 IND. L.J. 889, 912 (2001); John Douard, Note, *The Intrinsically Coercive Nature of Police Interrogation*, 3 RUTGERS RACE & L. REV. 297, 307 (2001). Others argue that the Court’s definition of “interrogation” is too narrow. See, e.g., Lisa Lewis, *Rethinking Miranda: Truth, Lies and Videotape*, 43 GONZ. L. REV. 199, 211 (2007); Jennifer Diana, Note, *Apples and Oranges and Olives? Oh My! Fellers, the Sixth Amendment, and the Fruit of the Poisonous Tree Doctrine*, 71 BROOK. L. REV. 985, 996 (2005). Additionally, the police can ask questions—and the answers are admissible even without the provision of *Miranda* warnings—if the questions were reasonably prompted by a concern for public safety. *New York v. Quarles*, 467 U.S. 649 (1984); see also Thomas, *Stories About Miranda*, *supra* note 151, at 1996–97 (discussing how *Quarles* is used by the police to admit confessions obtained without the issuance of warnings). The police can question

justified at all, it has to be as the “price” of *Edwards*¹⁸⁹—that because invoking the right to counsel has such dire consequences for law enforcement, it should not be easy to invoke. That argument cannot be made with respect to the right to remain silent. *Davis* plus *Mosley* eviscerates the protections of *Miranda*.

C. Davis at Best Should Be Deemed a Limited Rule, Applicable Only to Post-Waiver Invocations

Even if *Davis* is a viable decision, and even if it should apply to the right to remain silent, it is in reality limited in its application. *Davis* is a rule governing *post-waiver* initiations. That is, it applies only in the situation when the suspect already has waived his or her rights.¹⁹⁰

That *Davis* is a post-waiver case is clear from the facts of the case and from the holding. *Davis* had previously waived his rights and agreed to talk without an attorney present. At some point in the interrogation, he indirectly and ambiguously requested an attorney. Justice O'Connor, in writing for the majority held that *after a suspect knowingly and voluntarily waives his Miranda rights*, law enforcement officers may continue questioning unless he or she clearly and unequivocally requests counsel.¹⁹¹

Despite the fact that *Davis* involved a post-waiver attempt at invocation, the lower courts have not consistently limited it to that setting. Several lower courts have recognized that *Davis* is limited to a post-waiver situation,¹⁹² while others have applied it more generally to any attempted invocation.¹⁹³ It is difficult to see, however, how the *Davis* rule can truly apply pre-waiver. Take, for example, this exchange:

without providing *Miranda* warnings and any physical evidence derived from that interrogation is admissible. *United States v. Patane*, 542 U.S. 630 (2004). Finally, the Supreme Court has recently shown some leeway for questioning outside *Miranda*. *Missouri v. Seibert*, 542 U.S. 600 (2004).

¹⁸⁹ It is almost reminiscent of the “unintended consequences” argument in foreign policy. It is hard to imagine that the Justices, when handing down a decision that was protective of a suspect’s rights in *Edwards*, imagined that the decision would lead to the result in *Davis*, and, as a result, that it would be extremely difficult for a suspect to even invoke the right to counsel.

¹⁹⁰ See Harvey Gee, *Essay: When Do You Have To Be Clear?: Reconsidering Davis v. United States*, 30 Sw. U. L. REV. 381, 384 (2001) (arguing *Davis* only applies to post-waiver situations); see, e.g., *State v. Tuttle*, 650 N.W.2d 20, 28 (S.D. 2002) (“The *Davis* holding obviously applies to instances where suspects attempt to invoke *Miranda* rights after a knowing and voluntary waiver of those rights. *Davis*, in sum, applies to an equivocal post-waiver invocation of rights.”); *State v. Leyva*, 951 P.2d 738 (Utah 1997).

¹⁹¹ *Davis*, 512 U.S. 452, 459–61 (1994).

¹⁹² See, e.g., *Dooley v. State*, 743 So. 2d 65, 69 (Fla. Dist. Ct. App. 1999) (“[T]he holding in *Owen* [and *Davis*] ‘applies only where the suspect has waived the right earlier during the session.’”).

¹⁹³ See, e.g., *Bui v. DiPaolo*, 170 F.3d 232 (1st Cir. 1999) (applying *Davis* to a purported assertion immediately after being read rights), *cert. denied*, 529 U.S. 1086 (2000); *State v. Law*, 39 P.3d 661 (Idaho Ct. App. 2002) (applying *Davis* rule to pre-waiver possible invocation); *Commonwealth v. Sicari*, 752 N.E.2d 684, 697 n.13 (Mass. 2001) (“[C]ourts have held that

Police provide a standard *Miranda* warning, suspect agrees to waive his rights, and the police engage in questioning. At some point, the suspect responds as follows: "Gee, I think I shouldn't say anything . . . You know, . . . my lawyer, he wouldn't want me to talk to you"

Because this would almost certainly be deemed ambiguous, the police can ignore it and continue their line of questioning as if the suspect had said, "Gee, I think the Dodgers will win the World Series." They already have a waiver.

But pre-waiver, the scenario is entirely different. Consider the following scenario. A police officer provides a standard *Miranda* warning, and the suspect responds: "Gee, I think I shouldn't say anything You know, my lawyer, he wouldn't want me to talk to you."

Even if ambiguous, the police officer at this junction cannot simply "continue questioning." There has been no waiver of rights. In other words, even if the equivocal statement is not deemed an invocation, it cannot be construed to constitute a waiver. And a waiver of rights does not occur simply by the fact that the suspect proceeded to answer questions.¹⁹⁴ Thus, it is virtually inevitable that at least some clarification of rights must occur in this context, if only to obtain a valid waiver.

My point is this: even if *Davis* renders an ambiguous statement insufficient to invoke a suspect's rights, that statement should influence whether there occurred a valid waiver. Pre-waiver, the statement should not be deemed the equivalent to "Gee, I think the Dodgers might win the World Series." Even if not deemed an invocation per se, the statement can and should be considered in deciding the validity of any waiver. Pre-waiver, ignoring such a statement (or making a derogatory statement about how not talking would hurt the defendant's cause) should render any subsequent waiver invalid.¹⁹⁵ At a minimum, the officers need to clarify the suspect's desire in order to satisfy the waiver requirements.

Thus, even if a court were inclined to adapt the *Davis* rule to the right to remain silent, it should apply that rule at most to the post-waiver scenario. That was the approach of the Maryland Court of Appeals in 2004:

unless a suspect 'clearly and unambiguously' invokes his right to remain silent, *either before or after a waiver of that right*, the police are not required to cease questioning." (emphasis added), *cert. denied*, 534 U.S. 1142 (2002); *State v. Moss*, No. A-05-1132, 2007 WL 91649, at *5 (Neb. Ct. App. Jan. 16, 2007) (applying *Davis* pre-waiver); *cf. In Re Christopher K.*, 841 N.E.2d 945, 964-65 (Ill. 2005) ("Respondent correctly points out that the holding in *Davis* is limited to the situation where the alleged invocation of the right to counsel comes after a knowing and voluntary waiver. . . . By implication, this suggests the United States Supreme Court has left open the issue of whether the objective test applies in a pre-waiver setting. We believe the objective test set forth in *Davis* can be applied [pre-waiver.].").

¹⁹⁴ See *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (per curiam) (stating that the issues of "[i]nvocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together").

¹⁹⁵ See *State v. Collins*, 937 So. 2d 86, 89, 93 (Ala. Crim. App. 2005), *cert. denied*, 549 U.S. 941 (2006).

[A] careful reading of *Davis* reveals that the Supreme Court's bright line rule, requiring an unequivocal assertion of the right to counsel, pertains to a situation in which the defendant had previously waived his right and then, during the interrogation, arguably sought to exercise his rights. Based on the foregoing, we decline to apply the rationale of *Davis* to our analysis of appellant's silence, because the silence occurred in a pre-waiver context.¹⁹⁶

CONCLUSION: SOME POSSIBLE SOLUTIONS

In recent years, a plethora of suggestions for improving *Miranda*, including limiting the length of an interrogation,¹⁹⁷ curtailing the "trickery" police officers can employ,¹⁹⁸ and, perhaps most significantly, requiring videotaping of confessions¹⁹⁹ have been suggested. While these are certainly laudable, this Article urges a re-examination and re-invigoration of *Miranda*'s central premise: that suspects have a basic right not to answer questions by the police.²⁰⁰ To preserve that core value of *Miranda*, suspects should not be required to assert their rights unambiguously before police need honor those rights.

This Article suggested reasons to believe that suspects in the inherently intimidating environment of a custodial interrogation are likely to assert their rights indirectly and tentatively, and provided case after case in which the courts held that such ambiguous assertions were insufficient to constitute any invocation of rights. This case law undoubtedly speaks to people in different ways. Some of the statements that courts held to be ambiguous frankly shocked me. Others might be more inclined to provide the police with the benefit of the doubt, and suggest that they are in the best position to evaluate ambiguity. It is difficult for me to *prove* that when a suspect said, "I don't want to talk about *it*," or "I got nothing to say," or "I don't want to talk *now*," or "I guess I shouldn't talk," that the suspect was attempting, to the best of their ability, to end the interrogation.

Thus, perhaps the strongest evidence for the need for change comes not from the cases directly but from some remarkable statistics. Of all suspects subjected to

¹⁹⁶ *Freeman v. State*, 857 A.2d 557, 573 (Md. Ct. Spec. App. 2004); *accord State v. Hill*, No. 55071-3-I, 2006 WL 3056408, at *2 (Wash. Ct. App. Oct. 23, 2006).

¹⁹⁷ Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105 (1997).

¹⁹⁸ Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979). *But see* Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far*, 99 MICH. L. REV. 1168 (2001).

¹⁹⁹ *See* Erik Lilliquist, *Improving Accuracy in Criminal Cases*, 41 U. RICH. L. REV. 897, 923-26 (2007) (advocating taping despite recognizing some problems with it); Slobogin, *supra* note 5.

²⁰⁰ *See Miranda v. Arizona*, 384 U.S. 436, 472 (1966).

custodial interrogation, only one in five refuse to talk initially.²⁰¹ That is, eighty percent waive their rights; only twenty percent refuse to speak or refuse to speak without an attorney present. As I noted before, a good proportion of these twenty percent who refuse to talk are persons with prior felonies.²⁰² Whether they have learned that talking to the police is not helpful, or learned how to effectively invoke their rights (unlike novices to the criminal justice system) is unknowable—and probably a combination of both! But the more troubling statistic is this: out of those eighty percent who do agree to talk, *virtually none* subsequently assert their rights during the interrogation.²⁰³ In other words, studies show that almost no suspect who waives his rights initially and is subjected to police questioning later effectively invokes his rights. Almost none of the suspects do what *Miranda* so carefully guaranteed them—control whether and when they speak to the police.

Why do I call this remarkable? Of course, it is possible that all those who decide to speak to the police find the experience so helpful, cathartic, and enjoyable that they never want it to end. Frankly, I find this possibility preposterous. Rather, I believe that the only logical explanation for this statistic is that the rules for asserting either the right to counsel or the right to remain silent have become so difficult that almost no one is able to do it. Empirically, this seems evident by the fact that the number who manage to assert their rights post-waiver is infinitesimal. Descriptively, I hope I showed through my examination of the specific cases how the courts have set the bar for an unambiguous invocation incredibly and unrealistically high.²⁰⁴

²⁰¹ Saul M. Kassin et al., *supra* note 164, at 383 (“Consistently, research has revealed that custodial suspects waive their rights approximately eighty percent of the time.”). “Next to the warning label on cigarette packs, *Miranda* is the most widely ignored piece of official advice in our society.” Patrick A. Malone, “*You Have the Right to Remain Silent*”: *Miranda After Twenty Years*, 55 AM. SCHOLAR, Spring 1986, at 367, 368. One scholar wrote that the *Miranda* Court “would have been stunned” had they seen the data on how few people resist police interrogation. Thomas, *Stories About Miranda*, *supra* note 151, at 1977 (2004).

²⁰² See Duke, *supra* note 2.

²⁰³ William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975, 977 (2001) (“[O]nce suspects agree to talk to police, they almost never call a halt to questioning or invoke their right to have the assistance of counsel.”); see also Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 653 tb1.1 (1996) (noting that of 182 *Miranda* suspects, thirty-eight invoked their *Miranda* rights but only two did so after an initial waiver); Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1554–55 (1967).

²⁰⁴ In a study of 211 cases in which the suspects were provided their *Miranda* rights, suspects invoked their right to counsel in twenty cases and invoked the right to remain silent in six. Thomas, *Stories About Miranda*, *supra* note 151, at 1972–73 tbls.2 & 3. In eleven of the twenty cases where the suspect invoked the right to counsel, statements were suppressed or no questioning occurred at all. *Id.* In all of the six cases where the suspects claimed to have invoked the right to remain silent, the claim was rejected and the incriminating statement was admissible. *Id.*

So what should be done? Many others have discussed possible solutions in great detail,²⁰⁵ and, thus, I will only sketch out three proposals here. First, ideally, all ambiguous invocations of the right to remain silent should end the interrogation and further interrogation should proceed under the rules of *Mosley*.²⁰⁶ Such an approach would best protect the suspect's free will, given my arguments that many (if not most) ambiguous invocations likely represent attempts to remain silent. And, given the ease with which re-interrogation can occur under *Mosley*, this approach would pose no real impediment to law enforcement interests. This solution, however, is unlikely to be embraced. It was clearly rejected by the Supreme Court in *Davis*, and had been a minority position in the court pre-*Davis*, at least with respect to the right to counsel.²⁰⁷

Alternatively, the courts should adopt a stringent "stop-and-clarify" method. By stringent, I mean that the method would have to follow specific and rigid rules similar to *Miranda* warnings so as to ensure that the suspect's will is not worn down. For example, a police officer should be required to have a set script and would not be able to use the opportunity to editorialize on the benefits of talking to the police. Such a script might go like this:

It sounds like you don't want to speak to us about any topic, but it wasn't clear. You have the right not to speak to us, and we are prepared to honor that right. And if you don't want to speak to us, there will be no adverse consequence to you. So, do you want to speak to us at this time?

Let me add one other suggestion that would help ensure that the ideals of *Miranda* with respect to the right to remain silent be realized. The initial warnings should include the following two additions: First, the police must say: "You have the right to remain silent and you may state *at any time* that you don't wish to talk to us during the interrogation and we will stop asking you questions. In other words, if you decide to talk now, you can stop at any time." Second, the suspect must be told: "If you decide to ask for an attorney or to stay quiet, that choice will not be used against you in any way. We cannot comment on the fact that you chose not to talk to us in court."²⁰⁸ The first statement would explicitly inform the suspect that they can assert the right at any time—a right only implicitly conveyed currently. The second statement would hopefully dispel the fear of a suspect that the invocation of silence would "make them look bad" and could be used against them.

²⁰⁵ See, e.g., Holly, *supra* note 179, at 581.

²⁰⁶ See *Michigan v. Mosley*, 423 U.S. 96 (1975).

²⁰⁷ See *Davis v. United States*, 512 U.S. 452, 459 (1994).

²⁰⁸ This suggestion is explored in an excellent law review article, Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781 (2006).

After forty odd years, *Miranda* has been probed and prodded, attacked from all sides and, most recently, reaffirmed by the Court.²⁰⁹ At its heart lies the right of each individual to decide freely whether to cooperate with the police by submitting to questioning.²¹⁰ The *Miranda* decision represents the viewpoint that the suspect's choice to remain silent, or to speak only with the help of counsel, is not an evil to be avoided but an acceptable option. Somehow, this perspective has become thwarted by judges intent on promoting police interrogations at almost any cost. It is time to restore the promise of *Miranda* at its most basic level—to truly protect the right to remain silent. That right should not only be the province of those fortunate enough or educated enough to say the right words. The promise belongs to all.

²⁰⁹ *Dickerson v. United States*, 530 U.S. 428 (2000).

²¹⁰ *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (holding that the right against self-incrimination “is fulfilled only when the person is guaranteed the right ‘to remain silent unless he chooses to speak in the unfettered exercise of his own will’” (citation omitted)).

APPENDIX

STATE CASES CONSIDERING WHETHER *DAVIS* APPLIED TO RIGHT TO REMAIN SILENT AS OF FEBRUARY, 2008

Alabama—uses clarification approach but has not discussed the possible application of *Davis*. *Freeman v. State*, 776 So. 2d 160, 175 (Ala. Crim. App. 1999) (“When a purported invocation of a Fifth Amendment privilege is ambiguous, the police may question the accused for the narrow purpose of clarifying the unequivocal request.”), *cert. denied*, 531 U.S. 966 (2000).

Alaska—has not yet decided whether invocation need be unambiguous. *Munson v. State*, 123 P.3d 1042, 1047 (Alaska 2005).

Arizona—uses clarification approach; says will follow that approach until the Supreme Court of the state tells the lower courts to follow *Davis* for purposes of determining whether the suspect invoked the right to remain silent. *State v. Strayhand*, 911 P.2d 577, 592 (Ariz. Ct. App. 1996).

Arkansas—adopts *Davis* for right to remain silent. *Bowen v. State*, 911 S.W.2d 555, 565 (Ark. 1995) (“We see no distinction between the right to counsel and the right to remain silent with respect to the manner in which it must be effected.”), *cert. denied*, 517 U.S. 1226 (1996); *Standridge v. State*, 951 S.W.2d 299, 301 (Ark. 1997).

California—appears to have adopted *Davis* for right to remain silent. *People v. Stitley*, 108 P.3d 182, 196 (Cal. 2005) (“In order to invoke the Fifth Amendment privilege, . . . the suspect ‘must *unambiguously*’ assert his right to silence or counsel.” (citing *Davis v. United States*, 512 U.S. 452, 459 (1994))), *cert. denied*, 546 U.S. 865 (2005); *People v. Furness*, No. B183779, 2006 Cal. App. LEXIS 6249, at *8 (Cal. Ct. App. July 19, 2006). *But see In Re John W.*, No. G031077, 2005 Cal. App. LEXIS 7782 (Cal. Ct. App. Aug. 29, 2005) (holding that the police must ask clarifying questions if ambiguous); *People v. Bates*, No. D045113, 2005 Cal. App. LEXIS 11604 (Cal. Ct. App. Dec. 19, 2005) (same).

Colorado—adopts *Davis* for right to remain silent. *People v. Arroyo*, 988 P.2d 1124, 1131 (Colo. 1999) (following majority of other states and federal jurisdictions in applying *Davis*).

Connecticut—no case.

Delaware—uses clarification rule under state constitution. *Garvey v. State*, 873 A.2d 291, 296 (Del. 2005) (noting that under the Delaware Constitution, if a suspect attempts to invoke his rights equivocally, the police must clarify).

Florida—adopts *Davis* for right to remain silent. *Owen v. State*, 862 So. 2d 687, 698 (Fla. 2003), *cert. denied*, 543 U.S. 986 (2006).

Georgia—has not decided, but has suggested that the clarification approach may be appropriate. *Green v. State*, 570 S.E.2d 207, 209–10 (Ga. 2002) (“This Court previously expressed its approval of a requirement that interrogators strictly limit their questioning to [whether a suspect wants to invoke their rights] once that person has made an ambiguous or equivocal statement implicating that right. However, this Court has not yet addressed whether such clarification is a *requirement* in Georgia or is simply the better practice. We need not address that question now, however, because we find that Green’s assertion of his right to silence was unambiguous.”).

Hawaii—no case (but does not use *Davis* even for the right to counsel). *See State v. Hoey*, 881 P.2d 504, 523 (Haw. 1994).

Idaho—adopts *Davis* for right to remain silent. *State v. Law*, 39 P.3d 661, 664–65 (Idaho Ct. App. 2002) (adopting *Davis*); *State v. Whipple*, 5 P.3d 478, 482–84 (Idaho Ct. App. 2000) (implicitly adopting *Davis*).

Illinois—no case.

Indiana—no case.

Iowa—no case.

Kansas—requires that invocation of right to remain silent be unambiguous without citing *Davis*. *State v. Holmes*, 102 P.3d 406, 419 (Kan. 2004); *State v. Bieker*, 132 P.3d 478, 481 (Kan. Ct. App. 2006).

Kentucky—requires that invocation of right to remain silent be unambiguous without citing *Davis*. *Soto v. Commonwealth*, 139 S.W.3d 827, 847 (Ky. 2004), *cert. denied*, 544 U.S. 931 (2005).

Louisiana—adopts *Davis* for right to remain silent. *State v. Robertson*, 712 So. 2d 8, 29 (La. 1998) (holding that the state can continue questioning if the right to remain silent or the right to counsel is not specifically invoked), *cert. denied*, 525 U.S. 882 (1998); *State v. Gaspard*, 709 So. 2d 213, 220 (La. Ct. App. 1998) (“If the invocation

of the right to counsel must be unambiguous, then certainly the invocation of the right to remain silent must also be unambiguous.”).

Maine—requires that invocation of right to remain silent be unambiguous without citing *Davis*. *State v. Grant*, No. CR-04-731, 2006 Me. Super. LEXIS 15 (Me. Super. Ct. Jan. 9, 2006), *aff’d*, 939 A.2d 93 (Me. 2008). But state court of last resort has held *Davis* does not apply pre-waiver. *State v. Holloway*, 760 A.2d 223, 228 (Me. 2000) (declining to extend *Davis* to ambiguous invocation of right to remain silent in the absence of a prior waiver).

Maryland—appears to apply *Davis* post-waiver but rejects application pre-waiver. *Freeman v. State*, 857 A.2d 557, 570 (Md. Ct. Spec. App. 2004) (“While there may well be sound reason to apply the logic of *Davis* to the matter of an ambiguous invocation of the right to silence that follows a valid waiver of *Miranda* rights, that logic does not extend to an ambiguous invocation that occurs prior to the initial waiver of rights.”).

Massachusetts—has not decided. *Commonwealth v. Sicari*, 752 N.E.2d 684, 696 n.13 (Mass. 2001) (“[W]e need not decide whether to adopt the ‘clear articulation rule.’”).

Michigan—adopts *Davis* for right to remain silent. *People v. Harris*, No. 220547, 2001 WL 668957, at *2 (Mich. Ct. App. May 11, 2001); *People v. Granderson*, 538 N.W.2d 471, 474 (Mich. Ct. App. 1995). But see *People v. Draper*, No. 188113, 1997 Mich. App. LEXIS 560, at *4 (Mich. Ct. App. Feb. 7, 1997) (holding that if there is an equivocal invocation of right to remain silent, the police can continue questioning to seek clarification).

Minnesota—no case.

Mississippi—adopts the clarification approach but did not discuss *Davis*. *Holland v. State*, 587 So. 2d 848, 856 (Miss. 1991).

Missouri—no case.

Montana—no case.

Nebraska—adopts *Davis* for right to remain silent. *State v. Moss*, No. A-05-1132, 2007 Neb. App. LEXIS 5, at *14 (Neb. Ct. App. Jan. 16, 2007) (“This court recognized [the *Davis*] holding in [a prior case], and following the majority of jurisdictions, which had considered the issue, we held that the *Davis* ‘clear articulation rule’ was applicable to invocations of the *Miranda* right to remain silent.”).

New Hampshire—no case.

New Jersey—no post-*Davis* case; pre-*Davis* supported clarification approach. *State v. Bey*, 548 A.2d 887, 931 (N.J. 1988) (holding that where suspect ambiguously asserts *Miranda* rights, police should stop and clarify).

New Mexico—no case.

New York—holds that the right must be unambiguously asserted to cut off questions without citing *Davis*. *People v. Brandon*, 770 N.Y.S.2d 825, 831 (Crim. Ct. 2003).

Nevada—no case.

North Carolina—adopts *Davis* for the right to remain silent (although calling it a Sixth Amendment right). *State v. Golphin*, 533 S.E.2d 168, 225 (N.C. 2000), *cert. denied*, 532 U.S. 931 (2001).

North Dakota—adopts *Davis* for right to remain silent. *State v. Greybull*, 579 N.W.2d 161, 163 (N.D. 1998).

Ohio—adopts *Davis* for the right to remain silent. *State v. Murphy*, 747 N.E.2d 765, 779 (Ohio 2001) (“Although *Davis* dealt with invocations of the right to counsel, we think it also applies to the right to remain silent.”), *cert. denied*, 534 U.S. 1116 (2002).

Oklahoma—no case.

Oregon—no case.

Pennsylvania—no clear decision. The closest was a confusing opinion that said that *Davis* related to the Sixth Amendment right to counsel and therefore was not applicable to Fifth Amendment right to remain silent. *Commonwealth v. Chmiel*, No. 83-CR-748, 2003 WL 25287128 (Pa. Ct. Com. Pl. Aug. 20, 2003), *aff’d*, 889 A.2d 501 (Pa. 2005), *cert. denied*, 549 U.S. 848 (2006).

Rhode Island—no case.

South Carolina—adopts *Davis* for the right to remain silent. *State v. Reed*, 503 S.E.2d 747, 750 (S.C. 1998), *cert. denied*, 525 U.S. 1150 (1999).

South Dakota—no case.

Tennessee—adopts *Davis* for the right to remain silent. *State v. Mason*, No. 02C-01-9310-CC-00233, 1996 WL 111200, at *5 (Tenn. Crim. App. Mar. 14, 1996).

Texas—adopts *Davis* for the right to remain silent. *Dowthitt v. State*, 931 S.W.2d 244, 257 (Tex. Crim. App. 1996).

Utah—somewhat unclear. Generally adopts *Davis*, but says if invocation is something like “I don’t want to talk about *it*,” that is ambiguous with regard to scope and otherwise unambiguous, and that kind of statement requires clarification. *State v. Tiedemann*, 162 P.3d 1106, 1111 (Utah 2007) (emphasis added).

Vermont—adopts *Davis* for right to remain silent. *State v. Bacon*, 658 A.2d 54, 65 (Vt. 1995) (“Without doubt, [*Davis*] applies equally to situations in which a defendant who has waived his *Miranda* rights ambiguously invokes the right to remain silent during the subsequent interrogation.”), *cert. denied*, 516 U.S. 837 (1995).

Virginia—adopts the notion that the suspect must clearly invoke his rights without mentioning *Davis*. *Midkiff v. Commonwealth*, 462 S.E.2d 112, 115 (Va. 1995).

Washington—adopts *Davis* for the right to remain silent. *State v. Fitzgerald*, No. 56952-0-I, 2007 WL 1241518, at *1 (Wash. Ct. App. Apr. 30, 2007) (holding that a suspect must unequivocally assert right to remain silent); *State v. Hill*, No. 55071-3-I, 2006 WL 3056408, at *2 (Wash. Ct. App. Oct. 23, 2006) (holding that *Davis* only applies post-waiver).

West Virginia—adopts *Davis* as “an analytical starting point,” but suggested that it was not “adopting *Davis* as part of West Virginia’s jurisprudence.” *State v. Farley*, 452 S.E.2d 50, 59 n.12 (W. Va. 1994); *State v. Bradshaw*, 457 S.E.2d 456, 470 (W. Va. 1995) (holding that a suspect must clearly and unambiguously indicate he wants to cease all questions and not simply refuse to answer certain questions before police must stop), *cert. denied*, 516 U.S. 872 (1995).

Wisconsin—adopts *Davis* for right to remain silent. *State v. Markwardt*, 742 N.W.2d 546, 554 (Wis. Ct. App. 2007).

Wyoming—expressly did not decide if *Davis* applies to right to remain silent. *Peña v. State*, 98 P.3d 857, 868 (Wyo. 2004) (positing reasons why *Davis* might not apply to right to remain silent, but saying the court did not need to decide because police officers here clarified an ambiguous request).