Loyola University Chicago Law Journal

Volume 26
Issue 3 *Spring 1995*

Article 8

1995

Davis v. United States: The Supreme Court Rejects a Third Layer of Prophylaxis

Nancy M. Kennelly

Davis v. United States: The Supreme Court Rejects a Third Layer of Prophylaxis

Q. Why did you continue talking to them after you say you said, "I think I should have an attorney"?
A. Have you ever been interrogated by three Rockford Police Detectives?
Q. No, I haven't, but I want to know why you continued talking to them.
A. Because I believed it was self-defense. I still do. They wanted a statement of what happened to clear it up. I wanted to get it off my chest, so I gave them a statement.
Q. But you know you had a right to have an attorney there if you wanted one, didn't you?
A. Yes, I did.
Q. You ever insist on having an attorney contacted?
A. I asked for an attorney before I began the statement, and I saw that it was not going to get me anywhere, so I just ceased on that line, because I just knew I wasn't going to get an attorney anyways.
Q. Did it occur to you not to talk any further?
A. Yes, but it occurred to me I might be up all night and be badgered by these three detectives.[1]

I. INTRODUCTION

The Fifth Amendment to the United States Constitution declares: "No person shall be . . . compelled in any criminal case to be a witness against himself."[2] In 1966, the Supreme Court decided *Miranda v. Arizona*,[3] which, in line with the Fifth Amendment's guarantee against self-incrimination, mandates that law enforcement personnel follow certain procedural safeguards during custodial interrogations.[4]

Miranda provided for the preservation of suspects' Fifth Amendment privileges by requiring police to inform suspects in custody,

1. People v. Krueger, 412 N.E.2d 537, 539 (Ill. 1980) (quoting, in part, the cross-examination of the defendant), *cert. denied*, 451 U.S. 1019 (1981).

2. U.S. CONST. amend. V.

3. 384 U.S. 436 (1966). *Miranda* combined four separate cases for which the Supreme Court had granted certiorari: Westover v. United States, 342 F.2d 684 (9th Cir. 1965); State v. Miranda, 401 P.2d 721 (Ariz. 1965); People v. Stewart, 400 P.2d 97 (Cal. 1965); People v. Vignera, 207 N.E.2d 527 (N.Y. 1965). *Miranda*, 384 U.S. at 436.

4. *Miranda*, 384 U.S. at 467-73.

prior to questioning, of their constitutional rights.[5] Writing for the Court, Chief Justice Warren acknowledged the inherently coercive nature of custodial interrogation[6] and sought to ensure that any statements made by suspects are voluntary.[7] Thus, the *Miranda* Court provided that interrogating officers, prior to questioning, must advise suspects of their right to remain silent, their right to have an attorney present during questioning, and their right to have an attorney appointed if they cannot afford one.[8] According to *Miranda*, if suspects "indicate[] in any manner,"[9] at any stage of the process, that they desire counsel, officers must stop questioning until an attorney is

5. *Id.* at 444.

6. *Id.* at 455-56. Justice Warren noted that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Id.* at 455. The *Miranda* Court further described custodial interrogation in the following manner:

> An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to . . . techniques of persuasion . . . cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.

Id. at 461.

7. *See id.* (explaining the impropriety of admitting into evidence statements that are not voluntary).

8. *Id.* at 444. The suspects' right to remain silent raises separate issues that will not be addressed here. For a discussion of the Fifth Amendment right to remain silent, see WILLIAM E. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 28.5 (1986). Prior to *Miranda*, the Supreme Court determined the admissibility of a suspects' statements based on the Due Process Clause of the Fourteenth Amendment under the "voluntariness" test. B. JAMES GEORGE, JR., CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 259-61 (PLI Criminal Law & Practice Handbook Series No. 1, 1969); *see* Brown v. Mississippi, 297 U.S. 278, 287 (1936) (relying on the Due Process Clause to evaluate the voluntariness of a statement obtained during custodial interrogation). After *Brown*, the Court decided roughly 35 confession cases relying solely on the Due Process Clause. GEORGE, *supra*, at 259-61; *see, e.g.*, Lynumn v. Illinois, 372 U.S. 528, 530 (1963) (finding a confession inadmissible under the Due Process Clause where a suspect confessed only after the police made threats that the State would cut off financial aid and take away her children if she did not cooperate); Spano v. New York, 360 U.S. 315, 322-23 (1959) (holding a confession inadmissible under the Due Process Clause where interrogating officials continuously questioned the accused for over eight hours and repeatedly denied the accused's requests to consult with counsel).

9. *Miranda*, 384 U.S. at 444-45. The "in any manner" language of *Miranda* is the source of the pre-*Davis* conflict regarding unclear references to counsel. *See infra* part II.C. The *Miranda* Court's language suggested that law enforcement officials must cease questioning and extend the right to counsel to suspects upon any reference to counsel, no matter how equivocal or ambiguous. *See Miranda*, 384 U.S. at 444-45. This Note will focus only on ambiguous or equivocal requests for counsel during custodial interrogation.

present.[10]

Fifteen years later, the Court reaffirmed *Miranda* in *Edwards v. Arizona*,[11] holding that once suspects invoke their right to counsel during custodial interrogation, police officials must cease interrogation and may not resume questioning unless or until counsel is provided, or if the suspects initiate further conversations with police.[12]

While *Miranda* and *Edwards* provided rigid rules for police officials to follow once a suspect invokes the right to counsel, the Court did not offer guidance to officers in those situations where a suspect's reference to counsel was unclear, leaving the officer unsure as to whether that suspect was invoking the right to counsel.[13] Lower courts, faced with interpreting whether ambiguous or equivocal references to counsel invoked the procedural safeguards of *Miranda* and *Edwards*, have developed differing interpretations of the proper procedure which law enforcement personnel should follow in these circumstances.[14] The Supreme Court, while acknowledging the conflicting standards among the lower courts,[15] did not specifically address the issue of ambiguous or equivocal requests for counsel until *Davis v. United States*.[16]

This Note traces the law leading to the *Davis* decision beginning with a brief explanation of the Court's decisions in *Miranda* and *Edwards*.[17] It then reviews the three approaches lower courts previously used when interpreting the adequacy of equivocal or ambiguous references to counsel: (1) the Sixth Circuit's "per se bar" approach;[18] (2) the Fifth Circuit's "clarification" approach;[19] and (3)

---

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

11. 451 U.S. 477 (1981).

12. *Id.* at 484-85.

13. Davis v. United States, 114 S. Ct. 2350, 2354 (1994). In *Davis*, the Supreme Court admitted that it had not addressed the issue of ambiguous or equivocal references to counsel during custodial interrogation. *Id.*

14. *See infra* part II.C.

15. *Davis*, 114 S. Ct. at 2354. The *Davis* Court stated: "[W]e have twice previously noted the varying approaches the lower courts have adopted with respect to ambiguous or equivocal references to counsel during custodial interrogation . . . ." *Id.* (citing Connecticut v. Barrett, 479 U.S. 523, 529-30 n.3 (1987) and Smith v. Illinois, 469 U.S. 91, 96 n.3 (1984) (per curiam)).

16. *Id.* at 2350. Prior to *Davis*, the Court had twice explicitly declined to rule on the permissible limits of interrogation following unclear requests for counsel. *See Barrett*, 479 U.S. at 529-30 n.3 (finding it unnecessary to address the question left open in *Smith*); *Smith*, 469 U.S. at 96 (holding that the decision of the Illinois Supreme Court must be reversed regardless of the standard applied).

17. *See infra* part II.A-B.

18. *See infra* part II.C.1.

19. *See infra* part II.C.2.

the Illinois Supreme Court's "threshold standard of clarity" approach, ultimately adopted by the *Davis* Court.[20]

After explaining the three conflicting approaches, this Note discusses and analyzes the Supreme Court decision in *Davis v. United States*, which sets forth the "requisite level of clarity" rule.[21] It then predicts that *Davis* is likely to create one of two results: (1) police officers and lower courts will afford less protection to suspects' Fifth Amendment rights during custodial interrogation;[22] or (2) states will extend greater protection to suspects under state law during the custodial interrogation process.[23] Finally, this Note concludes that the Supreme Court's decision will deny the *Miranda* and *Edwards* safeguards to individuals who are unable to request the assistance of counsel clearly.[24]

II. BACKGROUND

Because of the inherently coercive nature of custodial interrogation,[25] the Supreme Court has created several safeguards to protect the accused and to preserve the integrity of the judicial system.[26] The Court developed prophylactic rules under *Miranda* and *Edwards* to

20. *See infra* parts II.C.3 and III. In his concurring opinion, Justice Souter referred to the Court's approach as the "requisite level of clarity" rule. *Davis*, 114 S. Ct. at 2363 (Souter, J., concurring). Neither the Court nor Justice Souter referred to the Court's approach as the threshold standard approach. *See Davis*, 114 S. Ct. 2350. However, both the threshold standard and the requisite level of clarity rule stand for the same proposition: Interrogating officers may continue questioning the suspect about his or her involvement in the crime unless or until the suspect clearly requests the assistance of counsel. *See id.* at 2356; People v. Krueger, 412 N.E.2d 537, 540 (Ill. 1980), *cert. denied*, 451 U.S. 1019 (1981). Hereinafter, this Note will refer to the *Davis* Court's approach as the requisite level of clarity rule.

21. *See infra* parts III-IV.

22. *See infra* part V.A.

23. *See infra* part V.B.

24. *See infra* part VI.

25. *Miranda*, 384 U.S. at 445. The *Miranda* Court, relying on various police manuals, found that interrogating officers' tactics included the following: trickery or misrepresenting the weight of the evidence against the suspect; promises of leniency; unfair and manipulative questioning; confinement in a small place; isolation from family, friends, or attorney; deprivation of basic amenities such as food and sleep; and unreasonably long interrogations. *Id.* at 448-55; *see also supra* note 6 and accompanying text.

26. *See* Escobedo v. Illinois, 378 U.S. 478, 488-90 (1964) (discussing the necessity of making individuals aware of their right to counsel); *see* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 357-58 (2d ed. 1986) (explaining that: "[T]he Supreme Court has excluded confessions which are considered the product of 'compulsion' by the state, in part because they may not be reliable as evidence, but primarily because society should not sanction coercive techniques, regardless of the importance of the information they may produce.").

ensure that confessions obtained during custodial interrogation do not violate the accused's Fifth Amendment right against self-incrimination.[27]

A. Miranda v. Arizona: *The Initial Layer of Prophylaxis*

In *Miranda v. Arizona*,[28] the Supreme Court sought to provide explicit constitutional guidelines for police and courts to adhere to when evaluating the admissibility of confessions obtained during custodial interrogations.[29] The Supreme Court, basing its decision on the Fifth Amendment privilege against compelled self-incrimination, held that before police officers can interrogate[30] individuals in custody,[31] the officers must clearly advise these individuals: (1) of their right to remain silent; (2) that anything they say can be used against them; (3) of their right to consult with an attorney; and (4) of their right to have an attorney appointed if they cannot afford counsel.[32] The Court

27. Following the *Miranda* decision, the Court characterized the procedural safeguards afforded in *Miranda* as "prophylactic" and not mandated by the Constitution. Michigan v. Tucker, 417 U.S. 433, 444-45 (1974). The Court continues to adhere to this characterization as evidenced by its recent references to *Miranda*. *See, e.g.*, McNeil v. Wisconsin, 501 U.S. 171, 179 (1991) ("In *Miranda v. Arizona*, we established a number of prophylactic rights designed to counteract the inherently compelling pressures of custodial interrogation, including the right to have counsel present."); *see also* Michigan v. Harvey, 494 U.S. 344, 350 (1990) ("Although recognizing that the *Miranda* rules would result in the exclusion of some voluntary and reliable statements, the Court imposed these 'prophylactic standards' on the States . . . to safeguard the Fifth Amendment privilege against self-incrimination.") (citation omitted); Arizona v. Roberson, 486 U.S. 675, 681 (1988) ("[T]he prophylactic protections that the *Miranda* warnings provide to counteract the 'inherently compelling pressures' of custodial interrogation and to 'permit a full opportunity to exercise the privilege against self-incrimination' are implemented by the application of the *Edwards* corollary . . . .") (citation omitted).

28. 384 U.S. 436 (1966).

29. *Id.* at 444-45.

30. *Id.* at 444. *Miranda* defined "interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody." *Id.* The Court later stated: "'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." Rhode Island v. Innis, 446 U.S. 291, 300 (1980).

Chief Justice Warren devoted a significant portion of the *Miranda* opinion to describing the "inherently compelling pressures which . . . compel [the suspect] to speak where [he or she] would not otherwise do so freely." *Miranda*, 384 U.S. at 467; *see supra* notes 6, 25, and accompanying text.

31. By the term "custody," *Miranda* included situations where "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444; *see, e.g.*, State v. Myers, 798 P.2d 453, 456 (Idaho 1990) (interpreting circumstances other than a stationhouse interrogation which triggered *Miranda*).

32. *Miranda*, 384 U.S. at 444. As a necessary protection of the Fifth Amendment,

further held that if suspects indicate "in any manner" either prior to or during the interrogation that they wish to consult with an attorney, questioning must cease until an attorney is provided.[33]

The *Miranda* Court specifically intended to ensure that suspects in police custody make free and informed choices when deciding whether to speak with police officers.[34] The Court reasoned that the most effective way to ensure suspects' Fifth Amendment privileges is to inform suspects in police custody of their rights before questioning begins and to give suspects the right to have counsel present during custodial interrogation.[35] In reaching this conclusion, the *Miranda* Court assumed: (1) that ordinary individuals are unaware of their Fifth Amendment rights; and (2) that even when individuals are aware of their rights, the custodial process can operate to persuade them to offer self-incriminating statements.[36]

Although *Miranda* sought to ensure that individuals in police custody were aware of their rights before questioning began, the *Miranda* Court did not intend its rule to impose unreasonable obstacles on police investigations.[37] Rather, the Court sought to provide a

---

Miranda is applicable not only in federal criminal proceedings, but is also binding on the states by virtue of the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 6 (1964) ("We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States."). *Miranda*, however, represents only the federal constitutional standard of protection. BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE 4 (1991). Thus, while state courts may not reduce the rights afforded to the accused under *Miranda*, states are free to expand the accused's individual rights as a matter of state law. *Id.* Indeed, the *Miranda* Court explicitly encouraged both Congress and the states to develop more efficient measures for protecting a suspect's privilege against self-incrimination during custodial interrogation. *Miranda*, 384 U.S. at 467.

33. *Miranda*, 384 U.S. at 444-45. As the Court stated: "If, however, [the suspect] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Id.* Thus, the right to have an attorney present during custodial interrogation is not automatic, but must be affirmatively invoked by the suspect. *See* Minnesota v. Murphy, 465 U.S. 420, 427-40 (1984) (indicating that the right to counsel during custodial interrogation is not self-executing).

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

35. *Id.* at 467-71. In Fare v. Michael C., 442 U.S. 707 (1979), the Court acknowledged that "the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation." *Id.* at 719. More specifically, the *Miranda* Court noted that the presence of counsel reduces the likelihood of police coercion, ensures that suspects fully understand their rights, and guarantees that statements to police are complete and accurate. *Miranda*, 384 U.S. at 470.

36. *Id.* at 467-68; *see supra* notes 6, 25, and accompanying text.

37. *Miranda*, 384 U.S. at 441-42, 477-78. Recognizing the important role of confessions in effective criminal investigation, the Court attempted to strike a balance between promoting legitimate police investigative activity and protecting a suspect's

legitimate, standard procedure for interrogating officers to follow prior to and during custodial interrogations.[38] By imposing this standard, the Court hoped to prevent coerced, involuntary confessions.[39] The Court warned that if officers continue questioning after suspects invoke the right to counsel, the government must show that the suspects were fully aware of their rights and that they validly waived their rights.[40] Arguably, by stating that questioning must cease when a suspect "indicates in any manner" a desire for the assistance of counsel, the *Miranda* Court did not require the suspect's requests for counsel be explicit before police must cease questioning.[41] In a subsequent decision, however, the Supreme Court backed away from the "in any manner" standard.[42]

---

opportunities to exercise his or her Fifth Amendment rights against self-incrimination. *Id.* at 477-78.

38. *Id.* at 478-79. Commenting later on the practicality of *Miranda*, the Court stated: "*Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible." *Michael C.*, 442 U.S. at 718; *see also* Berkemer v. McCarty, 468 U.S. 420, 430 (1984) ("One of the principal advantages of the [*Miranda*] doctrine that suspects must be given warnings before being interrogated while in custody is the clarity of that rule.").

39. *Miranda*, 384 U.S. at 444. The Court explained that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.*

40. *Id.* at 473-74. The Court stressed that if a statement is secured from the suspect without an attorney present, the government carries the "heavy burden" of showing that the suspect knowingly and voluntarily relinquished his or her right to remain silent and to obtain the assistance of counsel. *Id.* at 475.

41. As one commentator stated:

> [T]he spirit of *Miranda* militates in favor of a broad conception of the invocation threshold. The *Miranda* decision was motivated by a desire for effective protection of vulnerable suspects against the pervasive, yet often undetectable, dangers of custodial interrogation. Consequently, when a suspect gives any indication of a need for counsel, that is, of vulnerability to the inherent pressure, the spirit of *Miranda* seems to call for a protective response. In this, as in other areas of *Miranda* law, the rationales and aims of the *Miranda* scheme would seem to "require[] that ambiguity be interpreted against the interrogator."

James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 1006 n.121 (1986) (alteration in original) (quoting North Carolina v. Butler, 441 U.S. 369, 377 (1979) (Brennan, J., dissenting)).

42. *See infra* part II.B.

B. Edwards v. Arizona: *The Second Layer of Prophylaxis*

In *Edwards v. Arizona*,[43] the Supreme Court reaffirmed its holding in *Miranda* and imposed additional safeguards which the Court believed necessary to protect those suspects who request counsel during custodial interrogation.[44] The Court, once again basing its decision on the Fifth Amendment privilege against self-incrimination, held that once a suspect invokes the right to counsel during custodial interrogation, questioning must cease and may not resume unless or until counsel is provided, or unless the suspect initiates further communications, conversations, or exchanges with police.[45] The Court further held that once a suspect "clearly asserts" the right to counsel, police officials cannot establish waiver merely by showing that the suspect responded to further questioning by the police.[46] The Court created this "second layer of prophylaxis" in order to prevent interrogating officers from badgering and persuading suspects to relinquish their previously asserted right to counsel.[47]

Though *Miranda* recognized the right to the assistance of counsel during custodial interrogation, and *Edwards* held that a suspect who invokes the right to counsel may not be reinterrogated until counsel is provided, neither case provided a clear guide as to the proper standard

---

43. 451 U.S. 477, 477-87 (1981).

44. *Id.* at 484-85. In *Edwards*, the police arrested Edwards, the defendant, and advised him of his *Miranda* rights. *Id.* at 478. Edwards stated that he understood his rights and was willing to talk with the police about the crime. *Id.* After some time, Edwards stated, "I want an attorney before making a deal." *Id.* The police stopped questioning at that point. *Id.* at 479. The next morning, the police again advised Edwards of his rights and proceeded to interrogate him about his involvement in the crime. *Id.* Edwards answered the officers' questions and implicated himself in the crime. *Id.*

45. *Id.* at 484-85.

46. *Id.* The Court instructed that a waiver of the right to counsel must be a voluntary, knowing, and intelligent relinquishment of the privilege. *Id.* at 482. The validity of a waiver depends upon individual factors, including the background, experience, and conduct of the accused. *Id.* In *Edwards*, the Court concluded that the lower courts erroneously focused on the voluntariness of Edwards' confession rather than the knowing and intelligent waiver of his previously invoked right to counsel. *Id.* at 484. Thus, despite the fact that Edwards agreed to talk to the detectives, the Court found that any incriminating statements obtained during the second interrogation were inadmissible because Edwards did not legitimately waive his previously invoked right to counsel. *Id.*

47. *Id.* at 482-87. The *Edwards* Court sought to prevent persistent questioning aimed at wearing down the suspect's will to exercise his or her *Miranda* rights. *Id.*; *see* Michigan v. Harvey, 494 U.S. 344, 350 (1990) (indicating that "*Edwards* . . . established another prophylactic rule designed to prevent police from badgering suspects into waiving their previously invoked *Miranda* rights."); Oregon v. Bradshaw, 462 U.S. 1039, 1043 (1983) (stating that the *Edwards* rule was invoked to prevent suspects in police custody from being badgered by police officers in the same manner as the suspect in *Edwards*).

for determining whether the suspect successfully invoked the right to counsel.[48] The "in any manner" language in *Miranda* suggests a liberal or relaxed standard,[49] while the "clearly asserted" language in *Edwards* intimates a more demanding requirement.[50] Thus, through inconsistent language, the Court has indicated both broad and narrow approaches to equivocal requests for counsel.

C. *Three-Way Split Among the Courts*

Following the *Miranda* "in any manner" standard and the *Edwards* "clarity" requirement, lower courts were unsure about the proper procedure for the police to follow after an ambiguous or equivocal[51] request for counsel. As a result, three conflicting approaches emerged among courts deciding the appropriate standard for police officers to follow when suspects make ambiguous references to counsel during custodial interrogation.[52]

1. The Per Se Bar Approach

Relying on the *Miranda* "in any manner" language, a number of courts adopted a per se bar approach.[53] This approach commanded that interrogating officers cease all questioning upon a suspect's mere

48. *See supra* notes 13-14 and accompanying text.

49. *Miranda*, 384 U.S. at 444-45. The Court expressly stated: "If . . . [the suspect] indicates *in any manner* and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Id.* (emphasis added).

50. *Edwards*, 451 U.S. at 485. The *Edwards* Court stated: "[I]t is inconsistent with *Miranda* and its progeny for the authorities . . . to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Id.*

51. Prior to *Edwards*, the Court did not address the issue of what may be regarded as a clear or valid invocation of the right to have counsel present during custodial interrogation. *See* Smith v. Illinois, 469 U.S. 91, 99-100 (1984) (per curiam). As a result, lower courts struggled in evaluating requests for counsel. *See* Rhonda Y. Cline, Comment, *Equivocal Requests for Counsel: A Balance of Competing Policy Considerations*, 55 U. CIN. L. REV. 767, 769-70 (1987).

Generally, equivocal statements include indecisive statements or statements that express conflicting desires. *See id.* at 770-71. In Nash v. Estelle, for example, the suspect stated: "I would like to have a lawyer, but I'd rather talk to you." 597 F.2d 513, 516 (5th Cir.), *cert. denied*, 444 U.S. 981 (1979).

Ambiguous statements include vague or unintelligible statements. *See* Cline, *supra*, at 773. For instance: "Well, yes because my brother did say he was thinking of hiring one himself. I don't know . . . I don't know what it is, really and truly . . . ." was considered an ambiguous reference to counsel in Housewright v. McCree, 689 F.2d 797, 800 (8th Cir. 1982), *cert. denied*, 460 U.S. 1088 (1983).

52. *See infra* part II.C.1-3.

53. *See* Maglio v. Jago, 580 F.2d 202 (6th Cir. 1978); People v. Superior Ct., 542 P.2d 1390 (Cal. 1975), *cert. denied*, 429 U.S. 816 (1976); State v. Nash, 407 A.2d 365 (N.H. 1979); State v. Furlough, 797 S.W.2d 631 (Tenn. Crim. App. 1990); Ochoa v. State, 573 S.W.2d 796 (Tex. Crim. App. 1978) (en banc).

mention of counsel.[54] Courts advocating this approach treated any reference to counsel as a valid invocation of the right to counsel, thereby prohibiting further questioning until an attorney was present.[55]

The Sixth Circuit first advocated a per se bar approach in *Maglio v. Jago*.[56] In *Maglio*, police arrested Daniel Maglio as a suspect in a murder investigation.[57] A police officer read Maglio his *Miranda* rights and then asked Maglio to waive his rights and make a statement.[58] Maglio responded, "Maybe I should have an attorney."[59] The officer told Maglio that he could not consult with an attorney until the following day, and continued questioning him about the crime.[60] Maglio answered further questions and eventually confessed to the murder.[61]

---

54. *Maglio*, 580 F.2d at 205 (finding that the *Miranda* "in any manner" language intimates the existence of a per se rule prohibiting custodial interrogation following a suspect's request for counsel).

55. *See, e.g.*, *Superior Ct.*, 542 P.2d at 1394-95. The court, relying on the "in any manner" language of *Miranda*, stated:

> We have observed, for example, that a suspect need not make an express statement that he wishes to invoke his Fifth Amendment privilege; "no particular form of words or conduct is necessary." Furthermore, "to demand that it [the privilege] be invoked with unmistakable clarity (resolving any ambiguity against the defendant) would subvert *Miranda's* prophylactic intent."

Id. (alteration in original) (citations omitted) (quoting People v. Randall, 464 P.2d 114, 118 (Cal. 1970)).

56. 580 F.2d 202 (6th Cir. 1978).

57. *Id.* at 202-03.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* The interrogating officer reported the undisputed exchange as follows:

> And I told him that, well, I can't get you an attorney right now. We will have to stop questioning you. I said I would like to know how you got the car, but we can't question you anymore because you are entitled to have an attorney here, and you won't get one until you go to court. At this point he said that he had nothing to hide, and I kind of reiterated his rights to him a little bit, telling him he didn't have to talk and was entitled to an attorney; and I didn't want to violate his rights, but he could waive his rights and talk to us without an attorney. So he said that he would talk to us without an attorney.

Id. at 203 n.1.

The state prosecutor arrived to take a tape-recorded statement 45 minutes after Maglio confessed to committing the murder. *Id.* at 203. Prior to the second round of questioning, the prosecutor informed Maglio again of his *Miranda* rights. *Id.* Maglio expressed that he did not fully understand his rights at the time of his confession. *Id.* The prosecutor once again explained his rights and Maglio stated, "I understand it now." *Id.* Maglio then proceeded to repeat his confession. *Id.*

The trial judge ruled that Maglio waived his right to counsel and allowed his confession to be admitted into evidence.[62] On appeal, the Ohio Court of Appeals held that the interrogating officers violated Maglio's *Miranda* rights, but that the violation was harmless error.[63] The appellate court reasoned that Maglio's first statement did not taint the second because Maglio expressed that he understood his rights prior to the second confession.[64] Therefore, Maglio's waiver was voluntary and intelligent.[65] The federal district court denied Maglio's petition for habeas corpus relief, finding the first confession admissible because Maglio was adequately warned.[66]

On review, the Sixth Circuit reversed and ordered the case remanded to the federal district court for a new trial.[67] The court, relying on *Miranda*, declared that an interrogation must cease once suspects indicate in any manner that they desire counsel,[68] reasoning that interrogating officers should not force suspects to continuously request the assistance of counsel.[69] The Sixth Circuit concluded that when Maglio stated, "Maybe I should have an attorney," he invoked his right to counsel and the interrogating officer should have ceased questioning.[70] Accordingly, the Sixth Circuit held that under the broad language of *Miranda*,[71] Maglio's reference to counsel was sufficient to invoke his right to an attorney.[72]

---

62. *Id.* at 204 (summarizing the trial court's factual findings). The trial court observed that officers properly informed Maglio of his rights to remain silent and to counsel. *Id.* The court concluded that Maglio "intelligently and knowledgeably" waived his rights and voluntarily confessed to the crime. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* The Supreme Court of Ohio refused to grant leave to appeal. *Id.* (summarizing the supreme court's factual findings). Maglio sought a writ of habeas corpus in the United States District Court for the Northern District of Ohio. *Id.*

67. *Id.* at 207-08. The Sixth Circuit found that Maglio's Fifth Amendment rights had been violated. *Id.*

68. *Id.* at 205 (relying on *Miranda*, 384 U.S. at 473-74).

69. *Id.* at 206-07. Courts advocating a per se bar approach recognize that the denial of a suspect's request increases the pressure and undermines the protective rules of *Miranda*. *Id.* If interrogating officers continually question and clarify the suspect's request for counsel, the suspect may reasonably conclude that his request is being ignored and that it is pointless to make any further attempts. *Id.* at 207; *see, e.g.*, *supra* note 1 and accompanying text; *see infra* notes 200-02 and accompanying text.

70. *Maglio*, 580 F.2d at 205.

71. *See supra* note 49.

72. *Maglio*, 580 F.2d at 205.

2. The Clarification Approach

Prior to *Davis*, a clear majority of the state courts and lower federal courts followed the Fifth Circuit's clarification approach.[73] Under the clarification approach, if a suspect made an ambiguous or equivocal statement that could be reasonably understood as a possible expression of a desire for counsel, interrogating officers had to immediately stop substantive questioning and could only ask questions designed to clarify whether the suspect wished to consult with counsel.[74]

The Fifth Circuit first introduced the clarification approach in *Nash v. Estelle*.[75] In *Nash*, police arrested Ira Nash, Jr., as a suspect for murder.[76] Approximately one week later, the police brought Nash to the office of the District Attorney for questioning.[77] After the Assistant District Attorney advised Nash of his *Miranda* rights, Nash made an equivocal reference to counsel.[78] The Assistant District Attorney, acknowledging Nash's statement, informed Nash that their conversation must cease.[79] Nash reconsidered, agreed to finish the

73. *See e.g.*, United States v. March, 999 F.2d 456 (10th Cir.), *cert. denied*, 114 S. Ct. 483 (1993); United States v. Mendoza-Cecelia, 963 F.2d 1467 (11th Cir.), *cert. denied*, 113 S. Ct. 436 (1992); United States v. D'Antoni, 856 F.2d 975 (7th Cir. 1988); United States v. Gotay, 844 F.2d 971 (2d Cir. 1988); United States v. Fouche, 833 F.2d 1284 (9th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988); United States v. Porter, 776 F.2d 370 (1st Cir. 1985) (en banc); Nash v. Estelle, 597 F.2d 513 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 981 (1979); United States v. Riggs, 537 F.2d 1219 (4th Cir. 1976); Hampel v. State, 706 P.2d 1173 (Alaska Ct. App. 1985); State v. Staatz, 768 P.2d 143 (Ariz. 1988); People v. Benjamin, 732 P.2d 1167 (Colo. 1987); State v. Anderson, 553 A.2d 589 (Conn. 1989); Crawford v. State, 580 A.2d 571 (Del. 1990); Ruffin v. United States, 524 A.2d 685 (D.C. 1987), *cert. denied*, 486 U.S. 1057 (1988); Martinez v. State, 564 So. 2d 1071 (Fla. 1990); Hall v. State, 336 S.E.2d 812 (Ga. 1985); Carter v. State, 702 P.2d 826 (Idaho 1985); Sleek v. State, 499 N.E.2d 751 (Ind. 1986); People v. Giuchici, 324 N.W.2d 593 (Mich. Ct. App. 1982) (per curiam); State v. Pilcher, 472 N.W.2d 327 (Minn. 1991); Kuykendall v. State, 585 So. 2d 773 (Miss. 1991); Sechrest v. State, 705 P.2d 626 (Nev. 1985); State v. Gerald, 549 A.2d 792 (N.J. 1988); Russell v. State, 727 S.W.2d 573 (Tex. Crim. App.), *cert. denied*, 484 U.S. 856 (1987); State v. Sampson, 808 P.2d 1100 (Utah Ct. App. 1991), *cert. denied*, 112 S. Ct. 1282 (1992); State v. Robtoy, 653 P.2d 284 (Wash. 1982); State v. Clawson, 270 S.E.2d 659 (W. Va. 1980); Cheatham v. State, 719 P.2d 612 (Wyo. 1986).

74. *See* Thompson v. Wainwright, 601 F.2d 768, 771 (5th Cir. 1979) (en banc). While interrogating officers are not absolutely compelled to ask clarifying questions when a suspect makes an ambiguous reference to counsel, they must ask narrow clarifying questions, and properly determine that the suspect did not wish to have counsel present, before continuing to question the suspect about the crime. *Id.*

75. 597 F.2d 513 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 981 (1979).

76. *Id.* at 514.

77. *Id.* at 514-15.

78. *Id.* at 516. Nash's exact words were: "Well, I don't have the money to hire one, but I would like, you know, to have one appointed." *Id.*

79. *Id.*

interrogation without counsel,[80] and subsequently confessed.[81]

A Texas trial court judge ruled Nash's confession admissible,[82] and the Texas appellate court affirmed.[83] The federal district court granted Nash's petition for a writ of habeas corpus on the grounds that the official obtained Nash's confession in violation of his right to have counsel present during questioning.[84]

On review, the Fifth Circuit reversed the grant of habeas corpus relief, stating that Nash's indecisive statement was not enough to invoke his right to counsel.[85] In reaching this conclusion, the court found that the Assistant District Attorney who questioned Nash properly clarified Nash's statement,[86] and correctly determined that Nash wished to continue without an attorney present.[87] The Fifth Circuit reasoned that the mere mention of an attorney is insufficient to invoke the right to counsel.[88] Instead, when a suspect expresses both the

---

80. *Id.* at 516-17. The exchange went as follows:

FILES: Okay. I had hoped that we might talk about this, but if you want a lawyer appointed, then we are going to have to stop right now.

NASH: But, uh, I kinda, you know, wanted, you know, to talk about it, you know, to kinda, you know, try to get it straightened out.

FILES: Well, I can talk about it with you and I would like to, but if you want a lawyer, well, I am going to have to hold off, I can't talk to you. It's your life.

NASH: I would like to have a lawyer, but I'd rather talk to you.

FILES: Well, what that says there is, it doesn't say that you don't ever want to have a lawyer, it says that you don't want to have a lawyer here, now. You got the right now, and I want you to know that. But if you want to have a lawyer here, well, I am not going to talk to you about it.

NASH: No, I would rather talk to you.

FILES: You would rather talk to me? You do not want to have a lawyer here right now?

NASH: No, sir.

FILES: You are absolutely certain of that?

NASH: Yes, sir.

Id.

81. *Id.* at 515.

82. Nash v. State, 477 S.W.2d 557, 560 (Tex. Crim. App. 1972) (summarizing the trial court's holding).

83. *Id.* at 564.

84. *Nash*, 597 F.2d at 517 (summarizing the district court's factual findings).

85. *Id.* at 518.

86. *Id.* at 517. The court stated: "When, as in the case at bar, a desire for immediate talk clearly appears from the suspect's words and conduct, but he also states he wants a lawyer, . . . it is sound and fully constitutional police practice to clarify the course the suspect elects to choose." *Id.*

87. *Id.* at 520.

88. *Id.* at 519.

desire for an attorney and the desire to continue speaking with officials, it is appropriate for the interrogating officer to clarify the suspect's true desire.[89]

The Fifth Circuit further defined the scope of the *Nash* clarification approach in *Thompson v. Wainwright*.[90] In *Thompson*, officers arrested Larry Thompson on suspicion of murder.[91] After the officers advised Thompson of his *Miranda* rights, Thompson stated that he wished to consult with an attorney before talking to police.[92] The interrogating officer ignored Thompson's request and eventually persuaded him to make a statement.[93] Thompson later confessed to the crime.[94]

The Florida trial court held that Thompson knowingly and voluntarily waived his right to counsel.[95] After the Supreme Court of Florida affirmed his conviction,[96] Thompson unsuccessfully sought habeas corpus relief in the federal district court.[97]

On review, the Fifth Circuit once again instructed that an interrogating officer should seek clarification when suspects make ambiguous references to counsel.[98] The *Thompson* court, however, required interrogating officers to limit their inquiry strictly to clarifying

---

89. *Id.* at 517. The Fifth Circuit acknowledged that some suspects wish to unburden themselves and confess to their involvement in the crime. *Id.* Taking this into consideration, the court highlighted the benefits of the clarification approach. *Id.* at 517-18. The court noted that while the clarification approach protects suspects who do not wish to deal with the police on their own, this approach also adequately accommodates those suspects who desire to speak with police immediately, without the assistance of counsel. *Id.* at 519. The court observed:

> If the word "lawyer" were to be endowed with talismanic qualities, [the interrogating officer] would have had to order Nash removed from his office without another word when "lawyer" fell from Nash's lips. However, it is clear from the context of this colloquy that such unrealistic conduct would have denied to Nash his true desire to explain himself and to continue with the interview.

Id. at 519-20.

90. 601 F.2d 768 (5th Cir. 1979).

91. *Id.* at 769.

92. *Id.* Thompson first agreed to speak with police and signed a waiver of rights card. *Id.* He then changed his mind and requested the assistance of counsel. *Id.*

93. *Id.* at 770. The officer stated: "[W]e advised him if he told an attorney first he would not be able to talk to us and tell us his side of the story." *Id.*

94. *Id.* at 769-70.

95. *Id.* at 770 (summarizing the trial court's factual findings). The court observed that Thompson signed the waiver card and testified at the suppression hearing that he was aware of and understood his rights at the time of the interrogation. *Id.*

96. Thompson v. State, 328 So. 2d 1, 5 (Fla. 1976).

97. *Thompson*, 601 F.2d at 770 (summarizing the district court's holding).

98. *Id.* at 771.

the ambiguous statement,[99] maintaining that officers must not persuade or advise suspects to waive their rights.[100] Furthermore, the *Thompson* court ruled that a suspect's incriminating statements obtained in response to further questioning about the crime are inadmissible as the product of coercion.[101] Consequently, the *Thompson* court refused to admit Thompson's confession into evidence because the interrogating officer's post-request statements clearly went beyond the scope of clarifying whether Thompson wished to consult counsel.[102]

3. The Threshold Standard of Clarity Approach

Other courts, led by the Illinois Supreme Court in *People v. Krueger*,[103] adopted the threshold standard of clarity approach.[104] This approach required interrogating officers to cease questioning only if and when a suspect made a request for counsel that met a certain threshold standard of clarity.[105] These courts held that interrogating officers could continue questioning if a suspect's request for counsel

---

99. *Id.* at 771-72. The *Thompson* court explained that "*[f]urther questioning* [after a suspect makes an ambiguous request for counsel] *must be limited to clarifying that request* until it *is* clarified." *Id.* at 771 (emphasis in original).

100. *Id.* at 772. The *Thompson* court instructed:

> [T]he limited inquiry permissible after an equivocal request for legal counsel may not take the form of an argument between interrogators and suspect about whether having counsel would be in the suspect's best interests or not. Nor may it incorporate a presumption by the interrogator to tell the suspect what counsel's advice to him would be if he were present.

Id.

101. *Id.* If the interrogating officer poses questions after the suspect requests counsel and the suspect freely and voluntarily responds to those questions, under *Thompson*, the court must still exclude the suspect's responses. *Id.* at 771-72. The *Thompson* court ruled that officers cannot continue questioning the suspect about his or her involvement in the crime after the suspect makes an unambiguous request for counsel. *Id.* at 771.

102. *Id.* at 772. The court maintained that the interrogating officer's advice was especially persuasive and improper since it was materially incorrect. *Id.* While the court recognized that an attorney may have advised Thompson not to speak with police, consulting an attorney would not have absolutely prevented Thompson from telling "his side of the story." *Id.*

103. 412 N.E.2d 537 (Ill. 1980), *cert. denied*, 451 U.S. 1019 (1981).

104. *See* People v. Bestelmeyer, 212 Cal. Rptr. 605, 609 (Cal. Ct. App. 1985) (adopting a "totality of the circumstances" test); Bane v. State, 587 N.E.2d 97, 103 (Ind. 1992) (stating that the defendant made "no clear and unequivocal request for an attorney"); People v. Lattanzio, 549 N.Y.S.2d 179, 181 (N.Y. App. Div. 1989) (finding that defendant's alleged invocation of rights did not amount to an unequivocal assertion of the intention to retain counsel); Bunch v. Commonwealth, 304 S.E.2d 271, 276-77 (Va.) (stating that the validity of waiver depends upon facts of the case), *cert. denied*, 464 U.S. 977 (1983); Daniel v. State, 644 P.2d 172, 177-78 (Wyo. 1982) (stating that validity of defendant's waiver of rights depends upon the facts of the case).

105. Smith v. Illinois, 469 U.S. 91, 96 n.3 (1984).

did not satisfy this threshold.[106]

In *Krueger*,[107] officers arrested and charged Michael Krueger with stabbing a man to death.[108] Prior to questioning, officers advised Krueger of his *Miranda* rights,[109] but Krueger waived his rights at that time.[110] Later, when officers began questioning him about the stabbing, Krueger made an equivocal reference to counsel.[111] After further questioning and verbal persuasion by the officers, Krueger signed a statement admitting to stabbing the victim to death.[112]

The Illinois trial court admitted both the oral and written confessions after concluding that Krueger understood his rights and voluntarily waived them before the interrogation began.[113] The Illinois Appellate Court affirmed, stating that Krueger's reference to counsel was not clear enough to invoke his rights under *Miranda*.[114]

The Supreme Court of Illinois agreed with the trial court's findings of fact and ruled that Krueger did not request the assistance of counsel.[115] The court held that although *Miranda* does not demand an

106. *Krueger*, 412 N.E.2d at 540. For example, in each of the following cases, the court found the suspects' statements regarding counsel to be ambiguous or equivocal: *Bestelmeyer*, 212 Cal. Rptr. at 607 ("I just thinkin', maybe I shouldn't say anything without a lawyer and then I thinkin' ahh."); People v. Kendricks, 459 N.E.2d 1137, 1140 (Ill. App. Ct. 1984) ("I think I might need a lawyer."); State v. Moore, 744 S.W.2d 479, 480 (Mo. Ct. App. 1988) ("[M]aybe [I] should have an attorney."). In each of these cases, therefore, the suspect failed to satisfy the courts' threshold standard of clarity.

107. 412 N.E.2d at 537.

108. *Id.* at 538.

109. *Id.*

110. *Id.* Krueger "stated that he understood his rights" and "signed a written waiver-of-rights form." *Id.*

111. *Id.* At trial, all three interrogating officers stated that Krueger did not request counsel. *Id.* On cross-examination, however, each admitted that Krueger had made some sort of comment about obtaining an attorney. *Id.* The officers variously described Krueger's statement as follows: "Wait a minute. Maybe I ought to have an attorney. You guys are trying to pin a murder rap on me, give me 20 to 40 years." *Id.* "Hey, you're trying to pin a murder on me. Maybe I need a lawyer." *Id.* "Just a minute. That's a 20 to 40 years sentence. Maybe I ought to talk to an attorney." *Id.*

112. *Id.* at 539. Krueger admitted to the stabbing, but he maintained that it was in self-defense. *Id.*

113. *Krueger*, 393 N.E.2d at 1285 (summarizing the trial court's factual findings).

114. *Id.* at 1286. On appeal, Krueger argued that his *Miranda* rights had been violated because the interrogating officers continued questioning him after he requested counsel. *Id.*

115. *Krueger*, 412 N.E.2d at 540. The Illinois Supreme Court stated: "We hold that the officers did not violate defendant's *Miranda* rights, for, in this instance, a more positive indication or manifestation of a desire for an attorney was required than was made here." *Id.*

explicit request for counsel,[116] the mere mention of an attorney is insufficient to invoke the right to assistance of counsel during a custodial interrogation.[117]

The *Krueger* court relied on the following factors in reaching its decision: that the suspect was of normal intelligence, that "he fully understood his Miranda rights, and that he effectively waived his rights before questioning began."[118] The court further observed that the interrogating officers acted in good faith,[119] and that there was no evidence that the suspect was under undue coercion or duress.[120] Thus, the Supreme Court of Illinois concluded that suspects must make an objectively positive indication of their desire for an attorney in order to invoke their right to counsel during custodial interrogation.[121]

III. DISCUSSION

In *Davis v. United States*,[122] the United States Supreme Court addressed the problem that arises when a suspect makes an ambiguous reference to counsel during custodial interrogation.[123] The major issue before the Court was with what degree of clarity must suspects in custody assert their right to an attorney in order to stop police questioning and obtain counsel.[124] The issue which divided the Court, however, was whether interrogating officers are legally obligated to cease questioning and pose clarifying questions in response to an

116. *See supra* notes 33, 49, and accompanying text.

117. *Krueger*, 412 N.E.2d at 540. The Illinois Supreme Court stated:

> *Miranda's* "in any manner" language directs that an assertion of the right to counsel need not be explicit, unequivocal, or made with unmistakable clarity. We do not believe, however, that the Supreme Court intended by this language that every reference to an attorney, no matter how vague, indecisive or ambiguous, should constitute an invocation of the right to counsel.

Id.

118. *Id.*

119. *Id.* The court found that, according to the evidence, none of the interrogating officers judged the suspect's comments to be a request for counsel. *Id.* The court stated that although the officers' subjective beliefs with regard to whether the suspect asserted his desire for an attorney are not dispositive of whether the suspect did, in fact, invoke his right to counsel, "the officers must be allowed to exercise their judgment in determining whether a suspect has requested counsel." *Id.* The court concluded that the officers' apparently genuine beliefs that the suspect did not desire the assistance of an attorney distinguished this case from others relied upon by the suspect in which interrogating officers consciously violated the suspect's *Miranda* rights. *Id.*

120. *Id.*

121. *Id.*; *see supra* note 115.

122. 114 S. Ct. 2350 (1994).

123. *Id.* at 2352.

124. *Id.* at 2356.

ambiguous reference to counsel.[125]

A. Facts and Opinions Below

On November 4, 1988, Naval Investigative Service ("NIS") officials questioned Robert L. Davis, a navy seaman, in connection with the murder of a fellow member of the United States Navy.[126] Prior to questioning, agents informed Davis of his Article 31(b) rights.[127] Davis, handcuffed to a chair in the NIS office,[128] initially waived his rights, "both orally and in writing," and agreed to answer questions.[129]

More than an hour into the interrogation Davis stated, "Maybe I should talk to a lawyer."[130] At that point in the interview, according to

---

125. *Id.* at 2359 (Souter, J., concurring).

126. *Id.* at 2353.

127. *Id.* (citing 10 U.S.C. § 831 (1988)). Article 31 of the Uniform Code of Military Justice provides in relevant part:

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

Id. The *Davis* Court recognized:

> We have never had occasion to consider whether the Fifth Amendment privilege against self incrimination, or the attendant right to counsel during custodial interrogation, applies of its own force to the military, and we need not do so here. The President, exercising his authority to prescribe procedures for military criminal proceedings, has decreed that statements obtained in violation of the Self-Incrimination Clause are generally not admissible at trials by court-martial. Because the Court of Military Appeals has held that our cases construing the Fifth Amendment right to counsel apply to military interrogations and control the admissibility of evidence at trials by court-martial, and the parties do not contest this point, we proceed on the assumption that our precedents apply to courts-martial just as they apply to state and federal criminal prosecutions.

Id. at 2354 n.* (citations omitted).

128. United States v. Davis, 36 M.J. 337, 340 (C.M.A. 1993), *aff'd*, 114 S. Ct. 2350 (1994). Davis reported that agents left him handcuffed to a chair while they took a break. *Id.*

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

130. *Id.* There were conflicting stories on exactly what Davis said to the NIS agents. *Davis*, 36 M.J. at 340. Davis maintained that he stated, "Well, I'd like a lawyer." *Id.* The military judge did not believe that Davis made an unequivocal request for counsel. *Id.* at 341 (summarizing the military court's factual findings). The United States Court of Military Appeals concluded that the military judge's findings of fact were supported and

one of the interviewing agents, the NIS officials asked Davis to clarify whether or not he wanted an attorney.[131] According to the same agent, Davis responded, "No, I'm not asking for a lawyer. No, I don't want a lawyer."[132] The agents then took a short break, and before resuming questioning, they reminded Davis of his rights to remain silent and to counsel.[133] The interrogation continued for another hour, at which time Davis stated, "I think I want a lawyer before I say anything else."[134] At that point, the agents stopped the interrogation.[135]

At trial, Davis moved to suppress the statements made during the November 4 interrogation, claiming that the agents should have ceased questioning after Davis requested a lawyer.[136] The military trial court found that Davis' statement was equivocal and not in the form of a request,[137] and denied Davis' motion to suppress the statements.[138] The court then convicted Davis of unpremeditated murder.[139]

The United States Court of Military Appeals affirmed the general courts-martial but on different grounds.[140] The appellate court held that when interrogating officers can reasonably interpret a suspect's statement as a possible request for counsel, the officers must clarify the suspect's wishes before the interrogation may continue.[141] The court found that: (1) Davis' statement was ambiguous;[142] (2) the agents properly stopped the interrogation and limited their inquiry to

---

thus should not be disturbed. *Id.*

131. *Davis*, 114 S. Ct. at 2353. The NIS officer specifically stated:

> "[We m]ade 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 . . . ."

Id. (alteration in original).

132. *Id.*

133. *Id.* The agents did not repeat Davis' rights in full nor did they execute a second written waiver. *Davis*, 36 M.J. at 340.

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

135. *Id.*

136. *Davis*, 36 M.J. at 341 (summarizing the military trial court's factual findings).

137. *Id.* (summarizing the military trial court's holding). The Court of Military Appeals noted that the military judge found "'the mention of a lawyer by the accused during the course of the interrogation to have been not in the form of a request for counsel and that the agents properly determined that the accused was not indicating a desire for or invoking his right to counsel.'" *Id.* (quoting the military judge).

138. *Id.* (summarizing the military trial court's holding).

139. *Id.* at 338 (summarizing the military trial court's holding).

140. *Id.* at 341.

141. *Id.* The court recognized the three-way split among the various jurisdictions and adopted the approach taken by "several federal circuits." *Id.*; *see supra* part II.C.2.

142. *See supra* note 130 and accompanying text.

clarifying Davis' statement; and (3) the agents correctly concluded that Davis did not desire the assistance of counsel.[143]

B. The Supreme Court's Opinion

The Supreme Court granted certiorari in *Davis*[144] to determine the appropriate standard regarding ambiguous or equivocal references to counsel during custodial interrogation.[145] Davis urged the Court to adopt the per se bar approach, which would require interrogating officers to cease questioning and to provide an attorney upon any reference to counsel.[146] The United States, however, advocated the clarification approach, arguing that when a suspect makes an ambiguous or equivocal request for counsel, interrogating officers should be allowed to ask limited questions to clarify the suspect's statement regarding counsel.[147]

---

143. *Davis*, 36 M.J. at 342.

144. 114 S. Ct. 379 (1993).

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

146. *Id.* at 2363; Brief for Petitioner at 11-13, *Davis*, 114 S. Ct. 2350 (1994) (No. 92-1949).

147. *See* Brief for Respondent at 20, *Davis*, 114 S. Ct. 2350 (1994) (No. 92-1949). Neither party proposed the threshold standard of clarity approach which was ultimately adopted by the *Davis* Court. Since the interrogating officers used clarifying questions, the United States only needed to advance the clarification approach. On the other hand, Davis had to argue for the per se bar approach. *See Davis*, 114 S. Ct. at 2526; *see also* Brief for Petitioner at 11-13, *Davis*, 114 S. Ct. 2350 (1994) (No. 92-1949). Concerned organizations submitted amicus curiae briefs to the Court, none of which advocated the threshold standard of clarity approach. The National Association of Criminal Defense lawyers filed its brief in support of Davis and the per se bar approach. Brief of Amicus Curiae National Association of Criminal Defense Lawyers in Support of Petitioner at 6, *Davis*, 114 S. Ct. 2350 (1994) (No. 92-1949). This brief explicitly stated:

> [T]he vice of [the threshold standard of clarity] doctrine goes beyond its arbitrary refusal to give constitutional protection to some individuals while giving other[s] . . . the full benefit of the *Edwards* rule, because the burdens of a rule favoring direct and assertive language tend to fall disproportionately on certain identifiable groups within our population.

Id. at 7. Americans for Effective Law Enforcement, Inc., joined by the International Association of Chiefs of Police, Inc., The National District Attorneys Association, Inc., and The National Sheriffs' Association submitted an amicus brief also advocating the clarification approach. Brief of Amicus Curiae Americans for Effective Law Enforcement et al. at 5, *Davis*, 114 S. Ct. 2350 (1994) (No. 92-1949) (describing the clarification approach as a "common sense resolution . . . [which] fully accommodates the rights of the suspect, while at the same time preserves the interests of law enforcement and of the public welfare").

The Supreme Court's opinion[148] in *Davis* initially acknowledged the procedural safeguards created in *Miranda* to protect suspects against compulsory self-incrimination.[149] The Court emphasized that these safeguards were not themselves constitutional rights, but instead were created and imposed by the *Miranda* Court to combat the inherently coercive nature of custodial interrogation.[150] The *Davis* Court next reaffirmed the *Edwards* holding that if at any point during the custodial interrogation a suspect requests the assistance of counsel, questioning must cease and may not resume unless or until a lawyer is present or the suspect reinitiates conversations with the police.[151] The Court refused, however, to extend the *Edwards* protections to those situations where a suspect might desire counsel—that is, where the suspect has not "actually invoked" the right to counsel.[152] Although the Court did not explicitly require an ambiguous or equivocal reference to counsel to be clarified, the Court acknowledged that good police practice would often call for the use of clarifying questions to help protect the rights of the suspect.[153]

---

148. While the Court's judgment was unanimous, Justice O'Connor wrote for the narrow five-four majority with Chief Justice Rehnquist, Justices Scalia, Kennedy, and Thomas joining. *Davis*, 114 S. Ct. at 2352. Justice Scalia also wrote a concurring opinion. *Id.* at 2357 (Scalia, J., concurring). Justice Souter, joined by Justices Blackmun, Stevens, and Ginsburg, wrote a separate opinion concurring in the judgment only. *Id.* at 2358 (Souter, J., concurring).

149. *Id.* at 2354. The Court stated: "The right to counsel established in *Miranda* was one of a 'series of recommended "procedural safeguards" . . . [that] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.'" *Id.* (alteration in original) (quoting Michigan v. Tucker, 417 U.S. 433, 443-44 (1974)); *see supra* note 27 and accompanying text.

150. *Davis*, 114 S. Ct. at 2354.

151. *Id.* at 2354-55.

152. *Id.* at 2355. The Court explained that "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." *Id.* The Court required that in order for the suspect to "actually" or properly invoke his right to counsel "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." *Id.*

153. *Id.* at 2356. While rejecting a rule making clarification mandatory before questioning may continue, the Court recognized the advantages of the use of clarifying questions. *Id.* The Court explained:

> Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. . . . Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement

In short, if a suspect invokes the right to counsel, police questioning must cease; if the suspect does not properly request the assistance of counsel, the interrogation may continue.[154] Thus, the *Davis* Court, by demanding that a suspect's request satisfy a certain threshold standard of clarity, implicitly rejected the "in any manner" language of *Miranda* and instead focused on the "clearly asserted" language in *Edwards*.[155]

Addressing the *Miranda* Court's concern for individual rights, the *Davis* Court admitted that requiring a clear assertion of the right to counsel "might disadvantage some suspects . . . ."[156] The Court reasoned, however, that suspects who fully understand their *Miranda* rights are adequately protected from the inherent compulsion of custodial interrogation.[157] The Court concluded that in order to invoke the *Edwards* protections and ultimately cease questioning, a suspect must articulate a sufficiently clear request so that a reasonable police officer would understand the statement as a request for counsel.[158]

The *Davis* Court also noted the importance of providing an objective standard for interrogating officers to follow when faced with a suspect's unclear reference to counsel.[159] The Court adopted the requisite level of clarity rule,[160] reasoning that it provided a workable standard that police officers could easily apply.[161] The Court noted that

---

regarding counsel.

Id.

154. *Id.* at 2356-57; *see supra* note 152 and accompanying text (setting forth the Court's test for a "proper" invocation of the right to counsel).

155. *Compare Davis*, 114 S. Ct. at 2355 (explaining that the suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney") *with* Miranda v. Arizona, 384 U.S. 436, 444-45 (1966) (explaining that if the suspect "indicates *in any manner* and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning") (emphasis added) *and with* Edwards v. Arizona, 451 U.S. 477, 485 (1981) (explaining that "it is inconsistent with *Miranda* and its progeny for the authorities . . . to reinterrogate an accused in custody if he has *clearly asserted* his right to counsel") (emphasis added).

156. *Davis*, 114 S. Ct. at 2356. The Court explained: "We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present." *Id.*

157. *Id.* The Court stated: "'[F]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process.'" *Id.* (quoting Moran v. Burbine, 475 U.S. 412, 427 (1986)).

158. *Id.* at 2355.

159. *Id.* at 2356. The Court stated: "Although the courts ensure compliance with the *Miranda* requirements through the exclusionary rule, it is police officers who must actually decide whether or not they can question a suspect." *Id.*

160. *See supra* note 20.

161. *Davis*, 114 S. Ct. at 2356. The Court explained: "The *Edwards* rule—

suspects need not articulate their requests with precision.[162] Instead, the test is whether a reasonable officer would construe a suspect's statement as a valid request for counsel.[163] If the suspect's reference to counsel falls short of such clarity, the interrogating officer is not obligated to stop questioning or inquire about the suspect's wishes.[164] Still, the Court advised that it may be useful for interrogating officers to ask clarifying questions when a suspect makes an ambiguous or equivocal reference to counsel.[165]

The Court next maintained that its requisite level of clarity rule best serves the purposes of *Miranda* by balancing law enforcement interests with the concern for protecting a suspect's Fifth Amendment privilege against compelled self-incrimination.[166] The Court rejected the per se bar approach, which required that interrogating officers immediately cease questioning upon the mere mention of an attorney, as unduly burdensome to legitimate law enforcement activity.[167] The Court noted that while the approach prevents legitimate police investigations, such a safeguard also deprives the suspect who does not desire the assistance of counsel the opportunity to speak to police.[168] Finally, the

---

questioning must cease if the suspect asks for a lawyer—provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information." *Id.*

162. *Id.* at 2355. Justice Souter criticized the Court's requisite level of clarity standard, suggesting that trial courts could effectively require suspects to "speak with the discrimination of an Oxford don" in order to invoke their right to counsel. *Id.* at 2364. (Souter, J., concurring). The Court refuted this contention, stating that the suspect's request need not be unmistakably clear. *Id.* at 2355. The Court instructed, however, that the suspect must articulate his or her desire for an attorney in such a manner that a reasonable police officer would conclude that the suspect requested counsel. *Id.*; *see supra* note 152.

163. *Davis*, 114 S. Ct. at 2355; *see supra* note 152.

164. *Davis*, 114 S. Ct. at 2355-56. Once again the Court emphasized the importance of providing a rigid guideline for interrogating officers to follow. *Id.* The Court stated:

> But if we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he hasn't said so, with the threat of suppression if they guess wrong.

Id. at 2356.

165. *Id.* The Court advised that while clarification is not required, in some situations, it might be wise for interrogating officials to clarify whether or not the suspect wishes the assistance of counsel in order to avoid the subsequent suppression of evidence. *Id.* The Court explicitly stated that "[c]larifying questions . . . will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel." *Id.*

166. *Id.* at 2355-56.

167. *Id.* at 2356.

168. *Id.* at 2355-56. The Court stated:

Court concluded that a "third layer of prophylaxis" was unnecessary because *Miranda* and *Edwards* together serve as adequate safeguards to protect a suspect's Fifth Amendment rights during custodial interrogation.[169]

C. Justice Scalia's Concurring Opinion

Justice Scalia joined with the Court and also wrote a concurring opinion.[170] Citing 18 U.S.C. § 3501 as "the statute governing the admissibility of confessions in federal prosecutions,"[171] Justice Scalia called for its application in the present case.[172] Section 3501 instructs

---

> The rationale underlying *Edwards* is that the police must respect a suspect's wishes regarding his right to have an attorney present during custodial interrogation. But when the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity," because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present.

Id. (quoting Michigan v. Mosley, 423 U.S. 96, 102 (1975)).

169. *Id.* at 2356-57. The *Davis* Court stated that in *Miranda*, the Court held "that a suspect is entitled to the assistance of counsel during custodial interrogation . . . ." *Id.* at 2356. In *Edwards*, the Court designed a "second layer of prophylaxis for the *Miranda* right to counsel[] to prevent police from badgering a [suspect] into waiving his previously asserted *Miranda* rights." *Id.* at 2355. The *Davis* Court explicitly refused to extend *Edwards*, however, stating: "[W]e are unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer." *Id.* at 2357.

170. *Id.* at 2357 (Scalia, J., concurring).

171. *Id.* (Scalia, J., concurring). Section 3501 applies to all criminal prosecutions brought by the United States government. *See* 18 U.S.C. 3501(a) (1988). Because *Davis* involved a federal military prosecution, it could be argued that § 3501 applied. *See Davis*, 114 S. Ct. at 2357 (Scalia, J., concurring). In state criminal prosecutions, however, § 3501 does not apply.

172. *Davis*, 114 S. Ct. at 2357 (Scalia, J., concurring). Section 3501 states in relevant part:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
>
> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including . . . (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to

that a court must receive into evidence any confession that the court rules voluntary.[173] The jury is then permitted to hear relevant evidence on the issue of voluntariness to help the jury decide how much weight to attach to the confession.[174]

Justice Scalia maintained that the United States, as a party to the litigation,[175] has continuously declined to invoke section 3501 despite its relevance in several cases.[176] He acknowledged that the Court should not decide matters which the parties have not raised.[177] Justice Scalia noted, however, that it is ultimately within the discretion of the Court to raise relevant issues, and in certain situations, it is prudent to do so.[178] Justice Scalia argued that the Court should have asserted section 3501, and not *Miranda*, as the basis for its decision in the present case.[179]

---

questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

18 U.S.C. § 3501.

173. *Id.* § 3501(a).

174. *Id.*

175. *Davis*, 114 S. Ct. at 2357-58 (Scalia, J., concurring). When referring to the United States, or the Justice Department, as a party to litigation, Justice Scalia used the term "executive." *Id.* (Scalia, J., concurring).

176. *Davis*, 114 S. Ct. at 2357 (Scalia, J., concurring). Justice Scalia stated:

> This is not the first case in which the United States has declined to invoke § 3501 before us—nor even the first case in which that failure has been called to its attention. In fact, with limited exceptions the provision has been studiously avoided by every Administration, not only in this Court but in the lower courts, since its enactment more than 25 years ago.

Id. (Scalia, J., concurring) (citations omitted).

177. *Id.* at 2358 (Scalia, J., concurring).

178. *Id.* (Scalia, J., concurring). Justice Scalia cited to United States Nat'l Bank v. Independent Ins. Agents of Am., Inc., 113 S. Ct. 2173, 2177-79 (1993) (finding it proper for the appellate court to consider an issue despite the parties' failure, upon suggestion, to raise the issue). *Davis*, 114 S. Ct. at 2358 (Scalia, J., concurring).

179. *Davis*, 114 S. Ct. at 2358 (Scalia, J., concurring). Justice Scalia stated:

> The cited provisions of the Uniform Code and the Military Rules may (though I doubt it) be independent reasons why the confession here should be excluded, but they cannot *possibly* be reasons why § 3501 does not prevent *Miranda v. Arizona* from being a basis for excluding them, which is the issue before us. In any event, the Court today bases its refusal to consider § 3501 not upon the fact that the provision is inapplicable, but upon the fact that the Government failed to argue it—and it is *that* refusal which my present statement addresses.

Id. at 2357 n.* (Scalia, J., concurring) (citation omitted).

D. Justice Souter's Concurring Opinion

While concurring with the Court's judgment,[180] Justice Souter, writing for the four-justice concurrence,[181] rejected the Court's holding that during custodial interrogation officers can legally ignore a suspect's attempted invocation that could reasonably be construed as a request for counsel.[182] Accordingly, Justice Souter advocated the clarification approach,[183] followed by a majority of the lower courts prior to *Davis*.[184]

Justice Souter began his analysis with a lengthy footnote that rejected the Court's contention that *Edwards* governed the issue of ambiguous or equivocal requests for counsel.[185] Noting that *Edwards* did not address the legal significance of unclear references to counsel,[186] he pointed out that the Supreme Court and the lower courts would not have viewed the issue as unresolved if *Edwards* was

---

180. *Id.* at 2358 (Souter, J., concurring). Justice Souter maintained that the interrogating officers properly asked clarifying questions and correctly determined that Davis did not wish to have an attorney present during the interrogation. *Id.* at 2359 (Souter, J., concurring). Thus, he affirmed Davis's conviction, based partly on evidence of statements obtained after clarifying Davis's ambiguous reference to counsel. *Id.* (Souter, J., concurring).

181. *Id.* at 2358 (Souter, J., concurring). Justices Blackmun, Stevens, and Ginsburg joined in the concurring opinion. *Id.* (Souter, J., concurring).

182. *Id.* at 2359 (Souter, J., concurring). Justice Souter explicitly stated:

> I cannot, however, join in my colleagues' further conclusion that if the investigators here had been so inclined, [the agents] were at liberty to disregard Davis's reference to a lawyer entirely, in accordance with a general rule that interrogators have no legal obligation to discover what a custodial subject meant by an ambiguous statement that could reasonably be understood to express a desire to consult a lawyer.

Id. (Souter, J., concurring).

183. *Id.* (Souter, J., concurring); *see supra* part II.C.2.

184. *Davis*, 114 S. Ct. at 2359 (Souter, J., concurring). Justice Souter instructed as follows: "[W]hen law enforcement officials 'reasonably do not know whether or not the suspect wants a lawyer,' they should stop their interrogation and ask him to make his choice clear." *Id.* (Souter, J., concurring) (quoting *Davis*, 114 S. Ct. at 2355).

185. *Id.* at 2359-61 n.3 (Souter, J., concurring). Justice Souter stated, in pertinent part:

> Nor may this case be disposed of by italicizing the words of *Edwards v. Arizona* to the effect that when a suspect "clearly assert[s]" his right, questioning must cease. Even putting aside that the particular statement in that case was not entirely clear (the highest court to address the question described it as "equivocal"), *Edwards* no more decided the legal consequences of a less than "clear" statement than *Miranda*, by saying that explicit waivers are sufficient, settled whether they are necessary. Were it otherwise, there would have been no need after *Edwards* to identify the issue as unresolved.

Id. at 2360 n.3 (Souter, J., concurring) (alteration in original) (citations omitted); *see supra* notes 13-16 and accompanying text.

186. *Davis*, 114 S. Ct. at 2360 n.3 (Souter, J., concurring).

dispositive regarding ambiguous or equivocal reference to counsel.[187]

Recognizing that fairness and practicality guided "nearly three decades of case law"[188] regarding the procedures to be followed during custodial interrogation, Justice Souter argued that the appropriate standard for unclear references to counsel must also follow these same two principles.[189] Thus, he posited that the clarification approach both preserved a suspect's free choice between speaking with the police and remaining silent during the interrogation process[190] and provided a clear, workable guideline for interrogating officers to follow.[191] Justice Souter concluded that only the clarification approach could preserve "both ambitions" by preventing police officials from interrogating a suspect in custody until it is clear that the suspect does not wish the assistance of counsel.[192]

Cognizant of these two principles—fairness and practicality—Justice Souter next evaluated the Court's threshold standard of clarity approach, and concluded that it did not "fare so well."[193] He first evaluated the Court's approach with regard to its protection of individual rights.[194] He criticized the Court's explicit disregard for those suspects who wish to invoke their right to an attorney during questioning, but who are unable to make a request that sufficiently satisfies the requisite level of clarity rule.[195] Justice Souter recognized the dangers of drawing a sharp line between those who "clearly" request counsel and those who cannot articulate their desire for an

187. *Id.* (Souter, J., concurring).

188. *Id.* at 2359-60 (Souter, J., concurring).

189. *Id.* at 2360 (Souter, J., concurring). Justice Souter stated:

> Throughout that period, two precepts have commanded broad assent: that the *Miranda* safeguards exist "to assure that the *individual's right to choose* between speech and silence remains unfettered throughout the interrogation process" and that the justification for *Miranda* rules, intended to operate in the real world, "must be consistent with . . . practical realities."

Id. (Souter, J., concurring) (quoting Connecticut v. Barrett, 479 U.S. 523, 528 (1987) (quoting Miranda v. Arizona, 384 U.S. 436, 469 (1966)) (emphasis in original) and Arizona v. Robertson, 486 U.S. 675, 688 (1988) (Kennedy, J., dissenting) (alteration in original) respectively).

190. *Id.* at 2360 (Souter, J., concurring); *see Barrett*, 479 U.S. at 528.

191. *Davis*, 114 S. Ct. at 2359-60 (Souter, J., concurring).

192. *Id.* at 2360 (Souter, J., concurring).

193. *Id.* (Souter, J., concurring).

194. *Id.* at 2360-61 (Souter, J., concurring).

195. *Id.* (Souter, J., concurring). Justice Souter noted that the Court's requisite level of clarity rule failed to protect those individuals who *Miranda* acknowledged as needing a heightened degree of linguistic care—those with a poor grasp of the English language, the intimidated and shy, and the "woefully ignorant." *Id.* (Souter, J., concurring); *see, e.g.*, United States v. De La Jara, 973 F.2d 746, 750-51 (9th Cir. 1992) (discussing the difficulties of a suspect not perfectly fluent in English or familiar with the law).

attorney,[196] concluding that the Court's approach erroneously makes the right to counsel depend solely on the clarity of a suspect's statement rather than on the suspect's free choice.[197]

Justice Souter also rejected the Court's contention that *Miranda* warnings alone sufficiently relieve the inherent coercion of custodial interrogations.[198] In fact, he noted that the Court's approach counteracted the purposes of *Miranda*,[199] because one of the purposes of *Miranda* warnings is to give suspects some control over the interrogation process by allowing them to "cut off" questioning when they no longer wish to deal with the police alone.[200] Justice Souter implicitly recognized that when a suspect's request for counsel is equivocal or ambiguous, and is repeatedly ignored by interrogating officers, the suspect's sense of anxiety grows.[201] Consequently, thinking it futile to make further attempts to invoke the right to counsel, the suspect will likely see confessing as the only way to end the interrogation.[202]

---

196. *Davis*, 114 S. Ct. at 2360-61 (Souter, J., concurring). For example, the *Miranda* Court specifically noted that interrogating officials play on the weakness of the suspect, increasing the likelihood of coerced or false confessions. *Miranda*, 384 U.S. at 455-56. Those who wish the assistance of counsel, but who cannot clearly express their desire for counsel, will most likely succumb to the pressures of the interrogator and make incriminating statements to police. *Davis*, 114 S. Ct. at 2360-61 (Souter, J., concurring).

197. *Davis*, 114 S. Ct. at 2361-62 (Souter, J., concurring). Considering the fact that the fundamental purpose of *Miranda* is to protect the suspect's right to choose freely between speaking with law enforcement officials and remaining silent, the biggest danger of the Court's requisite level of clarity approach is that whether the suspect receives the assistance of counsel depends on fine, subtle distinctions. Based on sociolinguistic research, one commentator concluded:

> The constitutional rights of suspects in police custody are at risk not only because of how they speak, but also because of how the police hear and interpret their words. . . . As a result, suspects who use [indirect and tentative modes of expression] are doubly disadvantaged in their attempts to exercise their *Miranda* rights.

Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 288-89 (1993); *see, e.g., supra* note 111.

198. *Davis*, 114 S. Ct. at 2361 (Souter, J., concurring).

199. *Id.* at 2362 (Souter, J., concurring).

200. *See Miranda*, 384 U.S. at 468.

201. *See Davis*, 114 S. Ct. at 2359 (Souter, J., concurring); *see, e.g.*, People v. Krueger, 412 N.E.2d 537, 539-40 (Ill. 1980), *cert. denied*, 451 U.S. 1019 (1981). On cross-examination, the prosecution in *Krueger* asked the accused why he continued speaking with police after stating: "I think I should talk to an attorney." 412 N.E.2d at 539-40. The accused responded: "I asked for an attorney before I began the statement, and I saw that it was not going to get me anywhere, so I just ceased on that line, because I just knew I wasn't going to get an attorney anyways." *Id.* at 539.

202. *See supra* notes 1, 201, and accompanying text. The prosecution in *Krueger* asked the accused, "Did it occur to you not to talk any further?" *Krueger*, 412 N.E.2d at

Justice Souter also rejected the contention that the clarification approach placed too heavy a burden on legitimate police investigations.[203] He found this to be a weak assault against the clarification approach, which requires only that the interrogating officer clarify whether or not the suspect actually wanted to have an attorney present during questioning.[204] Admitting that some police investigations would suffer from the loss of these confessions, Justice Souter stressed that *Miranda* struck a balance in favor of preserving the suspect's rights.[205] In his concurrence, Justice Souter adhered to the *Miranda* Court's conclusion that an individual's constitutional rights cannot be sacrificed to facilitate the investigative process.[206]

Finally, he maintained that the Court's requisite level of clarity rule was neither the clearest guide nor the most practical approach for interrogating officers to follow.[207] Justice Souter asserted that his approach was more practical because it removed the uncertainty of

---

539. The accused responded: "[I]t occurred to me I might be up all night and be badgered by these three detectives." *Id.*

203. *Davis*, 114 S. Ct. at 2363 (Souter, J., concurring). The Court stated that a rule requiring the immediate cessation of questioning "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity." *Id.* at 2355-56 (quoting Michigan v. Mosley, 423 U.S. 96, 102 (1975)).

204. *Id.* at 2363 (Souter, J., concurring). The four concurring Justices found that "the margin of difference between the clarification approach advocated here and the one the Court adopts is defined by the class of cases in which a suspect, if asked, would make it plain that he meant to request counsel (at which point questioning would cease)." *Id.* (Souter, J., concurring).

205. *Id.* (Souter, J., concurring). Justice Souter observed: "While these lost confessions do extract a real price from society, it is one that *Miranda* itself determined should be borne." *Id.* (Souter, J., concurring); *see also* Michigan v. Harvey, 494 U.S. 344, 350 (1990) ("Although recognizing that the *Miranda* rules would result in the exclusion of some voluntary and reliable statements, the Court imposed these 'prophylactic standards' on the States to safeguard the Fifth Amendment privilege against self-incrimination." (citation omitted)); Escobedo v. Illinois, 378 U.S. 478, 490 (1964) ("No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, [his constitutional] rights.").

206. *Davis*, 114 S. Ct. at 2363 (Souter, J., concurring). The *Miranda* Court rejected the argument that society's need for interrogation outweighs the suspect's Fifth Amendment rights. *Miranda*, 384 U.S. at 479. The *Miranda* Court also noted that it had heard and rejected this argument in the past. *Id.* (citing Chambers v. Florida, 309 U.S. 227, 240-41 (1940)). The *Miranda* Court explicitly stated: "The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged." *Id.* at 479.

207. *Davis*, 114 S. Ct. at 2363 (Souter, J., concurring). Justice Souter recognized the overall difficulty in determining what are clear invocations of counsel, stating that some "difficult judgment calls" would arise applying all three approaches, including the Court's requisite level of clarity rule. *Id.* (Souter, J., concurring).

guessing whether or not the suspect had intended to invoke the right to counsel.[208] He reasoned that clarification is the "intuitively sensible course"[209] because it allows suspects the opportunity to exercise their free choice and to resolve any ambiguity.[210]

IV. ANALYSIS

The *Davis* Court acknowledged that a suspect's Fifth Amendment rights are sufficiently important to justify the prophylactic safeguards *Miranda* requires.[211] The Court also reaffirmed its holding in *Edwards* that a suspect who has invoked the right to counsel cannot be questioned substantively unless an attorney is present or unless the suspect initiates further conversations with the police.[212] Nevertheless, the Court refused to extend the scope of *Edwards*[213] to require interrogating officers to immediately stop substantive questioning when a suspect makes an ambiguous or equivocal reference to counsel.[214] Instead, the Court apparently concluded that *Miranda* rights, taken together with the procedural rules of *Edwards*, sufficiently shield the suspect from the coercive atmosphere of custodial interrogation.[215]

---

208. *Id.* (Souter, J., concurring).

209. *Id.* (Souter, J., concurring); *see infra* notes 264-68 and accompanying text.

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

211. *Id.* at 2354. The Court noted that "'[i]t remains clear, however, that this prohibition on further questioning—like other aspects of *Miranda*—is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose.'" *Id.* at 2355 (quoting Connecticut v. Barrett, 479 U.S. 523, 528 (1987)).

212. *Id.*

213. The *Davis* Court apparently viewed *Edwards* as an extension, or second layer, of the *Miranda* protections. *See id.* at 2356-57. *See generally Edwards*, 451 U.S. 477 (holding that if the suspect invokes the right to counsel at any time, the police may not question him or her until an attorney arrives). Arguably, however, this would not be an extension of *Edwards* (and a further extension of *Miranda*), because *Miranda* already required the immediate cessation of questioning when suspects request counsel in any manner. *See supra* note 49.

214. *Davis*, 114 S. Ct. at 2355. The Court reasoned that because *Edwards* required interrogating officers to respect the suspect's wishes regarding counsel, the police were under no legal obligation to cease questioning and provide an attorney when it was unclear as to whether the suspect wanted the assistance of counsel. *Id.* at 2355-56. The Court concluded that a rule requiring the immediate cessation of questioning would unduly and unnecessarily frustrate legitimate police investigations, especially when the suspect did not wish to have an attorney present during the interrogation. *Id.*

215. The Court explicitly stated:

> [T]he primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves. . . . A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted. Although

This Part of the Note analyzes the Court's troublesome rule, which places form over substance[216] by basing a suspect's right to counsel solely on the suspect's ability to speak clearly and assertively.[217] This Part then discusses the more fair and practical clarification standard advocated by Justice Souter.[218]

A. *Inherent Weaknesses in the Court's Requisite Level of Clarity Rule*

The *Davis* Court attempted to strike a balance between preserving a suspect's right to the assistance of counsel during custodial interrogation and promoting legitimate police investigative activities.[219] Unfortunately, the Court seriously misjudged the effect of its rule on both sides of the scale.[220] On one side, the Court found that the procedural safeguards already established in *Miranda* and *Edwards* provide sufficient protections to a suspect.[221] On the other side, the Court saw the need for effective law enforcement and determined that the requisite level of clarity rule gave ample latitude and guidance to ensure legitimate police practice.[222] Thus, the Court concluded that it was unnecessary to create a "third layer of prophylaxis" to prevent police questioning in situations where a suspect might want a lawyer.[223]

As Justice Souter's concurring opinion illustrates, the weaknesses of the Court's requisite level of clarity rule are readily apparent.[224] Contrary to the *Davis* Court's opinion, the procedural safeguards provided in *Miranda* and *Edwards* do not and cannot provide a suspect

---

> *Edwards* provides an additional protection—if a suspect subsequently requests an attorney, questioning must cease—it is one that must be affirmatively invoked by the suspect.

Id. at 2356.

216. Under the Court's requisite level of clarity rule, the focus is on the form of the request and the choice of words. *See id.* at 2355. The Court's rule does not put the focus where it should be, which is on whether the suspect actually wishes the assistance of counsel. *See id.* at 2362 (Souter, J., concurring).

217. *See infra* part IV.A.

218. *See infra* part IV.B.

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

220. *See id.* The Court clearly departed from the *Miranda* Court's liberal presumption toward the protection of individual rights, and instead took a very police-oriented position. *See id.* at 2355-56. The Court made only a few, conclusory statements regarding *Miranda's* Fifth Amendment protections, focusing its attention largely on law enforcement concerns. *Id.*

221. *See supra* notes 157, 169, and accompanying text.

222. *Davis*, 114 S. Ct. at 2356; *see supra* note 161 and accompanying text.

223. *Davis*, 114 S. Ct. at 2357; *see supra* note 169 and accompanying text.

224. *Davis*, 114 S. Ct. at 2360-63 (Souter, J., concurring).

with adequate protections against the compulsive nature of custodial interrogation.[225] Furthermore, the requisite level of clarity rule fails to provide what the Court described as an easy, workable standard for determining whether a suspect invoked the right to counsel.[226]

First, suspects' interests are not served when courts allow interrogating officers to ignore suspects' reasonable attempts to invoke the right to counsel.[227] *Miranda* and *Edwards* did not address the issue of ambiguous requests, and their protections do not reach suspects who are unable to assert a desire for an attorney clearly.[228] The *Davis* Court rule is most troublesome because it turns on subtle distinctions, drawing a sharp line between those who can clearly articulate their wishes and those who are unable to meet a particular officer's subjective[229] standard of clarity.[230]

Under the Court's rule, the right to counsel does not depend on a suspect's free choice, as the Court in *Miranda* intended.[231] Instead, the focus shifts to the way in which suspects fashion or form their words.[232] Using this rule, interrogating officers will unwittingly deny counsel to many suspects who desire an attorney but do not articulate their wishes clearly, and in the process, will circumvent *Miranda*'s

---

225. *See infra* notes 227-45 and accompanying text.

226. *See infra* notes 246-54 and accompanying text.

227. *See supra* notes 201-02 and accompanying text.

228. *See supra* notes 13, 185, and 196. *Miranda* recognized that suspects have the right to an attorney present during custodial interrogation. 384 U.S. at 436. *Edwards* reaffirmed *Miranda* and explicitly announced a bright-line rule cutting off interrogation upon invocation of the right to counsel. *Edwards*, 451 U.S. at 484-85.

229. Although the *Davis* Court implicitly described its standard as an objective test, see *Davis*, 114 S. Ct. at 2356, the requisite level of clarity rule effectively creates a subjective test. Under the *Davis* rule, officers are to determine exactly what constitutes a clear request for counsel based upon their own understanding or interpretation of the statement. *Id.* at 2363 n.7 (Souter, J., concurring). Indeed, Justice Souter pointed out that "[i]n the abstract, nothing may seem more clear than a 'clear statement' rule, but in police stations and trial courts the question, 'how clear is clear?' is not so readily answered." *Id.* (Souter, J., concurring); *see infra* notes 246-52 and accompanying text.

230. *See Davis*, 114 S. Ct. at 2356. Another danger in putting such emphasis on the suspect's choice of words is the possibility that the interrogating officer will interpret a statement incorrectly. *See, e.g., supra* notes 111 and 197. The examples clearly illustrate one of the dangers in applying the Court's requisite level of clarity rule. *See infra* note 243 (discussing the discrepancy between how an interrogating official and a suspect interpret the clarity in a request for counsel).

231. *See Davis*, 114 S. Ct. at 2356; *Miranda*, 384 U.S. at 478-79. The *Miranda* Court summarized the purpose of its rule as follows: "In order to combat . . . [the inherent pressures of custodial interrogation] and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." 384 U.S. at 467.

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

procedural safeguards.[233]

The *Davis* Court failed to appreciate the coercive nature of custodial interrogation and its effects on suspects.[234] It is unreasonable to expect individuals under considerable stress to make clear demands for a lawyer.[235] By adopting the requisite level of clarity rule, however, the Court requires suspects who may be confused, scared, or physically and psychologically exhausted to express themselves precisely and clearly.[236]

The inherently coercive nature of custodial interrogation[237] is not the only force frustrating suspects who wish to invoke their right to counsel. In fact, social and cultural differences pose even greater problems.[238] As Justice Souter indicated, research shows that the

---

233. Most courts had previously rejected the Court's approach because of the inadequate protections it affords the suspect. *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 730 (1979) (Marshall, J., dissenting) ("Requiring a strict verbal formula to invoke the protections of *Miranda* would 'protect the knowledgeable accused from stationhouse coercion while abandoning the young person who knows no more than to ask for the . . . person he trusts." (quoting Chaney v. Wainwright, 561 F.2d 1129, 1134 (5th Cir. 1977) (Goldberg, J., dissenting))); People v. Superior Ct., 542 P.2d 1390, 1394-95 (Cal. 1975) (holding that a demand for unmistakable clarity and resolution of ambiguity against the accused is contrary to *Miranda's* intent), *cert. denied*, 429 U.S. 816 (1976). Writing prior to *Davis*, one commentator stated:

> Too strict a standard would probably exclude many instances of conduct meant to be counsel assertions and, consequently, would risk constitutional losses in many cases that merit heightened protection. In many cases in which a suspect's behavior demands official restraint, such an extreme approach would allow law enforcement too much freedom to pursue inculpatory statements. Furthermore, an approach that allows agents to disregard completely every unclear assertion seems both unnecessarily rigid and oblivious to the reality that decision-making is not always an instantaneous, all-or-nothing process.

Tomkovicz, *supra* note 41, at 1011-12.

234. *See Davis*, 114 S. Ct. at 2356. The Court maintained that merely advising the suspect of his or her *Miranda* rights was sufficient to dispel the suspect's fears and eliminate the coercive atmosphere during custodial interrogation. *Id.*

235. *Id.* at 2361 (Souter, J., concurring). Justice Souter observed: "[M]any . . . [suspects] 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." *Id.* (Souter, J., concurring); *see supra* notes 6, 25, 30, and accompanying text (discussing the intimidating nature of interrogation); *see, e.g.*, *supra* notes 1, 201-02, and accompanying text (discussing the ambiguity in requests for counsel).

236. *See Davis*, 114 S. Ct. at 2360-61.

237. *See supra* notes 6, 25, 30, and 235.

238. *See, e.g.*, United States v. De La Jara, 973 F.2d 746, 750 (9th Cir. 1992). In *De La Jara*, the suspect requested counsel in Spanish. *Id.* at 750. The interpreter maintained that the suspect's statement could have been an assertion or a question depending on the manner and context in which the statement was made. *Id.* The interpreter listed the possible translations as follows: "Can I call my attorney?," "Should I call my attorney?," or "I should call my lawyer." *Id.* The court stated that "the meaning of De La Jara's statement is crucial, as the alternate translations have different legal effects." *Id.*

Court's clarity requirement may unfairly disadvantage specific groups of people.[239] For instance, one sociolinguistic study revealed that women, African-Americans, and immigrants are far more likely to use nonassertive or indirect language that makes them appear indecisive or hesitant when, in fact, they are emphatic in their opinions or desires.[240] Consequently, the burden of *Davis* falls disproportionately on these groups. Indeed, the Court explicitly acknowledges and accepts this result.[241]

Remarkably, not only does the Court's approach fail to protect a suspect's rights during questioning,[242] it also enhances the compelling atmosphere of custodial interrogation. As Justice Souter stated, a suspect's anxiety increases when officers ignore a request which the suspect believes is sufficient to invoke the right to counsel.[243] Furthermore, as he pointed out, a suspect will most likely perceive additional requests as futile.[244] Unable to withstand the pressures of interrogation, the suspect may simply confess to the crime.[245]

The Court also overestimates the practical application and utility of the requisite level of clarity rule.[246] The Court emphasized the need for a clear guide that interrogating officers could easily apply when determining whether to proceed with questioning,[247] concluding that

---

239. *Davis*, 114 S. Ct. at 2360-61 (Souter, J., concurring). *See* Ainsworth, *supra* note 197, at 286-87; *see also* Bonnie Erickson et al., *Speech Style and Impression Formation in a Court Setting: The Effects of "Powerful" and "Powerless" Speech*, 14 J. EXPERIMENTAL SOC. PSYCHOL. 266 (1978).

240. *See* Ainsworth, *supra* note 197, at 317-18. Speakers who use indirect methods of speech often interject words such as "I think" or "maybe" into otherwise clear and direct statements. *Id.* at 276-77. They may also attach "tag questions" to the end of statements. *Id.* at 277-78. For example, the suspect might state, "I should get a lawyer, shouldn't I?" *Id.* In both situations, the speaker conveys uncertainty to the listener even when, in fact, the speaker knows exactly what he or she wants. *Id.*

241. *Davis*, 114 S. Ct. at 2356; *see supra* note 156.

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

243. A major problem with the Court's approach is the law enforcement officials' and the suspect's diverging views about what words are sufficient to invoke the right to counsel. *See* Ainsworth, *supra* note 197, at 288-92. While a trained officer may understand subtle distinctions such as the use of "maybe" or "I think" as undermining a valid request, the suspect will likely view almost any statement referring to an attorney as a legitimate request for counsel. *Id.*

244. *Davis*, 114 S. Ct. at 2362 (Souter, J., concurring); *see supra* notes 1, 201-02, and accompanying text.

245. *See Davis*, 114 S. Ct. at 2362 (Souter, J., concurring); *supra* notes 1, 201-02, and accompanying text.

246. *See Davis*, 114 S. Ct. at 2355. The Court noted that "[t]o avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry." *Id.*

247. *Id.* at 2356. The Court stressed that although courts force compliance with the *Miranda* requirements through the exclusionary rule, police officers themselves must

its approach provided such a "bright-line" test.[248] The requisite level of clarity rule requires that the interrogating officer determine what is a "clear" request for counsel and what is not.[249] But, as Justice Souter suggests, the Court's approach leads to the same "difficult judgment calls" as the other approaches.[250] Undeniably, requests for counsel are rarely "crystal clear."[251] Under the Court's requisite level of clarity approach, however, interrogating officers are left to determine whether a suspect's statement is "clear" or whether it is "ambiguous."[252]

Furthermore, the Court does not take into consideration the conflicting interests of the interrogating officer and the suspect. Police officers know that they will most likely lose the confession if the suspect consults counsel.[253] Nevertheless, under the Court's rule,

---

decide whether they can question a suspect. *Id.* Consequently, interrogating officers need a "bright-line" rule that can be easily applied without placing too heavy a burden on the investigative process. *Id.*

248. *Id.*

249. *Id.* at 2355. The *Davis* Court noted the Court has previously observed that "'a statement either is such an assertion of the right to counsel or it is not.'" *Id.* (quoting Smith v. Illinois, 469 U.S. 91, 97-98 (1984) (per curiam)). In terms of practical application, however, the Court cannot claim that this approach will eliminate all confusion in interpreting ambiguous statements referring to an attorney. *Id.* at 2363 n.7 (Souter, J., concurring). There will always be close situations where the officer is unsure of the suspect's wishes regarding counsel. *Id.* (Souter, J., concurring). *See supra* notes 246, 248, and accompanying text.

250. *See, e.g., Smith*, 469 U.S. at 93. When the officers informed the accused of his *Miranda* rights, the accused stated "I'd like to do that." *Id.* The Illinois Appellate Court found Smith's statement "clear and unequivocal." People v. Smith, 447 N.E.2d 556, 559 (Ill. App. Ct. 1983). The Illinois Supreme Court determined that the accused's statement was ambiguous and concluded that the accused failed to invoke his right to counsel. People v. Smith, 466 N.E.2d 236, 240 (Ill. 1984). The United States Supreme Court found the accused's statement to be "neither indecisive or [*sic*] ambiguous." *Smith*, 469 U.S. at 97.

251. *See Smith*, 469 U.S. at 101 (Rehnquist, J., dissenting).

252. Some examples of "difficult judgment calls" include: Poyner v. Murray, 964 F.2d 1404, 1409 (4th Cir.) ("Didn't you say I have a right to an attorney?"), *cert. denied*, 113 S. Ct. 419 (1992); United States v. Mendoza-Cecelia, 963 F.2d 1467, 1472 (11th Cir.) ("I don't know if I need a lawyer, maybe I should have one, but I don't know if it would do me any good at this point."), *cert. denied*, 113 S. Ct. 436 (1992); Shedelbower v. Estelle, 885 F.2d 570, 571 (9th Cir. 1989) ("You know, I'm scared now. I think I should call an attorney."), *cert. denied*, 498 U.S. 1092 (1991); Smith v. Endell, 860 F.2d 1528, 1529 (9th Cir. 1988) ("Can I talk to a lawyer? At this point, I think maybe you're looking at me as a suspect . . . ?"), *cert. denied*, 498 U.S. 981 (1990); White v. Finkbeiner, 611 F.2d 186, 190 (7th Cir. 1979) ("I'd rather see an attorney."), *vacated*, 451 U.S. 1013 (1981).

253. *See generally* Escobedo v. Illinois, 378 U.S. 478, 488 (1964) (noting that "'any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.'" (quoting Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part, dissenting in part))).

To get a better idea of interrogating officers' motivations during custodial

which makes clarification optional, the officer responsible for protecting a suspect's rights and making the clarity determination is the same officer seeking the confession.[254] From a practical standpoint, it is difficult to argue that an officer with such diverging interests can provide the objective, unbiased protections assumed by the Court.

A final weakness of the *Davis* opinion is the Court's contention that the clarification approach would unduly burden police and their investigative activities. While it is true that requiring the immediate cessation of questioning will result in some lost confessions, *Miranda* explicitly accepted this trade-off.[255] Justice Souter agreed that the *Miranda* Court chose to sacrifice those confessions obtained against the will of the suspect.[256] Thus, although clarification may result in some loss of incriminating statements, the clarification approach is consistent with *Miranda*, which mandates that the overall benefit of preventing police coercion during custodial interrogation outweighs the cost of lost confessions.[257]

B. Justice Souter's Clarification Approach

While the *Davis* Court adopted the strict requisite level of clarity rule, Justice Souter advocated the more flexible clarification approach.[258] The clarification approach represents a common sense compromise between the more radical per se bar and the requisite level of clarity approaches.[259] It extends adequate protection against self-incrimination while providing the latitude essential to legitimate police

---

interrogation, the author spoke to an attorney with the Cook County, Illinois, State's Attorney's Felony Review Unit. Attorneys with the Felony Review Unit interrogate suspects generally after police questioning in order to obtain information, assess the case, and decide whether or not to pursue an indictment. Interview with Assistant State's Attorney from the Cook County, Illinois, Felony Review Unit, in Chicago, Ill. (Oct. 25, 1994). The attorney requested anonymity.

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

255. *Miranda*, 384 U.S. at 479; *see supra* notes 204-06 and accompanying text.

256. *Davis*, 114 S. Ct. at 2363 (Souter, J., concurring); *see supra* note 206.

257. *Miranda*, 384 U.S. at 479.

258. *See supra* part III.B-D. Justices Blackmun, Stevens, and Ginsburg joined Justice Souter's concurrence.

259. The per se bar approach calls for the immediate cessation of questioning upon the mere mention of counsel. *Maglio*, 580 F.2d at 205. The requisite level of clarity rule requires unmistakably clear requests for counsel before interrogating officers are under a legal obligation to stop questioning about the crime. *Davis*, 114 S. Ct. at 2356. Striking a balance between these two approaches, the clarification approach requires that statements be a reasonable expression of the desire to consult with an attorney. *Id.* at 2359 (Souter, J., concurring). Thereafter, if the interrogating officer employs narrow, clarifying questions and determines that the suspect does not wish to have counsel present, the officer may continue questioning. *Id.* (Souter, J., concurring).

investigative activity.[260]

Justice Souter's clarification approach is the more practical approach for several reasons. First, the clarification approach affords more protection by reducing the level of clarity required to invoke the right to counsel.[261] This approach acknowledges that most suspects will not speak with lawyer-like precision.[262] Thus, in order to stop the interrogation, a suspect need only make a statement that is arguably an expression of the desire for counsel.[263]

Second, the clarification approach allows the suspect—rather than police officials—to decide whether or not to obtain the assistance of counsel.[264] After a suspect makes an ambiguous reference to counsel, and questioning about the crime ceases, interrogating officers may attempt to clarify the suspect's statement and may not proceed until the suspect explains any desires regarding counsel.[265] For example, if the suspect makes an equivocal reference to counsel, an interrogating officer may ask, "Do you wish to have an attorney here with you during the interrogation?"[266] The suspect need only respond with a "yes" or "no" answer, thereby resolving any ambiguity. If interrogating officers wish to proceed with the interrogation, they must pursue this narrow line of questioning until it is clear that the suspect wants to continue without the assistance of counsel.[267] Thus, even when the suspect cannot initially articulate a request for an attorney,

260. *Davis*, 114 S. Ct. at 2360 (Souter, J., concurring).

261. In fact, the level of clarity necessary for a suspect to ultimately invoke the right to counsel will most likely be the same under both the clarification approach and the requisite level of clarity rule. The clarification approach provides greater protection to suspects, however, because the clarification approach mandates that interrogating officers stop substantive questioning once the suspect makes a statement that the officer could reasonably interpret to be an expression of the desire for counsel. *Thompson*, 601 F.2d at 771. In order to continue the interrogation, the officer must then ask clarifying questions to determine whether the suspect wishes the assistance of an attorney. *Id.* Clarifying questions assist suspects by providing them with another chance to communicate their true desires regarding counsel. *See supra* note 74 and accompanying text.

262. *See, e.g., supra* notes 61, 80, 106, 111, 130, and 252.

263. *Davis*, 114 S. Ct. at 2359 (Souter, J., concurring).

264. *Id.* at 2363 (Souter, J., concurring).

265. *See supra* notes 99-100.

266. Justice Souter noted that the agents properly clarified Davis's ambiguous statement by posing questions "aimed solely at clarifying whether a suspect's ambiguous reference to counsel was meant to assert his Fifth Amendment right." *Davis*, 114 S. Ct. at 2359 (Souter, J., concurring); *see supra* note 131.

267. Justice Souter suggested that when interrogating officers do not know whether the suspect intended to invoke his or her right to counsel, "[officers] should stop their interrogation and ask him to make his choice clear." *Davis*, 114 S. Ct. at 2359 (Souter, J., concurring).

officers can effectively determine the suspect's actual wishes by asking clarifying questions.[268]

Most importantly, Justice Souter's clarification approach also provides an incentive for interrogating officers to determine whether or not a suspect wants to consult an attorney. Under the clarification approach, the interrogation must cease when a suspect makes a statement that could reasonably be construed as a request for counsel.[269] As a result, the clarification approach encourages interrogating officers to clearly inform suspects of their choice between obtaining an attorney and dealing with the police alone.[270] In this way, a suspect decides whether to have an attorney present and interrogating officers are not forced to speculate about the suspect's wishes or make any "difficult judgment calls."[271]

The Court's approach fails to provide the same incentive for interrogating officers.[272] Under the Court's approach, officers are not required to stop the interrogation unless the suspect's request is direct and clear.[273] Although the Court suggests that it would be "good police practice for interviewing officers to clarify" the wishes of a suspect, the Court does not require interrogating officers to ask clarifying questions.[274] Thus, there is no true incentive for interrogating officers to ascertain whether a suspect wishes to consult with an attorney. Accordingly, there is no reason to risk the loss of a confession by stopping and clarifying whether the suspect meant to invoke the right to counsel.

---

268. *See supra* notes 130-35 and accompanying text.

269. *Davis*, 114 S. Ct. at 2359 (Souter, J., concurring).

270. Interrogating officers may lose an incriminating statement or confession by clarifying the suspect's reference to counsel. *See supra* note 205 and accompanying text. Under the clarification approach, however, officers must risk this loss if they wish the opportunity to continue questioning the suspect immediately and without an attorney present. Indeed, unless the interrogating officer clarifies the suspect's ambiguous statement and determines that the suspect does not wish the assistance of counsel, all questioning must cease until an attorney is provided. *See supra* part II.C.2.

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

272. By refusing to adopt a rule requiring officers to ask clarifying questions, the Court removed a critical incentive for officers to determine whether suspects intended to invoke their right to counsel during custodial interrogation. Under the Court's requisite level of clarity approach, interrogating officers "are at liberty to disregard [a suspect's] reference to a lawyer entirely, in accordance with a general rule that interrogators have no legal obligation to discover what custodial subject meant by an ambiguous statement . . . ." *Id.* at 2359 (Souter, J., concurring).

273. *Id.* at 2355.

274. *Id.* at 2356.

V. IMPACT

The *Davis* decision creates at least two possible results: (1) courts, in applying the Supreme Court's decree, will provide suspects less protection against compulsory self-incrimination during custodial interrogation;[275] or (2) states will reject *Davis* as insufficient, adopt an alternative standard, and afford suspects greater protections under their respective state constitutions.[276]

A. Lessening Individual Protection in Applying Davis

Since *Davis*, federal jurisdictions that previously followed the clarification standard must now abide by the requisite level of clarity rule.[277] Prior to *Davis*, courts in jurisdictions following the clarification approach compelled interrogating officers to clarify a suspect's ambiguous or equivocal reference to counsel before continuing with the interrogation and taking the suspect's statement.[278] Now, these courts must leave the decision to individual officers of whether or not to clarify a suspect's unclear reference to counsel.[279] As long as a suspect's statement falls below the threshold standard of clarity,

---

275. *See infra* part V.A. Courts that have already interpreted *Davis* include: United States v. Buckley, 36 F.3d 1106 (10th Cir. 1994) (unpublished opinion), *cert. denied*, 115 S. Ct. 1154 (1995); Coleman v. Singletary, 30 F.3d 1420 (11th Cir. 1994); United States v. Menzer, 29 F.3d 1223 (7th Cir.), *cert. denied*, 115 S. Ct. 515 (1994). *See supra* note 32.

276. *See infra* part V.B.

277. *See, e.g.*, *Coleman*, 30 F.3d at 1422-24. In *Coleman*, a sixteen-year-old killed his ten-year-old sister. *Id.* at 1422. During custodial interrogation, when asked if the accused wished to make a voluntary statement to police, the accused stated, "I don't know. But if [the public defender] said to stop [the questioning] I don't want to do what he said not to do." *Id.* at 1423. The officers continued to ask the accused to speak with them about the crime, despite the fact that the public defender had said that she would instruct the accused not to answer any questions. *Id.* at 1422-23. The accused finally stated, "I guess if that guy thinks it's all right, I don't care," and proceeded to confess to the murder. *Id.* at 1423. The court ruled the accused's statement equivocal and held that he did not invoke his right to an attorney. *Id.* at 1424. The court explained:

> Before the Supreme Court's recent decision in Davis v. United States, the rule in this Circuit was that: "When a defendant makes an equivocal request for an attorney during a custodial interrogation, 'the scope of that interrogation is immediately narrowed to one subject and one only. *Further questioning thereafter must be limited to clarifying that request* until it *is* clarified.'"
>
> . . . .
>
> Because we are bound to follow the Supreme Court's holding in *Davis*, our decisions creating a duty to clarify a suspect's intent upon an equivocal invocation of counsel are no longer good law.

Id. at 1423-24 (quoting Owen v. Alabama, 849 F.2d 536, 539 (11th Cir. 1988) (quoting Thompson v. Wainwright, 601 F.2d 768, 771 (5th Cir. 1979))) (emphasis in original).

278. *See supra* part II.C.2.

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

courts cannot punish interrogating officers for forging ahead without clarifying whether or not the suspect actually wanted the assistance of an attorney.[280]

Consequently, interrogating officials in the stationhouse will likely reduce the level of protection provided to suspects during custodial interrogation.[281] Interrogating officers may now continue questioning a suspect in situations where the clarification approach, in the past, forced them to cease questioning about the crime.[282] In most present situations, an officer will probably not ask a suspect "whether or not he wishes to consult with an attorney."[283] It is contrary to the interrogating officer's interest to offer the assistance of counsel in such a blunt manner,[284] and few officers will risk losing the confession by employing such clarifying questions.[285] Instead, officers will continue to pose questions about the crime unless the suspect clearly articulates the desire to have an attorney present.[286]

B. Rejecting Davis *as Insufficient*

The *Miranda* Court explicitly recognized that its method was not the only means for protecting a suspect's Fifth Amendment rights.[287] Indeed, the *Miranda* Court encouraged Congress and the States to

---

280. *See, e.g., Coleman*, 30 F.3d at 1424.

281. *See id.*

282. Interview with Assistant State's Attorney from the Cook County, Illinois, Felony Review Unit, in Chicago, Ill. (Oct. 25, 1994). The prosecuting attorney from the Felony Review Unit reported that, in her experience, since *Davis*, interrogating officials are less inclined to give the benefit of the doubt to the suspect whose request for counsel is unclear. *Id.* For example, she stated that, in the past, she would have accepted as a valid request, or at least clarified the suspect's statement, "I think I probably should talk to a lawyer." *Id.* After *Davis*' "sufficient clarity" requirement, however, she would not consider this clear enough to trigger the suspect's right to counsel. *Id.*

283. *Id.*

284. *Id.* The prosecuting attorney stated that in her experience, during custodial interrogation, questioning officials generally inform the suspect of his or her right to counsel but refrain from explicitly asking whether the suspect would like to have an attorney present. *Id.*

285. *Id.* The prosecuting attorney stated that in her experience, most interrogating officials will not clarify suspects' statements by explicitly asking suspects whether or not they want an attorney present during the interrogation. *Id.* Rather, interrogating officials simply instruct suspects that they cannot offer any advice, and readvise them that they have the right to an attorney. *Id.* Interrogating officials will not lay out suspects' choices too plainly because of the increased chance of losing confessions. *Id.*

286. *Id.*; *see supra* note 277.

287. *Miranda*, 384 U.S. at 467. The Court stated that the procedures laid out in *Miranda* must be followed "unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and assuring a continuous opportunity to exercise it." *Id.*

devise superior methods for protecting the rights of individuals.[288] Because states may extend greater protections under their state constitutions, state legislatures and courts can provide greater protection to suspects during custodial interrogation than that afforded under the *Davis* rule.[289]

Thus, a second likely response is for states to reject *Davis* as inadequate and to adopt a more effective alternative standard. In fact, Hawaii has already taken such an approach. In *State v. Hoey*,[290] the Supreme Court of Hawaii refused to accept the *Davis* Court's rationale.[291] Rather, the *Hoey* court interpreted the Hawaii Constitution as providing broader protections to the privilege against self-incrimination than the Federal Constitution.[292] The *Hoey* court, adopting Justice Souter's reasoning in *Davis*,[293] concluded that the clarification standard provided a suspect greater safeguards during custodial interrogation.[294]

---

288. *Id.*

289. *See* LATZER, *supra* note 32, at 4.

290. 881 P.2d 504 (Haw. 1994).

291. *Id.* at 523. In *Hoey*, police arrested the suspect for robbery and kidnapping. *Id.* at 508. During custodial interrogation, when the officer asked the suspect whether he wished to have an attorney present, the suspect stated, "I don't have the money to buy one." *Id.* at 509. The officer did not readvise the suspect that he could have an attorney appointed if he could not afford counsel. *Id.* Instead, the officer asked if the suspect wanted counsel present at that time. *Id.* The suspect responded, "Right now, I don't think so." *Id.* Shortly thereafter the suspect confessed to the crime. *Id.* The Hawaii Supreme Court ruled the confession inadmissible because the officer failed to clarify the ambiguity of the suspect's reference to counsel. *Id.* at 523.

292. *Id.* The *Hoey* court explained:

> This court "has always been mindful of its obligation to 'afford defendants the minimum protection required by federal interpretations of the . . . Federal Constitution. . . .'" By the same token, as the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawai'i Constitution, we are free to give broader protection under the Hawai'i Constitution than that given by the federal constitution.

Id. (quoting State v. Hutch, 861 P.2d 11, 19 (Haw. 1993) (quoting State v. Texeira, 433 P.2d 593, 597 n.2 (Haw. 1967))) (alteration in original).

293. The Supreme Court of Hawaii stated:

> [W]e choose to afford our citizens broader protection under article I, section 10 of the Hawai'i Constitution than that recognized by the *Davis* majority under the United States Constitution by aligning ourselves with the jurisdictions in the ". . . [clarification] camp" . . . .
>
> In reaching our holding, we adopt the reasoning of Justice Souter set forth in his concurring opinion in *Davis* . . . .

Id. (footnote omitted).

294. *Id.* at 524. The *Hoey* court stated:

> Simply ignoring the fact that the [ambiguous] statement was made will not suffice. . . . The burden of proving by a preponderance of the evidence that a waiver of a constitutional right was knowing, voluntary, and intelligent rests

VI. CONCLUSION

In *Davis v. United States*,[295] the Supreme Court refused to extend the protections created in *Miranda v. Arizona*[296] and *Edwards v. Arizona*[297] to suspects who fail to clearly articulate their desire for the assistance of counsel during custodial interrogation. The Court adopted the requisite level of clarity rule which provides that interrogating officers are under no constitutional obligation to cease questioning a suspect about a crime unless or until the suspect's request for counsel meets the threshold standard of clarity.[298] The *Davis* Court recognized the advantages of the clarification approach advocated by a minority of the courts; however, the Court refused to require the clarification of ambiguous or equivocal requests for counsel.[299] Consequently, individuals who are unable to express clearly their desire for the presence of counsel during custodial interrogation will be denied necessary Fifth Amendment protections against compulsory self-incrimination.[300]

NANCY M. KENNELLY

---

upon the [prosecution]. Based on the foregoing, we cannot find that the [prosecution] met this burden.

Id.

295. 114 S. Ct. 2350 (1994).

296. 384 U.S. 436 (1966).

297. 451 U.S. 477 (1981).

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

299. *Id.* at 2356; *see supra* part III.B.

300. *See supra* parts IV-V.