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# Understanding Davis v. United States

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# UNDERSTANDING *DAVIS V. UNITED STATES*

*Marcy Strauss*\*

## I. INTRODUCTION

Forty years ago, in the landmark case of *Miranda v. Arizona*,<sup>1</sup> the Supreme Court held that in order to safeguard the right against self-incrimination guaranteed by the Fifth Amendment to the Constitution, a person has the right to have an attorney present during custodial interrogation.<sup>2</sup> Fifteen years later, in *Edwards v. Arizona*,<sup>3</sup> the Court made clear its commitment to providing suspects with counsel during interrogation by setting forth a bright-line rule: when a suspect invokes the right to have counsel present during questioning, no further interrogation may occur until counsel is made available to the suspect or until the suspect initiates further discussion.<sup>4</sup>

However, what was unclear in both *Miranda* and *Edwards*, was precisely what constituted an invocation of the right to counsel. More specifically, lower courts differed on whether police must stop interrogating suspects who have made ambiguous or equivocal request for counsel.<sup>5</sup> In 1994, the Supreme Court finally entered the

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

2. *Id.* at 469–73. The phrase “custodial interrogation” is a meaningful one. A person interrogated but not in custody, as well as a person in custody and not interrogated, has no *Miranda* rights. See, e.g., *Rhode Island v. Innis*, 446 U.S. 291, 298–301 (1980) (discussing the meaning of interrogation); *Oregon v. Mathiason*, 429 U.S. 492, 494–95 (1977) (per curiam) (discussing the meaning of custody); see also *infra* note 81 and accompanying text.

3. 451 U.S. 477 (1981); see also *infra* notes 54–71 and accompanying text.

4. *Edwards*, 451 U.S. at 484–85.

5. See *infra* notes 89–115 and accompanying text. There is a difference between ambiguous and equivocal requests:

Ambiguity exists when the listener is unsure which of two or more interpretations to give to a single statement. Equivocality exists when the speaker is unsure about what he

fray. In *Davis v. United States*,<sup>6</sup> the Court held that only unambiguous requests for counsel trigger the protections of *Edwards*.<sup>7</sup> Thus, interrogating officers may continue their questioning when a suspect ambiguously asserts his right to counsel during a custodial interrogation.<sup>8</sup>

This decision spurred a chorus of protest and criticism among commentators. Many argued that the *Davis* decision eviscerated the “bright line” nature of *Edwards* which was among its chief benefits.<sup>9</sup> Instead of a clear rule to guide officers and courts alike, a new uncertainty crept into the calculation of whether a suspect has the right to an attorney. Specifically, many critics argued that the *Davis* ruling would have a disproportionate effect on women and members of certain cultural groups who often phrase requests in an equivocal manner.<sup>10</sup> Perhaps most prominent is the writing of Professor Janet Ainsworth, who argued based on sociolinguistic evidence that women disproportionately adopt indirect speech patterns.<sup>11</sup> Thus, she predicted that a legal rule requiring the use of direct and unqualified language would adversely affect female defendants more often than their male counterparts.<sup>12</sup>

This article is an attempt to take the *Davis* debate to a new level by analyzing the actual effect of its holding. Specifically, how have the courts distinguished between ambiguous and unambiguous

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or she really means by his or her statement. Thus, ambiguity is determined from the listener's point of view; and equivocality is determined from the speaker's intent.

Eugenia L. Guiffreda, Note, *Davis v. United States: Speak Clearly or Lose Your Right to Counsel*, 6 MD. J. CONTEMP. LEGAL ISSUES 405, 405 n.5 (1995). Most courts, however, use the terms interchangeably, and so will this paper.

6. 512 U.S. 452 (1994).

7. *See id.* at 459.

8. *See id.*

9. *See* Guiffreda, *supra* note 5, at 418; Alexa Young, Note, *When is a Request a Request? Inadequate Constitutional Protection for Women in Police Interrogations*, 51 FLA. L. REV. 143, 151, 153 (1999).

10. Young, *supra* note 9, at 144; *see* C. Antoinette Clarke, *Say It Loud: Indirect Speech and Racial Equality in the Interrogation Room*, 21 U. ARK. LITTLE ROCK L. REV. 813, 820–21 (1999); Floralynn Einesman, *Confessions and Culture: The Interaction of Miranda and Diversity*, 90 J. CRIM. L. & CRIMINOLOGY 1, 32–33 (1999); Tom Chen, Note, *Davis v. United States: “Maybe I Should Talk to a Lawyer” Means Maybe Miranda Is Unraveling*, 23 PEPP. L. REV. 607, 643 (1996); Guiffreda, *supra* note 5, at 417–18; Samira Sadeghi, Comment, *Hung up on Semantics: A Critique of Davis v. United States*, 23 HASTINGS CONST. L.Q. 313, 330 (1995).

11. *See* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogations*, 103 YALE L.J. 259, 261 (1993).

12. *See id.* at 286, 315.

requests for counsel? After all, figuring out what is equivocal and what is not requires sound judgment. How have the lower courts characterized different “types” of requests for counsel? And to the extent possible to assess,<sup>13</sup> have the predictions of Ainsworth and others, that minorities and women would especially suffer, been proven accurate?

After reading the lower court published decisions—state and federal for the last twelve years—I attempt to provide an answer to these questions. Specifically, in Section Two of this article, I provide an overview of the law of interrogation and the right to counsel set forth in *Miranda*, *Edwards* and *Davis*. In Section Three, I briefly describe the main arguments raised against *Davis*; namely, that the decision will create uncertainty in the law and, more significantly, will eviscerate the *Miranda* guarantees, particularly for women and minorities who tend not to speak in clear, declarative terms. Section Four provides a descriptive and empirical look at the invocation of counsel post-*Davis*. There, I analyze virtually every state and federal decision since the issuance of the *Davis* decision that considered whether a defendant unequivocally invoked the right to counsel.<sup>14</sup> In Section Five, I conclude that some support exists for the concern that women and minorities use ambiguous language in requesting counsel. However, the evidence also indicates that this problem also persists among Caucasian males faced with the power and authority of the police during custodial interrogations. Perhaps the greatest concern raised by the post-*Davis* cases is the fact that courts often reach inconsistent results. Thus, whether a suspect is accorded the protection of counsel during interrogation may depend more on the whim of the particular judge hearing the case than on the precise request made by the suspect.

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13. It obviously is difficult, if not impossible, to determine a person’s ethnicity from reading a court opinion. Occasionally, the court will mention the race of the defendant. In any case, we tried to ascertain the defendants’ race and ethnicity by checking prison databases in various states. Also, in some instances, I was able to find the ethnicity by searching available news reports on the case. Gender is typically easy to determine from the case.

14. I have tried to be comprehensive in my analysis of the caselaw. I use the modifier “virtually” to recognize that some cases may not have been published, and others may have escaped my scrutiny despite my attempt to be exhaustive. I can confidently say that if any cases have been missed, they are few in number and that my examination certainly encompasses a representative sample.

## II. ASSERTING THE RIGHT TO COUNSEL DURING INTERROGATION

A. *A Brief Overview of the Miranda Right to Counsel*

In 1966, the Supreme Court drastically overhauled the law of police interrogations when it handed down its decision in *Miranda v. Arizona*.<sup>15</sup> Prior to *Miranda*, the law of interrogations was governed largely by the voluntariness doctrine under the Due Process Clause.<sup>16</sup> Courts excluded evidence which was obtained as a result of police coercion that rose to the level of a Due Process violation under the Constitution.<sup>17</sup> While this approach ensured that the most egregious police practices of severe physical abuse were condemned, "it left largely uncontrolled a myriad of other practices that did not reflect physical abuse but operated to coerce a suspect into making a statement."<sup>18</sup>

In *Miranda*, the Supreme Court shifted the focus from the Due Process Clause to the Fifth Amendment's guarantee against self-incrimination.<sup>19</sup> After an exhaustive survey of the long history of physical abuse and psychological tactics designed to trick, cajole, and intimidate a suspect into confessing, the Court concluded that suspects could not meaningfully exercise their right against self-incrimination in such an environment.<sup>20</sup> Thus, the Court held that the Fifth Amendment requires the police to inform a suspect of his constitutional rights and to obtain a waiver of those rights before

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15. 384 U.S. 436 (1966).

16. See *Brown v. Mississippi*, 297 U.S. 278, 283 (1936); *Hopt v. Utah*, 110 U.S. 574, 584-87 (1884). Although the voluntariness test predominated until the *Miranda* decision, the Court also flirted with a right to counsel approach based on the Sixth Amendment as well. See *Escobedo v. Illinois*, 378 U.S. 478, 490-91 (1964); *Massiah v. United States*, 377 U.S. 201, 203-04, 206 (1964). See generally Karl P. Warden, *Miranda—Some History, Some Observations, and Some Questions*, 20 VAND. L. REV. 39 (1966) (discussing the constitutional rights of the accused prior to *Miranda*, which included the Fifth and Sixth Amendments and culminated in *Escobedo v. Illinois*).

17. See *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961); Joseph D. Grano, *Voluntariness, Free Will and the Law of Confessions*, 65 VA. L. REV. 859, 863-64 (1979). See generally Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417 (1985) (comparing prior police interrogation techniques, governed by the due process clause of the Fourteenth Amendment, with current practice under *Miranda*); Anne E. Link, *Fifth Amendment—the Constitutionality of Custodial Confessions*, 82 J. CRIM. L. & CRIMINOLOGY 878 (1992) (describing several pre-*Miranda* tests used to measure the admissibility of custodial confessions).

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

19. *Miranda*, 384 U.S. at 458-67.

20. See *id.* at 453-58.

conducting a custodial interrogation.<sup>21</sup> In other words, the police must warn suspects that they have a right to remain silent and that anything they say may be used against them in a court of law.<sup>22</sup>

Moreover, and most significant for our purposes, suspects must be told that they have the right to have counsel present during questioning and that counsel will be provided to them if they cannot afford it.<sup>23</sup> This right to counsel, of course, is not explicitly stated in the Fifth Amendment.<sup>24</sup> Rather, the *Miranda* Court viewed it as an essential component for ensuring that a suspect's right to silence is honored.<sup>25</sup> A lawyer's presence substantially decreases the possibility of police coercion and ensures an accurate recording of the statement and circumstances of any interrogation.<sup>26</sup>

After a suspect is informed of his right to remain silent and the right to have an attorney present, the police may interrogate that suspect only if he has voluntarily waived these rights.<sup>27</sup> If, instead of waiving his rights, however, a suspect indicates that he wants to remain silent, or that he wants an attorney present during interrogation, the police must cease questioning.<sup>28</sup> Justice Warren describes the sequence of events following an invocation of rights as follows:

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates

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21. See *id.* at 467–70; see also Joseph D. Grano, *Miranda v. Arizona and the Legal Mind: Formalism's Triumph over Substance and Reason*, 24 AM. CRIM. L. REV. 243, 256–58 (1986).

22. *Miranda*, 384 U.S. at 469.

23. *Id.* at 471, 473.

24. See U.S. CONST. amend. V.

25. See William H. Erickson, *The Unfulfilled Promise of Miranda v. Arizona*, 24 AM. CRIM. L. REV. 291, 296 (1986).

26. *Miranda*, 384 U.S. at 465–66.

27. See *Colorado v. Spring*, 479 U.S. 564, 574, 577 (1987); *Moran v. Burbine*, 475 U.S. 412, 421 (1986); *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

28. See *Miranda*, 384 U.S. at 473–74.

on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.<sup>29</sup>

Despite a lengthy opinion, questions quickly arose concerning the scope of the newly established *Miranda* rights. An initial issue concerned re-interrogation: can the police resume questioning of suspects once their rights are invoked? Or does *Miranda* permanently ban any such resumption?

In *Michigan v. Mosley*,<sup>30</sup> the Supreme Court considered the circumstances in which police can resume questioning suspects after they assert their right to remain silent.<sup>31</sup> There, the defendant, Mosley, was arrested for several robberies, and given his *Miranda* warnings.<sup>32</sup> Initially, Mosely waived his rights and answered some preliminary questions.<sup>33</sup> The questioning ceased when Mosley stated that he did not want to discuss the robberies any further.<sup>34</sup> Two hours later, different detectives questioned Mosley about a fatal shooting during a different robbery than was the subject of the earlier interrogation.<sup>35</sup> Mosley was issued new *Miranda* warnings and agreed to talk about the murder.<sup>36</sup> After fifteen minutes, Mosley confessed to the murder after being told that a confederate had turned him in as the "shooter."<sup>37</sup>

At trial, Mosley's confession was admitted, and he was convicted of murder.<sup>38</sup> On appeal, Mosley argued that the government had violated his Fifth Amendment rights by re-interrogating him after he had asserted his right to remain silent.<sup>39</sup> The Supreme

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29. *Id.*

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

31. *Id.* at 101-06.

32. *Id.* at 97.

33. *Id.* at 97-98.

34. *Id.*

35. *Id.* at 97-98, 104.

36. *Id.* at 98.

37. *Id.*

38. *Id.* at 99.

39. *Id.* at 96.

Court disagreed. While recognizing that repeated rounds of questioning in the face of a decision to remain silent will nearly always undermine a suspect's free will, the Court found that *Miranda's* admonition that interrogation must cease upon assertion of the right to silence cannot "sensibly be read to create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject."<sup>40</sup> Such a reading would "transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity."<sup>41</sup> Instead of a bright-line rule, the Court held that the admissibility of statements elicited from a suspect who invoked his right to remain silent depends on "whether his 'right to cut off questioning' was 'scrupulously honored.'"<sup>42</sup>

Through the exercise of his option to terminate questioning, [the suspect] can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting.<sup>43</sup>

The Court concluded that Mosley's rights were scrupulously honored.<sup>44</sup> The questioning immediately ceased after he had initially asserted his right to remain silent.<sup>45</sup> The second interrogation took place after the passage of time, focused on a different topic, was conducted by a different officer than the first one, and occurred at a different place than the original interrogation.<sup>46</sup> The new officers again read him his *Miranda* rights, reminding him of these rights and the officers' willingness to adhere to them.<sup>47</sup> In these circumstances, the Court believed that a suspect would not feel that his original request to remain silent had been ignored (and thus, that re-asserting that right again would be futile).<sup>48</sup> Nor would the process function

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40. *Id.* at 102–03 (emphasis omitted).

41. *Id.* at 102.

42. *Id.* at 104 (citations omitted).

43. *Id.* at 103–04.

44. *Id.* at 104.

45. *Id.*

46. *Id.*

47. *Id.* at 104–05.

48. *Id.* at 105–06.



like one continuous interrogation, convincing the suspect that his initial invocation of the right to remain silent was irrelevant.<sup>49</sup>

Since *Mosley*, lower courts have given varying degrees of weight to the several factors noted there.<sup>50</sup> Nonetheless, all agree that in order to find that a suspect's right to remain silent was scrupulously honored, the initial interrogation must have immediately ceased upon the assertion of the right, some (unspecified) time period must pass, and the interrogator must re-state the *Miranda* rights.<sup>51</sup> It appears that the other factors (new officers, different crime, new location) are elements played off against the passage of time. The shorter the period of time between the two interrogations, the more it "helps" to be questioned about an unrelated offense by new officers at a different location.<sup>52</sup>

### B. The Creation of a Bright-line Rule: *Edwards v. Arizona*

Six years later, and fifteen years after *Miranda*, the Supreme Court first considered the effect of invoking the right to counsel instead of the right to remain silent. Many people wondered if the *Mosley* test would be imported into this situation. In other words, would the Court embrace a test, like the one articulated in *Mosley*, which eschewed a bright-line rule in favor of one that considered a totality of the circumstances to determine if the right was honored?

In *Edwards v. Arizona*,<sup>53</sup> the Court adopted a per se proscription of indefinite duration upon further questioning after a suspect invokes the right to counsel rather than the right to remain silent.<sup>54</sup> In

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49. See generally *id.* (discussing the significance of renewed questioning only after a considerable period of time has passed and a fresh set of warnings have been issued).

50. See, e.g., *Campaneria v. Reid*, 891 F.2d 1014, 1021 (2d Cir. 1989) (stating that questioning can be resumed after fresh *Miranda* rights are given and the right to remain silent is scrupulously honored, by continuing questioning only after the passage of a significant period of time and by limiting the questioning to a different subject matter); *People v. Stander*, 251 N.W.2d 258, 263 (Mich. Ct. App. 1977) (mentioning only one of the factors articulated in *Mosley*).

51. See, e.g., *Stewart v. United States*, 668 A.2d 857, 867 (D.C. 1995) (right to remain silent not scrupulously honored because insufficient passage of time); *Derrington v. United States*, 488 A.2d 1314, 1329 (D.C. 1985) (right to remain silent not scrupulously honored because insufficient passage of time and failure to reissue *Miranda* warnings); *People v. Taylor*, 463 N.E.2d 705, 710 (Ill. 1984) (rights scrupulously honored).

52. *Mosley*, 423 U.S. at 98.

53. 451 U.S. 477 (1981).

54. *Id.* at 484-85; see, e.g., Yale Kamisar, Professor of Law, Univ. of Mich., *The Edwards and Bradshaw Cases: The Court Giveth and the Court Taketh Away*, Address at Fifth Annual Supreme Court Review and Constitutional Law Symposium, in 5 THE SUPREME COURT: TRENDS

*Edwards*, the defendant was arrested for burglary, robbery and first degree murder.<sup>55</sup> At the police station, he was read his *Miranda* rights.<sup>56</sup> However, he waived those rights and agreed to talk to the police.<sup>57</sup> After being told that another suspect had implicated him in the crime, Edwards denied involvement, and sought to “make a deal.”<sup>58</sup> After the officer told him that he didn’t have the authority to make a deal, Edwards then said, “I want an attorney before making a deal.”<sup>59</sup> At this point, all questioning stopped and Edwards was taken to the county jail.<sup>60</sup>

Early the next morning, two detectives came to the jail to speak to him.<sup>61</sup> When told by the guards that the detectives were there to talk to him, Edwards said that he did not want to talk to anyone.<sup>62</sup> The guard told him that he “had to,” and took him to see the detectives.<sup>63</sup> The detectives read him his rights, and Edwards responded that he was willing to talk, but wanted to hear the taped statement of the person who had implicated him.<sup>64</sup> Edwards listened to the tape for several minutes and agreed to make a statement if it was not tape-recorded.<sup>65</sup> Although the officers informed him that, even if not taped, the statement could be used against him, Edwards reiterated: “I’ll tell you anything you want to know, but I don’t want it on tape.”<sup>66</sup> He then implicated himself in the crime.<sup>67</sup> The confession was introduced at his trial, and he was convicted.<sup>68</sup>

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AND DEVELOPMENTS 1982–1983, at 153, 156 (Jesse H. Choper et. al. eds., Nat’l Practice Inst. 1984); Erickson, *supra* note 25, at 292.

55. *Edwards*, 451 U.S. at 478.

56. *Id.*

57. *Id.*

58. *Id.* at 478–79.

59. *Id.* at 479.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 480. Actually, he was tried twice and convicted both times. On the day his new trial was to begin, Edwards pled guilty in return for a fifteen year sentence. Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 460 n.62 (1987).

Edwards argued that his *Miranda* rights had been violated when the police officers interrogated him after he had invoked his right to counsel, and the Supreme Court agreed:

[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. . . . [A]n accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police.<sup>69</sup>

Such a rule ensures that the police do not badger a defendant who has indicated his desire for the aid of an attorney “into waiving his previously asserted *Miranda* rights.”<sup>70</sup>

Thus in *Edwards*, the Court adopted more stringent protection when a suspect invokes the right to counsel than when the suspect invokes “only” the right to remain silent.<sup>71</sup> A suspect’s right to

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69. *Edwards*, 451 U.S. at 484–85. For an understanding of the issue of initiation and waiver, see *Oregon v. Bradshaw*, 462 U.S. 1039, 1045–46 (1983).

70. See *Michigan v. Harvey*, 494 U.S. 344, 350 (1990).

71. Some find this anomalous. The Fifth Amendment guarantee against self-incrimination fundamentally protects the right to remain silent. The right to counsel is guaranteed prophylactically to preserve the right to remain silent. The Court has pointed to a number of reasons for providing more protection to the invocation of the right to counsel than the right to remain silent. For example, a suspect’s request to remain silent does not imply that he would be unwilling to speak on a different subject at a different time. (As I say to my students, partly in jest, perhaps the suspect simply has a sore throat at that moment.) Invoking the right to counsel, however, evidences the suspect’s belief that he is incapable of facing the power of the state without the countervailing weight of an attorney on his side. This perceived need for the assistance of counsel would not likely change over time, or vary depending on the offense. Interestingly, after *Davis*, there has been one “coming together” of the rules on invoking the right to silence versus the right to counsel. Many courts have adopted the *Davis* rule, holding that to invoke the *Miranda* right to remain silent, a suspect must invoke the right unambiguously. See, e.g., *Whitaker v. State*, 71 S.W.3d 567, 572 (Ark. 2002) (finding that silence must be invoked unambiguously and unequivocally); *Owen v. State*, 862 So. 2d 687, 692 (Fla. 2003) (applying the *Davis* rule when a defendant waives his *Miranda* rights); *State v. Greycull*, 1998 ND 102, ¶ 17, 579 N.W.2d 161, 163 (applying the *Davis* “clear articulation rule”); *State v. Murphy*, 747 N.E.2d 765, 778–79 (Ohio 2001) (deeming ambiguous, “I’m ready to quit talking now and I’m ready to go home, too”); *State v. Hassell*, 2005 WI App 80, ¶ 18–19, 280 Wis. 2d 637, ¶ 18–19, 696 N.W.2d 270, ¶ 18–19 (finding “I don’t know if I should speak to you” ambiguous for a right to remain silent); *State v. Ross*, 552 N.W.2d 428, 429–30 (Wis. Ct. App. 1996). *But see* *State v. Strayhand*, 911 P.2d 577, 592 (Ariz. Ct. App. 1995) (rejecting the *Davis* application to the right to

remain silent had to be “scrupulously honored” and the passage of time (even as short as a couple hours) could allow subsequent attempts to re-interrogate.<sup>72</sup> A suspect’s assertion of the right to counsel, however, seemingly operates as an absolute bar to any further police-initiated interrogation in the absence of counsel. Fresh warnings, the passage of time, questioning on a new crime, and evidence of voluntariness in responding to questions are all irrelevant and do not overcome the presumption that any subsequent waiver is invalid.<sup>73</sup> *Edwards* adopted a prophylactic, seemingly bright-line rule: once a defendant asserts the right to an attorney, all questions must cease unless counsel is present or the defendant himself initiates the conversation and waives his rights.<sup>74</sup>

Of course, even bright-line rules inevitably prove ambiguous. Almost immediately, challenges were brought to clarify the precise scope of the *Edwards* ban on subsequent interrogations.<sup>75</sup> In virtually every post-*Edwards* decision, the Court reaffirmed the vitality of the bright-line rule against police-initiated interrogations once a suspect invokes his right to counsel. For example, the Court rejected an attempt to make the *Edwards* rule offense-specific when it declared that *Edwards* bars police-initiated conversations and waivers even for a separate, unrelated offense.<sup>76</sup> Moreover, the Supreme Court also held that a suspect’s opportunity to consult with an attorney does not open the door to future police-initiated interrogations.

In context, the requirement that counsel be ‘made available’ to the accused refers not to the opportunity to consult with an attorney outside the interrogation room, but to the right to have the attorney present during custodial interrogation . . . .<sup>77</sup>

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remain silent). *See generally* *Burket v. Angelone*, 208 F.3d 172, 200 (4th Cir. 2000) (stating that the Seventh, Fifth and Eighth Circuits rely on *Davis* but that the Fourth Circuit has yet to decide).

72. *Michigan v. Mosely*, 423 U.S. 96, 104 (1975).

73. *See Edwards*, 451 U.S. at 484–85, 487.

74. *Id.* at 484–85.

75. *See infra* notes 80–85 and accompanying text.

76. *Arizona v. Roberson*, 486 U.S. 675 (1988).

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

... Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.<sup>78</sup>

In all of these cases, the Court was concerned with preserving the clear, bright-line nature of the *Edwards* decision.<sup>79</sup>

But perhaps the most significant question about the reach of *Edwards* concerns the very essence of the rule: what actually constitutes an invocation of counsel?<sup>80</sup> After *Edwards*, the lower courts were split among three different approaches. Some courts held that if a suspect made any request that could be construed as a request for counsel, ambiguous or not, the police were required to stop questioning the suspect immediately.<sup>81</sup> Other courts took the opposite position: police officers could ignore any ambiguous request for an attorney, and needed to cease questioning only if and when the request became a clear, unequivocal one.<sup>82</sup> Finally, most courts took a middle approach: when faced with an ambiguous request for counsel, the police could only ask questions to clarify the

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78. *Id.* at 153.

79. One issue the Court has yet to decide on *Edwards* concerns its duration. The *Edwards* rule seems permanent—once a suspect invokes the right to an attorney, the police may not approach to interrogate the suspect on any offense. *See Edwards*, 451 U.S. at 484–85. Taken literally, this would mean the police are barred from ever re-approaching a suspect—even years or decades later, even after he has served his time on the initial offense for which he invoked the right. Most assume that *Edwards* cannot be taken so literally, but no clear limiting point has been established by the courts. In 1992, the Supreme Court granted certiorari on a case that would provide guidance on this issue, but certiorari was dismissed when the defendant in the case died. *United States v. Green*, 504 U.S. 908 (1992), *cert. dismissed*, 507 U.S. 545 (1993) (*per curiam*). *See generally* Strauss, *supra* note 18.

80. *See generally* Timothy J. Yuncker, Note, *Davis v. United States: The Unambiguous Decline of Ambiguous Requests for Counsel During Custodial Interrogation*, 4 WIDENER J. PUB. L. 711 (1995) (discussing the quandary faced by judges, prosecutors and defense attorneys prior to *Davis*). Unlike the Sixth Amendment right to counsel, the *Miranda* “right to counsel” must be invoked. *See McNeil v. Wisconsin*, 501 U.S. 171, 171 (1991); *Michigan v. Jackson*, 475 U.S. 625, 632 (1986). Of course, even calling the *Miranda* right a “right to counsel” is a misnomer. As I tell my students, the police never have to provide you with an attorney under *Miranda*, even if you request one. They just can’t question you if they do not provide you with one.

81. *See, e.g., Maglio v. Jago*, 580 F.2d 202, 205 (6th Cir. 1978). These courts found support in the language of *Miranda* itself, which indicated that a right to counsel is triggered whenever a person in custody “indicates in any manner . . . that he wishes to consult with an attorney.” *Id.* (emphasis added) (citing *Miranda v. Arizona*, 384 U.S. 436, 445 (1966)).

82. *See People v. Kendrick*s, 459 N.E.2d 1137, 1140 (Ill. App. Ct. 1984) (citation omitted); *State v. Moore*, 744 S.W.2d 479, 481 (Mo. Ct. App. 1988) (citation omitted).

suspect's desire for counsel.<sup>83</sup> If the suspect then unambiguously indicated a desire for counsel, the police had to cease all questioning.<sup>84</sup> On the other hand, if the clarifying questions revealed a suspect's willingness to waive his rights, the interrogation could proceed.<sup>85</sup>

Although it acknowledged the split amongst the courts, the Supreme Court avoided resolving this issue for years. For example, in *Smith v. Illinois*,<sup>86</sup> the Court recognized that the lower courts had "conflicting standards for determining the consequences of such ambiguities"<sup>87</sup> but avoided directly confronting the issue because the decision below had to be "reversed irrespective of which standard is applied."<sup>88</sup> Thus, it was not until *Davis v. United States*<sup>89</sup>—almost thirty years after deciding *Miranda*—that the Court faced this critical question. What exactly triggers the protections set forth in *Miranda* and *Edwards*?

### C. Asserting the Right: *Davis v. United States*

On October 2, 1988, Robert Davis and Keith Shackleton, both members of the United States Navy, spent the evening playing pool at a club on the Charleston Naval Base.<sup>90</sup> Shackleton lost the game of pool and a thirty dollar wager on the game, which he refused to pay.<sup>91</sup> The next morning, Shackleton's body was found.<sup>92</sup> He had been beaten to death with a blunt object.<sup>93</sup>

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83. See, e.g., *United States v. March*, 999 F.2d 456, 461 (10th Cir. 1993); *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1472 (11th Cir. 1992) (citation omitted); *United States v. Gotay*, 844 F.2d 971, 975 (2d Cir. 1988); *United States v. Fouche*, 833 F.2d 1284, 1287 (9th Cir. 1987) (citation omitted); *United States v. Porter*, 776 F.2d 370, 370 (1st Cir. 1985); *Nash v. Estelle*, 597 F.2d 513, 517 (5th Cir. 1979); *United States v. Riggs*, 537 F.2d 1219, 1222 (4th Cir. 1976); *State v. Meade*, 963 P.2d 656, 664 (Or. 1998) (Durham, J., dissenting) (stating that the majority rule in most courts is the clarification approach); see also Gregory J. Griffith, Note, *The Supreme Court Limits the Fifth Amendment Right to Counsel by Requiring Clear Requests—Davis v. United States*, 84 K.Y. L.J. 197, 208 (1995–1996).

84. See cases cited *supra* note 82.

85. See *Nash*, 597 F.2d at 517 (citation omitted).

86. 469 U.S. 91 (1984).

87. *Id.* at 95.

88. *Id.* at 96 & n.3.

89. 512 U.S. 452 (1994).

90. *Id.* at 454.

91. *Id.*

92. *Id.*

93. *Id.*

The investigation gradually centered on Davis for a variety of reasons. Agents determined that Davis was at the club on the night of the incident.<sup>94</sup> They also learned that Davis did not report to his station the following morning and that Davis owned a pool cue which had a blood stain on it.<sup>95</sup> Additionally, people told the agents that Davis had admitted to committing the crime and had described details of the event which clearly suggested his participation in the killing.<sup>96</sup>

Davis's interrogation followed shortly thereafter, and the investigating agents read him his rights.<sup>97</sup> Davis waived these rights both orally and in writing.<sup>98</sup> After questioning went on for about an hour and a half, Davis said, "Maybe I should talk to a lawyer."<sup>99</sup> At this point the agents testified that:

We made it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, "No, I'm not asking for a lawyer," and then he continued on, and said, "No, I don't want a lawyer."<sup>100</sup>

After a short break, and after a re-reading of *Miranda* rights, the agent recommenced the interrogation.<sup>101</sup> About an hour later, Davis said that if he had killed Shackleton, he would have told someone.<sup>102</sup> When the agents confronted Davis with the evidence that he had indeed told people that he had killed Shackleton, Davis then said, "I think I want a lawyer before I say anything else."<sup>103</sup> At this point, the questioning ceased.<sup>104</sup>

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94. *Id.*

95. *Id.*

96. He was arrested at the Naval Hospital, where he had been held in the psychiatric ward since October 28, 1988. Thomas O. Levenberg, *Fifth Amendment—Responding to Ambiguous Requests for Counsel During Custodial Interrogations*, 85 J. CRIM. L. & CRIMINOLOGY 962, 972 (1995).

97. *Davis*, 512 U.S. at 454.

98. *Id.* at 455.

99. *Id.*

100. *Id.*

101. *Id.*

102. Levenberg, *supra* note 96, at 973.

103. *Id.*

104. *Id.*

At his court martial, Davis's motion to suppress the statements made during the interrogation was denied.<sup>105</sup> The statements were admitted, and Davis was convicted of unpremeditated murder and sentenced to life in prison.<sup>106</sup> After his conviction was affirmed up the military chain of appeals, the Supreme Court granted certiorari to finally decide how law enforcement officers should respond when faced with an ambiguous request for counsel during custodial interrogations.<sup>107</sup>

Justice O'Connor, writing for the majority, affirmed the decision of the United States Court of Military Appeals and held that, after a suspect knowingly and voluntarily waives his *Miranda* rights, law enforcement officers may continue questioning him unless he clearly and unequivocally requests an attorney.<sup>108</sup>

But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light

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105. *Davis*, 512 U.S. at 455.

106. *Id.*

107. *Id.* at 456.

108. *Id.* at 461–62. Given the fact that *Davis* involved an assertion of counsel by a suspect after he had already validly waived his rights, a number of courts have considered whether *Davis* is limited to the post-waiver situation. In other words, some courts have held that when a suspect, pre-waiver, ambiguously requests an attorney, the officer is limited to posing clarifying questions to establish a valid waiver. See, e.g., *Noyakuk v. State*, 127 P.3d 856, 869 (Alaska Ct. App. 2006) (“Thus, the *Davis* rule (that interrogating officers need not interrupt their questioning to clarify the suspect’s wishes) applies only to a post-*Miranda*-waiver setting.”); accord *State v. Leyva*, 951 P.2d 738, 743 (Utah 1997). In *Noyakuk*, for example, prior to waiving his rights, the defendant asked, “Shouldn’t I just have my attorney with me, or something?” 127 P.3d at 860–61. The court held that after an ambiguous invocation, the police officer is limited to posing clarifying questions in order to establish the validity of any subsequent waivers. See *id.* at 868. In this case, because the police officer simply explained the defendant’s rights without any suggestion that getting a lawyer would hurt or prejudice the defendant, the subsequent waiver of rights was valid. *Id.* at 871. On the other hand, the waiver was found invalid in *State v. Collins*, 937 So.2d 86, 89, 93 (Ala. Crim. App. 2005), because the police ignored the defendant, who asked how long it would take to get a lawyer. *Id.*; see also Harvey Gee, *When Do You Have to Be Clear?: Reconsidering Davis v. United States*, 30 Sw. U. L. REV. 381, 384 (2001) (arguing *Davis* only applies to post-waiver situations).

Other courts, however, have found that *Davis* applies at any state, pre or post waiver. In other words, at any point an ambiguous request for counsel can be ignored. See, e.g., *United States v. Brown*, 287 F.3d 965, 972–73 (10th Cir. 2002) (“If a suspect . . . is ambiguous . . . our precedents do not require the cessation of questioning.”); *United States v. Muhammad*, 120 F.3d 688, 697–98 (7th Cir. 1997) (“A defendant must unambiguously request the assistance of counsel . . . and thus prevent the interrogator from asking any further questions.”); *Ex Parte Cothren*, 705 So. 2d 861, 862–67 (Ala. 1997) (finding “I think I want to talk to an attorney before I answer that” ambiguous); *Moore v. State*, 903 S.W.2d 154, 158 (Ark. 1995) (declining to adopt a rule “requiring officers to ask clarifying question”); *In re Christopher K.*, 841 N.E.2d 945, 963–65 (Ill. 2005) (applying the *Davis* rule where “the suspect makes a reference to counsel immediately after he has been advised of his *Miranda* rights”).



of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning . . . .

Rather the suspect must unambiguously request counsel.<sup>109</sup>

The test for determining whether the request is ambiguous is an objective one.<sup>110</sup> "Although a suspect need not 'speak with the discrimination of an Oxford don,' . . . he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."<sup>111</sup>

In adopting this approach, the Court rejected the alternatives previously utilized by the lower courts. The stop and clarify approach was not mandated by *Miranda*. Although the Court recognized that it will often be good police practice to ask clarifying questions when a suspect makes ambiguous comments about an attorney, such a procedure is not required under *Miranda*.<sup>112</sup> The Court emphatically denounced the approach that any reference to counsel, ambiguous or not, constituted an invocation of *Edwards*. The Court held:

[I]f we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney . . . [p]olice officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong.<sup>113</sup>

Such an approach "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity."<sup>114</sup>

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109. *Davis*, 512 U.S. at 459.

110. *Id.* at 458–59 (citation omitted).

111. *Id.* at 459.

112. *Id.* at 461–62. It is a good practice because, after all, if the police officer is wrong in his assessment, and a court determines that the request was actually unambiguous, then the statement might be suppressed. Justice Souter, in his concurring opinion, held that police officers had an obligation to clarify ambiguous statements that could reasonably be understood as a request for counsel. *Id.* at 466 (Souter, J., concurring). He concurred because he believed that the police officers here sufficiently clarified Davis's desire to continue without an attorney before he made his incriminating statements. *Id.* Three other justices joined his opinion. *Id.*

113. *Id.* at 461 (majority opinion).

114. *Id.* at 460 (citing *Michigan v. Mosley*, 423 U.S. 96, 102 (1975)).

So did the police act appropriately here? Justice O'Connor accepted the lower court's conclusion that Davis's statement, "Maybe I should talk to a lawyer" was not a reasonably clear request for counsel.<sup>115</sup> Thus, the agents did not have to cease questioning Davis, and his subsequent statements were admissible in court.<sup>116</sup>

### III. THE ATTACK ON *DAVIS*: ARGUMENTS AGAINST THE COURT'S APPROACH

The Court's decision in *Davis* was roundly criticized by scholars and lawyers alike.<sup>117</sup> Critics made two main points. First, the decision eviscerated the "bright line" rule established in *Edwards* and introduced significant uncertainty into the process.<sup>118</sup> Second, and similarly, the decision has had a devastating impact on the right to counsel, since most people do not speak with perfect clarity normally, much less when in custody and being questioned by the police.<sup>119</sup> Many individuals, by virtue of their education, socio-economic background, gender or national origin are virtually "incapable of meeting such a standard [of linguistic clarity]."<sup>120</sup>

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115. *Id.* at 462. Although later courts heavily rely on this part of the decision, the court assumed without discussion that the statement was ambiguous. See *id.* ("The courts below found that petitioner's remark to the NIS agents—'[m]aybe I should talk to a lawyer'—was not a request for counsel, and we see no reason to disturb that conclusion."). The petitioner wanted to argue whether the statement "maybe I should talk to a lawyer" was ambiguous. The government argued that the issue was not properly before the court because it was not included within the questions that the Court granted certiorari to review. See Jane M. Faulkner, Note, *So You Kinda, Sorta, Think You Might Need a Lawyer?: Ambiguous Requests for Counsel After Davis v. United States*, 49 ARK. L. REV. 275, 296 n.134 (1996).

116. *Davis*, 512 U.S. at 462.

117. See, e.g., Wayne D. Holly, *Ambiguous Invocations of the Right to Remain Silent: A Post-Davis Analysis and Proposal*, 29 SETON HALL L. REV. 558 (1998); David Aram Kaiser & Paul Lufkin, *Deconstructing Davis v. United States: Intention and Meaning in Ambiguous Requests for Counsel*, 32 HASTINGS CONST. L.Q. 737 (2005); Peter M. Tiersma & Lawrence M. Solan, *Cops and Robbers: Selective Literalism in American Criminal Law*, 38 LAW & SOC'Y REV. 229 (2004); Sadeghi, *supra* note 10, at 313. Additionally, it was criticized by some lower courts. See, e.g., *State v. Hoey*, 881 P.2d 504, 522 (Haw. 1994) ("But we decline to adopt a rule requiring officers to ask clarifying questions.").

118. See, e.g., Holly, *supra* note 117, at 572–75.

119. See, e.g., Sadeghi, *supra* note 10, at 330–35.

120. Kaiser & Lufkin, *supra* note 117, at 756. Justice Scalia had little sympathy with this position. During oral argument, he rejected the petitioner's argument that the law must protect a suspect from his own inarticulateness by noting, "[w]e cannot run a system for idiots." Major Ralph Kohlmann, *Davis v. United States: Clarification Regarding Ambiguous Counsel Requests, and an Invitation to Revisit Miranda!*, ARMY LAW., Mar. 1995, at 27 n.18.

Thus, for those individuals, the *Davis* decision means foregoing the right to counsel.<sup>121</sup>

The purpose of this section is not to assess the merits of such claims or to analyze them in particular depth. The arguments against *Davis* have been thoroughly discussed in numerous law review articles.<sup>122</sup> Rather, the goal here is simply to set forth the major criticisms, because it is these arguments which will become the measuring sticks for the descriptive and empirical study of the actual effect of the *Davis* decision.

#### A. *The Introduction of Uncertainty*

One argument against *Davis* is that it creates too much uncertainty in an area where the court should be establishing clear rules to guide suspects, the police and the courts.<sup>123</sup> Obviously, clear rules serve several useful functions. They provide guidance to and limitations upon the police, which are essential in the area of interrogation, where vague, general rules may give the police significant leeway to wear down and persuade the accused to incriminate themselves.<sup>124</sup>

Additionally, precisely defined rules help guide the courts in determining the statements that should be properly suppressed. As a result, judicial resources that might otherwise be expended in distinguishing between difficult and subtle nuances concerning the admissibility of evidence are conserved.<sup>125</sup> Presumably, bright-line rules are more capable of being enforced equally across the board, without discretion or the possibility of abuse or bias.

Thus, the Supreme Court has often sung the praises of bright-line rules (as opposed to more nuanced approaches or totality of circumstances tests) and lauded the bright-line rule of *Edwards* governing the circumstances when police can reinstate interrogation. For example, the Court in *Minnick* noted that “[t]he merit of the *Edwards* decision lies in the clarity of its command and the certainty

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121. See, e.g., Sadeghi, *supra* note 10, at 330–35.

122. See *supra* notes 115–117 and accompanying text.

123. See Sadeghi, *supra* note 10, at 335 (“The concern for clarity and ease of application, however, remains unabated after the *Davis* decision . . .”).

124. Strauss, *supra* note 18, at 377.

125. *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990).

of its application.”<sup>126</sup> Likewise, in *Davis* the Court insisted that it was being consistent with the rule in *Edwards* and was preserving the “bright line” nature of that decision: “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 [as set forth in *Edwards*] would be lost.”<sup>127</sup>

Despite the Court’s assurances, however, numerous critics suggest that the holding in *Davis* is contrary to the goal of having clearly defined guidelines for the police, courts and suspects.<sup>128</sup> *Davis* certainly introduces a new ambiguity, and a potentially large hole in the bright-line rule of *Edwards*. The Court in *Davis* refused to define or to provide any significant guidelines for determining when a statement should be deemed unequivocal.<sup>129</sup> Thus, it was left to the lower courts to fill in the blanks and make such determinations. Obviously, one measure of the validity of *Davis* is the ability of the lower courts to do this with some degree of consistency between them. To the extent courts diverge, reaching different results on ostensibly similar statements, the interests of justice and fairness certainly seem to be perverted.<sup>130</sup>

### B. *The Effect on Subgroups in Society*

Justice O’Connor’s opinion for the Court in *Davis* recognized that ignoring all ambiguous requests might harm some suspects who want legal representation but are unable to clearly assert this desire.<sup>131</sup> Nonetheless, she dismissed this concern by holding that the “primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves.”<sup>132</sup>

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126. *Id.* Of course, time has shown that some of the seemingly clear aspects of *Edwards* are quite fuzzy indeed.

127. *Davis v. United States*, 512 U.S. 452, 461 (1994).

128. *See, e.g.*, Sadeghi, *supra* note 10; *supra* text accompanying note 10.

129. The only guideline: that the test was objective—how a reasonable police officer in this situation would have perceived the request. *Davis*, 512 U.S. at 459. As mentioned previously, there was no guidance provided by the application of the holding to the facts of the case. *See supra* note 115.

130. *See, e.g.*, *Smith v. Illinois*, 469 U.S. 91, 95–96 & n.3 (1984) (“[C]ourts have developed conflicting standards for determining the consequences of such ambiguities.”).

131. *Davis*, 512 U.S. at 460.

132. *Id.*

Justice Souter concurred, but expressed more concern about the ability of disadvantaged groups to invoke their rights under *Davis*:

[C]riminal suspects . . . “thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures” . . . would seem an odd group to single out for the Court’s demand of heightened linguistic care. A substantial percentage of them lack anything like a confident command of the English language . . . many are “woefully ignorant” . . . and many more will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that the ability to speak assertively will abandon them.<sup>133</sup>

Numerous scholars have argued and documented a concern that the *Davis* rule will have a disproportionate effect on females and ethnic and cultural minorities.<sup>134</sup> As Professor Yale Kamisar noted, referring to an article written by Professor Janet Ainsworth, “sociolinguistic research indicates that certain segments of the population—women, African-Americans, immigrants from Eastern Europe—are far more likely than other groups to avoid strong, assertive means of expression and to use indirect and hedged speech patterns that give the impression of uncertainty or equivocality.”<sup>135</sup> Professor Ainsworth specifically stated:

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

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133. *Id.* at 469–70 (citation omitted).

134. *See, e.g.,* Kaiser & Lufkin, *supra* note 117, at 756 n.69 (“[T]he actual linguistic practices of many women and minorities preclude them from meeting the standard of clarity demanded by *Davis*.”).

135. *Constitutional Law Conference Addresses Supreme Court’s 1993–94 Term*, 56 CRIM. L. REP. 1068–69 (1994).

using speech patterns that the law currently refuses to recognize.<sup>136</sup>

Thus, for example, women and minorities are more likely to use “hedges” like “I think I want to see a lawyer,” or modal verbs like “maybe” I want a lawyer, or to use political language like, “I might want a lawyer if possible.”<sup>137</sup>

The fact that certain groups might be incapable of expressing their desire for counsel with the sufficient clarity to invoke *Edwards* has two implications. First, it simply seems unfair to adopt a rule that makes it “easier” for middle-class, Caucasian males to assert their right than others.<sup>138</sup> Second, after *Davis*, the fact that segments of society speak in indirect, ambiguous patterns means a large loss of constitutional protection during interrogation. As Professor Clarke noted: “The real world repercussions of such a bias [between speech patterns of Caucasian males and others] are by no means inconsequential. If minorities are indeed disadvantaged by this doctrine [the *Davis* rule], then the law has compromised the ability of millions of arrestees to exercise their constitutional rights.”<sup>139</sup> Essentially, *Davis* denies protection to those who are least able to protect themselves. Presumably, the experienced criminal who understands his rights and how to exercise them properly benefits much more from this approach than the young, intellectually challenged, weak, culturally oppressed and possibly innocent.

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136. Ainsworth, *supra* note 11, at 261; see also Adam G. Finger, Comment, *How Do You Get a Lawyer Around Here? The Ambiguous Invocation of a Defendant's Right to Counsel Under Miranda v. Arizona*, 79 MARQ. L. REV. 1041, 1061 (“The use of an indirect method of speech is preferred in Asian society and is considered sophisticated. Furthermore, . . . ideas are believed best communicated without being explicitly stated. Transferring this idea into a context similar to *Davis*, it is easy to see how this cultural pressure and indirect method of speech would inhibit a direct and unequivocal invocation of the right to counsel.”); Young, *supra* note 9, at 157–58 (discussing *Davis*'s disproportionate impact on women as a result of gender-biased jurisprudence).

137. See, e.g., Tiersma & Solen, *supra* note 117, at 250 (“Another method of hedging is to use verbs that express the speaker's mental state (‘I think’ or ‘I believe’).”).

138. See, e.g., Clarke, *supra* note 10, at 822 (“[I]t represents indifference to our cultural differences . . . ‘we will accord you the protection of our laws, so long as you think and act as we do.’”).

139. *Id.* at 821.

IV. THE AFTERMATH OF *DAVIS*:  
A DESCRIPTIVE AND EMPIRICAL LOOK AT SUBSEQUENT CASES

These criticisms prophesied that *Davis* would have a devastating effect on the right to counsel during custodial interrogations guaranteed in *Miranda*.<sup>140</sup> Now that over ten years has passed since *Davis* was decided, it is time to move from prediction to evaluation. How have the courts interpreted *Davis*? Do court decisions demonstrate the validity of these concerns or show them to be overstated? Has *Davis* proven to be the “final death-blow for *Miranda*,” as one writer put it,<sup>141</sup> or simply a minor setback, or indeed, no setback at all?

This section attempts to answer these questions by surveying every state and federal court decision since *Davis*.<sup>142</sup> In researching this article, I examined all the criminal cases, both state and federal, that referred to the *Davis* decision. Minnesota,<sup>143</sup> Hawaii,<sup>144</sup> New Jersey<sup>145</sup> and West Virginia<sup>146</sup> do not follow the *Davis* approach. The highest court in each of these states has found that the state constitution provides greater rights to a suspect than does the federal Constitution.<sup>147</sup> Thus, those states utilize the so-called clarification approach: upon any clear or equivocal request for counsel, the police must cease all questioning and seek clarification of the suspect's

140. See sources cited *supra* note 10.

141. Clarke, *supra* note 10, at 819.

142. The number of cases obviously varied by state, but not predictably. For example, while California had thirty-six decisions, Tennessee had eleven, New York had only two, and Pennsylvania had no relevant cases.

143. *State v. Risk*, 598 N.W.2d 642, 648–49 (Minn. 1999).

144. *State v. Wallace*, 94 P.3d 1275, 1286 (Haw. 2004); *State v. Hoey*, 881 P.2d 504, 522 (Haw. 1994).

145. *State v. Chew*, 695 A.2d 1301, 1318 (N.J. 1997).

146. See *State v. Farley*, 452 S.E.2d 50, 59 n.12 (W. Va. 1994).

147. In a few other states, the law seems unclear. See, e.g., *State v. Meade*, 963 P.2d 656, 659–60 (Or. 1998) (when request for counsel is equivocal, police may follow up with questions intended to clarify if suspect meant to invoke that right). Compare *State v. Jones*, 6 P.3d 58, 61 (Wash. Ct. App. 2000) (not following *Davis*), with *State v. Walsh*, No. 21878-0-II, 1998 Wash. App. LEXIS 1561, at \*10 (Nov. 6, 1998) (following *Davis*). Some caselaw suggests that Montana does not follow *Davis*. See, e.g., *State v. Spang*, 2002 MT 120, ¶ 25, 310 Mont. 52, ¶ 25, 48 P.3d 727, ¶ 25 (holding that the Montana Constitution provides a broader right to counsel than federal law, but not suggesting that *Davis* should be ignored and finding that the defendant's statement was ambiguous). Later decisions in Montana, however, have followed *Davis*. See, e.g., *State v. Maestas*, 2006 MT 101, ¶ 15, 332 Mont. 140, ¶ 15, 136 P.3d 514, ¶ 15.

request.<sup>148</sup> I included all cases decided over the past twelve years, except where the court did not make clear what the suspect said,<sup>149</sup> where the court did not decide the issue,<sup>150</sup> or where the defendant conceded that the statement was ambiguous and urged the court to reject *Davis*.<sup>151</sup>

Admittedly, there are certain limitations to the approach I've taken. By limiting the analysis to actual court decisions, I fail to consider the thousands of custodial interrogations that never make their way to suppression motions, much less to published opinions, simply because no charges are brought or because the defendant pleads guilty.<sup>152</sup> It may be true that socially and economically disadvantaged persons are most likely to be represented by public defenders,<sup>153</sup> and are most likely to plea bargain and hence, avoid trial and evidentiary motions.<sup>154</sup> Thus, the actual effect of the *Davis* rule upon these subclasses may not be accurately measured by the available data. Of course, this limitation is not self-imposed: there is

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148. *Wallace*, 94 P.3d at 1286; *Hoey*, 881 P.2d at 523. Florida follows *Davis*, but adds a twist under the state constitution:

If, at any point during custodial interrogation, a suspect asks a clear question concerning his or her rights, the officer must stop the interview and make a good-faith effort to give a simple and straightforward answer. To do otherwise—i.e., to give an evasive answer, or to skip over the question, or to override or “steamroll” the suspect—is to actively promote the very coercion [that *Miranda*] was intended to dispel. A suspect who has been ignored or overridden concerning a right will be reluctant to exercise that right freely. Once the officer properly answers the question, the officer may then resume the interview (provided of course that the defendant in the meantime has not invoked his or her rights). Any statement obtained in violation of this proscription violates the Florida Constitution and cannot be used by the state.

*Almeida v. State*, 737 So. 2d 520, 525 (Fla. 1999); see also *Bean v. State*, 752 So. 2d 644, 648 (Fla. Dist. Ct. App. 2000).

149. See, e.g., *People v. Kuklinski*, 805 N.Y.S.2d 729 (App. Div. 2005); *People v. Jones*, 799 N.Y.S.2d 783 (App. Div. 2005).

150. See, e.g., *State v. Livi*, No. 41316, 1998 Wash. App. LEXIS 1159, at \*9–10 (Aug. 3, 1998) (assuming that “I want to speak to an attorney” is unequivocal, and concluding that admission of the incriminating statements was harmless error).

151. See, e.g., *State v. Huertas*, No. 40410, 1998 Wash. App. LEXIS 1049, at \*7 (July 13, 1998).

152. See Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1450 (2005) (citing Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics* tbls.5.17 & 5.46 (2002) (stating that over 95 percent of criminal defendants never go to trial)).

153. *Id.* at 1453–54.

154. See, e.g., Joseph S. Hall, Note, *Guided to Injustice?: The Effect of the Sentencing Guidelines on Indigent Defendants and Public Defense*, 36 AM. CRIM. L. REV. 1331, 1358 (1999) (stating that under Federal Sentencing Guidelines, “indigent defendants are forced into accepting a greater percentage of pleas”).



no way to collect data about the thousands of interrogations that never proceed to trial, either because the suspect is not charged, the suspect pleads guilty, the interrogation yields no salient information, or there is no challenge to the interrogation procedures.<sup>155</sup>

Perhaps most problematic is the fact that clear, obvious, unambiguous assertions of counsel may never make their way into published opinions. In these cases, the police presumably honor the request for counsel, cease questioning, and no *Miranda* issues are presented. Or conversely, if the police did not honor the request, most prosecutors, recognizing that they will likely lose a suppression motion, may be tempted to offer an attractive deal, rather than take a chance in the courtroom. Alternatively, the prosecutor may elect not to use a statement elicited in clear violation of *Miranda*, and thus no litigation concerning the statement occurs. The bottom line is that presumably, most cases in which a suspect unequivocally requests counsel never show up in published or even unpublished opinions. Thus, there is simply no way to assess the ethnicity, gender, or cultural background of the suspects making such clear, obvious requests.

Nonetheless, there is still some value in considering the cases that are available. First, they demonstrate how courts are actually interpreting the *Davis* requirement that suspects must unequivocally request counsel. Second, these cases provide important insight into the manner in which a wide variety of suspects are phrasing potential requests for counsel. It is likely that at least in some, if not many of these cases, the suspect *was* attempting to request counsel. Perhaps in the majority of them, the suspect was at least confused and unsure about whether to request an attorney. So how are suspects communicating such feelings?

### *A Descriptive Framework for the Caselaw*

#### 1. Ambiguous Requests

After studying all the state and federal cases, the “requests” for counsel that courts typically deem ambiguous can be categorized in seven different ways: (1) questions concerning a lawyer; (2) comments regarding a lawyer; (3) requests that are conditioned on a

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155. See *supra* notes 152–154 and accompanying text.

further event occurring; (4) requests that use modal verbs like “maybe,” “might,” or “could”; (5) hedges like “I think,” or “I guess”; (6) requests that seem explicit but become ambiguous in context; and (7) comments that are incoherent.<sup>156</sup>

*a. Questions concerning a lawyer*

The most common type of purported request for counsel occurs when the suspect asks a question about the right to a lawyer.<sup>157</sup> Suspects’ most frequently asked question is, “Do you think I need a lawyer?”<sup>158</sup> Other questions involve timing. A suspect may ask when a lawyer would be appointed and whether it would be immediate;<sup>159</sup> whether the lawyer is provided at no cost,<sup>160</sup> how a

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156. There is some overlap between these categories. For example, the defendant may ask a conditional question or a question that uses a modal verb like “maybe.” They may also make an incoherent comment about a lawyer.

157. These may include statements that become questions because of intonation—the voice is raised at the end in typical question format. So a suspect who says, “I can have an attorney now,” but whose voice pattern makes it appear as a question, may turn what seems like an unambiguous demand into one more equivocal. Since I reviewed transcripts or summaries in court decisions, it is not always clear how the question mark came to be included at the end of the defendant’s “statement.”

158. See *Mueller v. Angelone*, 181 F.3d 557, 573 (4th Cir. 1999) (“Do you think I need an attorney here?”); *Deere v. State*, No. CACR96-1188, 1997 Ark. App. LEXIS 434, at \*2 (June 4, 1997) (“Do I need that lawyer or anything right now?”); *People v. Marks*, No. B145935, 2001 Cal. App. Unpub. LEXIS 2224, at \*3, \*12–13 (Oct. 29, 2001) (“Do I need an attorney in this case? I don’t have no attorney to back me up or nothing.”); *State v. Doe*, 50 P.3d 1014, 1020 (Idaho 2002) (mother asked if son needed lawyer); *State v. Walker*, 80 P.3d 1132, 1138 (Kan. 2003) (“[D]o I need to get a lawyer?” (alteration in original)); *State v. Ninci*, 936 P.2d 1364, 1379 (Kan. 1997) (“I don’t know, do I need to have a lawyer right now?”); *Ragland v. Commonwealth*, Nos. 2002-SC-0388-MR, 2003-SC-0084-TG, 2004 Ky. LEXIS 284, at \*26 (Nov. 18, 2004) (“Do I need to get an attorney for this because I’m really concerned?”); *State v. Lockhart*, 2003 ME 108, ¶ 11, 830 A.2d 433, 440 (“[S]hould I talk to a lawyer?”); *State v. Greybull*, 1998 ND 102, ¶ 9, 579 N.W.2d 161, 162 (“Do I have to get a lawyer? Do I need to get a lawyer . . . [?]”); *State v. Bruhn*, No. 03CA008364, 2004 Ohio App. LEXIS 1855, at \*6 (Apr. 28, 2004) (“Should I get one?”); *McHam v. State*, 2005 OK CR 28, ¶ 29, 126 P.3d 662, 671 (Okla. Crim. App. 2005) (“This is a murder case. Don’t I need a lawyer?”); *State v. Denton*, No. E2000-02615-CCA-R3-CD, 2003 Tenn. Crim. App. LEXIS 907, at \*6 (Oct. 28, 2003) (“Shouldn’t I have a lawyer[?]”); *Belcher v. State*, No. E1999-02287-CCA-R3-PC, 2001 Tenn. Crim. App. LEXIS 803, at \*12–13 (Oct. 10, 2001) (“[D]o I need, do I need, should I have my lawyer here? I don’t know. I, I don’t know.”); *State v. Ledford*, No. E1999-00917-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 656, at \*30 (Aug. 28, 2000) (“Don’t I need to talk to a lawyer?”). *But see Mitchell v. State*, 1994 OK CR 70, ¶ 2, 884 P.2d 1186, 1193 (Okla. Crim. App. 1994) (holding that under some circumstances, the question, “Do I need an attorney?” could amount to a request for counsel if the defendant is young, inexperienced, of low intelligence, mentally disabled or overwhelmingly upset).

159. See *United States v. Orsinger*, Nos. 03-10500, 03-10709, 2005 U.S. App. LEXIS 12985, at \*2 (9th Cir. June 27, 2005) (“Yo, [w]hen do I get a lawyer[?]”); *Paulino v. Castro*, 371 F.3d 1083, 1086 (9th Cir. 2004) (holding that the statements “Where’s the attorney? . . . You mean it’s gonna take him long to come?” could be construed as questions on the availability of a lawyer,

lawyer is obtained;<sup>161</sup> or simply question the right to an attorney.<sup>162</sup>

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rather than assertions of the defendant's objective desire for a lawyer at that time); *United States v. Doe*, 170 F.3d 1162, 1164 (9th Cir. 1999) ("What time will I see a lawyer?"); *United States v. Lux*, 905 F.2d 1379, 1382 (10th Cir. 1990) (the defendant asked how long it would take if she wanted to get a lawyer, and if she would have to stay in jail while she waited for a lawyer); *People v. Johnson*, No. CO36585, 2001 Cal. App. LEXIS 538, at \*4 (Dec. 20, 2001) ("How long will it take for me to get a lawyer down here?"); *State v. Saunders*, No. CR9798074S, 2000 Conn. Super. LEXIS 484, at \*8 (Feb. 22, 2000) (finding that the question "When does my lawyer come down here?" does not constitute a request for counsel); *State v. Henry*, 44 P.3d 466, 471 (Kan. 2002) ("Do I need to talk to a lawyer? . . . If I want to talk to a lawyer, is there one here?"); *State v. Hickles*, 929 P.2d 141, 146 (Kan. 1996) ("Is this when I get an attorney?"); *State v. Ash*, 611 S.E.2d 855, 861 (N.C. Ct. App. 2005) ("Now? Where's my lawyer at?"); *Tuttle v. State*, No. 72,387, 1997 Tex. Crim. App. LEXIS 87, at \*28–29 (Nov. 5, 1997) (finding that "when can I get an attorney?" is an ambiguous statement).

160. See, e.g., *Lord v. Duckworth*, 29 F.3d 1216, 1218 (7th Cir. 1994) ("I can't afford a lawyer but is there any way I can get one?").

161. See *Smith v. State*, 499 S.E.2d 663, 668 (Ga. Ct. App. 1998) ("[S]o if I want an attorney right now, what do I do?" (alteration in original)); *Goodner v. State*, 714 N.E.2d 638, 640 (Ind. 1999) ("But how can I get a lawyer, I can't get none this fast."); *Rocha v. State*, Nos. 14-02-00653-CR, 14-02-00654-CR, 2003 Tex. App. LEXIS 1381, at \*11 (Tex. App. Feb. 13, 2003) ("The lawyer, how can you have one? Does one have to look for one, or does the government or—I don't know."); *Saldana v. State*, 59 S.W.3d 703, 710 (Tex. App. 2001) ("If I wanted a lawyer, where would a lawyer come from?"); *Maley v. State*, No. 01-93-01129-CR, 1996 Tex. App. LEXIS 3099, at \*22–23 (July 18, 1996) (describing various general questions about whether the suspect needed a lawyer).

162. *United States v. Younger*, 398 F.3d 1179, 1187 (9th Cir. 2005) ("[B]ut, excuse me, if I am right, I can have a lawyer present through all this, right?"); *Dormire v. Wilkinson*, 249 F.3d 801, 803 (8th Cir. 2001) ("Could I call my lawyer?"); *People v. Crittenden*, 885 P.2d 887, 908 (Cal. 1994) ("Did you say I could have a lawyer?"); *People v. Torres*, No. B159761, 2003 Cal. App. Unpub. LEXIS 7043, at \*7 (July 22, 2003) ("Can I have an attorney with me now?"); *People v. Salazar*, No. E031903, 2003 Cal. App. Unpub. LEXIS 6626, at \*7 (July 8, 2003) ("[I]s there any attorneys around?"); *People v. Barcheers*, No. D036109, 2001 Cal. App. LEXIS 279, at \*9 (Jan. 3, 2001) ("Don't I get to speak with an attorney?"); *State v. Anonymous*, 694 A.2d 766, 774–75 (Conn. 1997) (reversing the trial court's decision and holding that "Do I still have a right to an attorney?" was ambiguous); *Stroup v. State*, 810 N.E.2d 355, 358 (Ind. Ct. App. 2004) ("How long would it be before I got a lawyer appointed?"); *State v. Anfinson*, No. 2-171/00-0511, 2002 Iowa App. LEXIS 708, at \*9 (July 3, 2002) ("Well what if I do want a lawyer? . . . Do I get one that I want?"); *State v. Brown*, 589 N.W.2d 69, 72 (Iowa Ct. App. 1998) ("Is my lawyer here?"); *Hickles*, 929 P.2d at 146 ("Is this when I get an attorney?"); *State v. Brown*, 100 Ohio St. 3d 51, 2003-Ohio-5059, 796 N.E.2d 506, ¶ 19 ("[D]on't I supposed to have a lawyer present[?]); *State v. Foster*, No. 2000-T-0033, 2001 Ohio App. LEXIS 5840, at \*23 (Dec. 21, 2001) ("Well, can I have a lawyer present?"); *Lucia v. State*, No. 10-04-00229-CR, 2005 Tex. App. LEXIS 7024, at \*2 (Aug. 24, 2005) ("I need a lawyer before I talk to you, right?"); *Herrera v. State*, No. 08-01-00152-CR, 2004 Tex. App. LEXIS 1703, at \*3 (Feb. 20, 2004) ("[W]hat about an attorney?"); *Loredo v. State*, 130 S.W.3d 275, 284 (Tex. App. 2004) ("Can I ask for a lawyer now?"); *Halbrook v. State*, 31 S.W.3d 301, 302–03 (Tex. App. 2000) ("Do I get an opportunity to have my attorney present?" before a breath test found ambiguous even though the defendant followed up with, "Why not? . . . Are you asking me to give evidence against myself without an attorney present?"); *Flores v. State*, 30 S.W.3d 29, 34 (Tex. App. 2000) ("Will you allow me to speak to my attorney before" deemed neither clear nor unequivocal); *Commonwealth v. Malvo*, 63 Va. Cir. 22, 25 (Va. Cir. Ct. 2003) ("Do I get to talk to my attorneys?"); *Monroe v. State*, 2006 WY 5, ¶ 5, 126 P.3d 97, ¶ 5 (Wyo. 2006) ("Are you going to get me a good attorney?").

In none of these cases are such questions deemed unequivocal requests for counsel.<sup>163</sup> Typically, courts dismiss such questions as mere queries about the role of attorneys, or as suspects' attempts to seek the advice of the police. Courts do not view these questions as unequivocal requests for counsel. For example, in *State v. Anfinson*,<sup>164</sup> the court held that the female suspect's inquiry about an attorney—"Well what if I do want a lawyer?"—was ambiguous because she may have been seeking advice from the officers rather than requesting counsel.<sup>165</sup> Another court concluded that a fourteen-year-old child's question, "Do I need a lawyer?" was not a sufficiently clear request for counsel because "[t]here is no indication respondent was incapable of simply saying 'I want a lawyer.'"<sup>166</sup>

The question, "Can I get a lawyer?" has received a more checkered reception. Many courts have found this type of question to be ambiguous, and a way of simply asking for clarification of one's rights.<sup>167</sup> The approach of other courts in finding it unambiguous will be considered below.<sup>168</sup>

#### *b. Statements or comments about a lawyer*

Similarly, courts have routinely characterized statements about a lawyer which do not specifically request the assistance of an attorney as ambiguous comments.<sup>169</sup> As one court noted, "[t]he mere mention of the word 'attorney' or 'lawyer' without more" is not enough to

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163. "It is undisputed that the statement 'do I need a lawyer?' is a request for advice and is not an unequivocal request for counsel." *State v. Dumas*, 750 A.2d 420, 424 (R.I. 2000); *see also Mueller*, 181 F.3d at 573 (finding ambiguous, "Do you think I need an attorney here?").

164. 2002 Iowa App. LEXIS at \*1.

165. *Id.* at \*9-11.

166. *People v. Christopher K. (In re Christopher K.)*, 841 N.E.2d 945, 949, 966 (Ill. 2005).

167. *See, e.g., Belcher v. State*, No. E1999-02287-CCA-R3-PC, 2001 Tenn. Crim. App. LEXIS 803, at \*12-14 (Oct. 10, 2001) ("[D]o I need, should I have my lawyer here?"); *Gutierrez v. State*, 150 S.W.3d 827, 832 (Tex. App. 2004) (finding ambiguous, "Can I have him present now?" after the defendant was read his right to an attorney); *accord State v. Wesley*, 96-1218, p. 4, p. 7 (La. App. 1 Cir. 3/27/97); 691 So. 2d 772, 774-75 ("Can I get me a lawyer before I can talk? Like the man said on that thing right there?"); *State v. Nixon*, 96-0134, p. 3, p. 6 (La. App. 1 Cir. 12/20/96); 687 So. 2d 114, 116-17 ("Can I get my lawyer?"); *Foster*, 2001 Ohio App. LEXIS 5890, at \*23-25 ("Well, can I have a lawyer present?").

168. *See infra* note 245 and accompanying text.

169. *See, e.g., Ledbetter v. Edwards*, 35 F.3d 1062, 1070 (6th Cir. 1994) (the defendant indicated that it would be "nice" to have an attorney present prior to giving his confession); *People v. Box*, 5 P.3d 130, 157 (Cal. 2000) ("[A]n attorney told me not to talk to anyone else." (alteration in original)); *People v. McDaniel*, 647 N.E.2d 266, 268-71 (Ill. 1995) (the defendant told police he would explain why he committed murder after he talked to a lawyer).

invoke the right to counsel.<sup>170</sup> Statements by the suspect that he has a lawyer,<sup>171</sup> or that his lawyer wants him to remain silent are not deemed invocation of the *Edwards* right.<sup>172</sup> For example, a seventy-five-year-old suspect's statement to police, "I called a lawyer. He wants—the lawyer wants to be here before I say anything" was held ambiguous, "reflect[ing] only that his attorney wished to be present during any questioning—not that [the defendant] himself wanted his attorney to be present."<sup>173</sup> In another case, a Ukrainian resident alien, for whom English was a second language, stated after being read his right to an attorney, "I can't—I can't afford it."<sup>174</sup> The court held that this comment was ambiguous and that the police were free to ignore it.<sup>175</sup>

Comments about the benefits of getting a lawyer<sup>176</sup> or about needing an attorney now or in the future<sup>177</sup> have also been held to be

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170. *Hankins v. State*, No. 14-95-01005-CR, 1997 Tex. App. LEXIS 5663, at \*6 (Oct. 23, 1997); *accord Jeffrey v. State*, No. 03-01-00202-CR, 2002 Tex. App. LEXIS 2714, at \*20–21 (Apr. 18, 2002) (finding that a mere reference to a lawyer is not enough to invoke the right to counsel).

171. *State v. Eby*, 37 P.3d 625, 628 (Idaho Ct. App. 2001) (finding the statement "I've got an attorney" ambiguous).

172. *See, e.g., People v. Tally*, 7 P.3d 172, 180 (Colo. Ct. App. 1999) ("I wanna talk to you, but I also, I don't wanna have an attorney come to me and tell me . . . this is not what I should've done."); *Alvarez v. State*, 890 So. 2d 389, 393 (Fla. Dist. Ct. App. 2004) (finding "Mr. Stanfield told me not to talk about the rest of this" ambiguous, especially when the defendant did not identify Stanfield as an attorney and police officers did not know and did not construe it as a request). *But see State v. Dagnall*, 596 N.W.2d 482, 484 (Wis. Ct. App. 1999) (finding that given all the circumstances, the statement "My lawyer told me that I shouldn't talk to you guys" was not ambiguous).

173. *State v. Baker*, 2005-Ohio-46, at ¶¶ 3, 34.

174. *State v. Linnik*, 12th Dist. No. CA2004-06-015, 2006-Ohio-880, ¶ 29.

175. *Id.* at \*11; *accord Braboy v. State*, 745 A.2d 471, 478–79 (Md. Ct. Spec. App. 2000) (holding "I want a lawyer *but* I can't afford a lawyer" ambiguous where the police officer explained that the defendant didn't have to talk if he wanted an attorney); *State v. Brown*, No. 03-3048-CR, 2005 Wisc. App. LEXIS 3, at \*5 (Wisc. Ct. App. Jan. 5, 2005) (stating that officers are not required to clarify an ambiguous request for counsel).

176. *See State v. Parker*, 886 S.W.2d 908, 918 (Mo. 1994) ("[I] ought to talk to an attorney"); *Murphy v. State*, No. 04-01-00544-CR, 2002 Tex. App. LEXIS 8164, at \*2 (Tex. App. Nov. 20, 2002) ("I don't know if I should talk to y'all without an attorney").

177. *See Dabney v. Giurbino*, No. 03-55882, 2005 U.S. App. LEXIS 27504, at \*2–3 (9th Cir. Dec. 12, 2005) (finding an inquiry if counsel would be appointed "in the long run" was ambiguous); *Moore v. State*, 528 S.E.2d 793, 794 (Ga. 2000) (finding that a comment about needing an attorney in the future was not a clear request for counsel); *Commonwealth v. Jones*, 786 N.E.2d 1197, 1206 (Mass. 2003) (finding that the statement "going to need a lawyer sometime" was merely a musing concerning the need for an attorney); *People v. Granderson*, 538 N.W.2d 471, 473 (Mich. Ct. App. 1995) (holding that "Yeah, I'm—I'm ah need that 'cause I can't afford none" was ambiguous after the officers talked about providing the defendant with an attorney if he could not afford one).

statements about the wisdom of having a lawyer and not a present desire for one. For example, according to one court, a suspect who said, "I'll be honest with you, I'm scared to say anything without talking to a lawyer," may have expressed his reservation about the wisdom of continuing the interrogation without counsel, but did not clearly communicate a desire to invoke the right to counsel.<sup>178</sup> Another suspect's comment, after being read his right to counsel, "Well I'm going to need one," was deemed ambiguous: "At best, a reasonable officer could have thought [the defendant] *might* be invoking the right to counsel."<sup>179</sup>

*c. Requests for the assistance of counsel for  
a limited purpose unrelated to interrogation  
or conditioned on another event happening*

Sometimes a suspect requests an attorney for a particular event or circumstance which thus far has not happened. For example, the suspect may say that he wants an attorney if he is being arrested or charged,<sup>180</sup> being forced to take a polygraph,<sup>181</sup> making a deal,<sup>182</sup> going to appear in a line up,<sup>183</sup> or going to sign or make a formal statement.<sup>184</sup> Courts do not deem such statements to be unambiguous requests for the assistance of counsel *during interrogation*.<sup>185</sup> Moreover, such requests typically are not a clear statement of a

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178. *Midkiff v. Commonwealth*, 462 S.E.2d 112, 114–15 (Va. 1995).

179. *State v. Tefft*, No. 1-99-35, 1999 Ohio App. LEXIS 6471, at \*7 (Ohio Ct. App. Sept. 2, 1999).

180. *See State v. Spears*, 908 P.2d 1062, 1071 (Ariz. 1996) ("You want to arrest me for stealing a car, then let me call a lawyer and I'll have a lawyer appointed to me . . ."); *People v. Burnfield*, 692 N.E.2d 412, 413 (Ill. App. Ct. 1998) ("If I'm going to be charged with rape[,] maybe I should talk to an attorney."); *Pritchett v. Commonwealth*, No. 1430-99-3, 2000 Va. App. LEXIS 807, at \*7–8 (Va. Ct. App. Dec. 12, 2000) (deeming "If I'm going to be arrested, I need an attorney" a conditional statement and not a clear, unambiguous request); *cf. State v. Fischer*, 2003 WI App. 5, ¶8, 259 Wis. 2d 799, ¶8, 656 N.W.2d 503, ¶8 (noting that the suspect stated that if the officers read him his rights, he would request an attorney).

181. *Jolley v. State*, 684 N.E.2d 491, 493 (Ind. 1997) (noting that defendant stated that if he was going to take a polygraph, he wanted a lawyer).

182. *State v. Walker*, 80 P.3d 1132, 1136 (Kan. 2003).

183. *State v. Lanos*, 14 S.W.3d 90, 92 (Mo. Ct. App. 1999).

184. *State v. Day*, No. 83138, 2004 Ohio App. LEXIS 1301, at \*10 (Ohio Ct. App. Mar. 25, 2004); *see also Walker v. State*, 707 So. 2d 300, 304 (Fla. 1997) (holding the statement "If you [get a stenographer to take down my statement], I want an attorney" ambiguous because it was conditioned on obtaining a stenographer (which did not occur)); *State v. Rogers*, No. CA2004-06-014, 2005 Ohio App. LEXIS 6001, at \*10 (Ohio Ct. App. Dec. 19, 2005) (holding that a suspect asking if he could "write this [confession] with a lawyer?" was ambiguous).

185. *See supra* notes 180–184.

present desire for an attorney during interrogation.<sup>186</sup> Thus, as the California Supreme Court noted in *People v. Gonzalez*,<sup>187</sup> when the defendant requested counsel if charged:

On its face, defendant's statement was conditional; he wanted a lawyer *if* he was going to be *charged*. The conditional nature of the statement rendered it, at best, ambiguous and equivocal because a reasonable police officer in these circumstances would not necessarily have known whether the condition would be fulfilled since . . . the decision to charge is not made by police. . . . Confronted with this statement, a reasonable officer would have understood only that "the suspect *might* be invoking the right to counsel," which is insufficient under *Davis* to require cessation of questioning.<sup>188</sup>

*d. Use of "modal verbs" like "maybe," "might," or "could"*<sup>189</sup>

As many scholars predicted, it is not that unusual for a person subjected to custodial interrogation to tentatively ask for the assistance of counsel.<sup>190</sup> Thus, saying "I might want a lawyer," is invariably labeled ambiguous. It simply reflects a possible, but not

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186. See *State v. Fortier*, No. CR-94-454, 1996 Me. Super. LEXIS 339, at \*3 (Me. Super. Ct. Oct. 16, 1996) (finding that "I've got to get an attorney" and "I've got to talk to an attorney" spoken at the fourth hour of interrogation was not clear evidence of present desire for attorney presence during interrogation); see also *Commonwealth v. Obershaw*, 762 N.E.2d 276, 284 (Mass. 2002) (noting that police inquired if the suspect would lead them to the body, but he asked if he could talk to a lawyer first); *State v. Picerno*, No. PI-02-3047B, 2004 R.I. Super. LEXIS 33, at \*68-71 (R.I. Super. Ct. Jan. 30, 2004) (citing *Connecticut v. Barrett*, 479 U.S. 523 (1987)) (holding that a defendant who requests counsel for a written statement does not invoke right to counsel in regard to oral statements); *Lemmons v. State*, 75 S.W.3d 513, 518, 520 (Tex. App. 2002) (finding "If you all would like to talk tomorrow or something, I would be more than willing to talk. But for the evening or until I can get a lawyer . . ." to just end interrogation that night and not invoke right to counsel).

Such a result is ironic in light of the facts of *Edwards*. There, the suspect said to the police, "I want an attorney before making a deal." Such a statement was deemed to be an invocation of the right to counsel. *Edwards v. Arizona*, 451 U.S. 477, 479, 487 (1981); cf. *State v. Genter*, 2003-1987, p. 35 (La. App. 4 Cir. 4/7/04); 872 So. 2d 552, 571 (finding that the statement "I already told you everything and if this is gonna [sic] continue I'll just wait for a lawyer" was ambiguous (alteration in original)).

187. 104 P.3d 98 (Cal. 2005).

188. *Id.* at 106 (quoting *Davis v. United States*, 512 U.S. 452, 459 (1994)).

189. Combined with question format, these statements are invariably deemed ambiguous. See *United States v. Posada-Rios*, 158 F.3d 832, 867 (5th Cir. 1998) (holding that the defendant's statement that she "might have to get a lawyer then, huh?" was ambiguous).

190. See discussion *supra* Part III.B.

unequivocal, desire for counsel. The suspect may or may not want a lawyer. The fact that the suspect *might* be invoking his rights is not sufficient under *Davis*.<sup>191</sup> Of course, such a result is predictable since in *Davis* the statement, “Maybe I should talk to a lawyer,” was deemed ambiguous by the lower courts, a finding the Supreme Court did not disturb.<sup>192</sup> Courts treat terms like “possibly” or “probably” as expressions of indecision rather than unequivocal demands for counsel.<sup>193</sup>

### *e. Hedges*

“Hedges” are “lexical expressions that function to attenuate the emphasis of a statement, or to make it less precise.”<sup>194</sup> Thus, a person may say “I think I want an attorney” or “I guess I would like an attorney,” rather than phrase the request more directly or

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191. See, e.g., *United States v. Zamora*, 222 F.3d 756, 765–66 (10th Cir. 2000) (finding “I might want to talk to my attorney” ambiguous); *People v. Morton*, No. G030535, 2003 Cal. App. Unpub. LEXIS 9554, at \*9–10 (Cal. Ct. App. Oct. 7, 2003) (noting suspect’s statement, where suspect asked, “Do I need an attorney present?”; investigator replied, “That’s gonna be up to you”; and then suspect said, “Well I probably should then,” was ambiguous); *Jordan v. State*, 480 S.E.2d 18, 21–22 (Ga. 1997) (finding “might need a lawyer” ambiguous); *People v. Burnfield*, 692 N.E.2d 412, 416–17 (Ill. App. Ct. 1998) (finding “maybe I should talk to an attorney” ambiguous); *Bailey v. State*, 763 N.E.2d 998, 1003 (Ind. 2002) (determining “I may need a what do you call it . . . a appointed . . . oh appointed attorney” was ambiguous); *State v. Morgan*, 559 N.W.2d 603, 608 (Iowa 1997) (finding “might need a lawyer” ambiguous); *State v. Chesson*, 2003-0606, p. 640 (La. App. 3 Cir. 10/1/03); 856 So. 2d 166, 173–75 (holding “I think I might should talk to an attorney” ambiguous); *State v. Cooper*, 36, 830, p. 8 (La. App. 2 Cir. 3/5/03); 839 So. 2d 995, 999 (noting that the “comment of the defendant’s father that they might want a lawyer later [fell] woefully short of an unambiguous request for counsel”); *People v. Tierney*, 703 N.W.2d 204, 221 (Mich. Ct. App. 2005) (finding “maybe I should talk to an attorney” to be ambiguous); *State v. Boggess*, 600 S.E.2d 453, 460 (N.C. 2004) (holding defendant’s statement “[I]f y’all going to treat me this way, then I probably would want a lawyer” was ambiguous); *State v. Bundy*, No. 02 CA 211, 2005 Ohio App. LEXIS 3092, at \*4, \*23 (Ohio Ct. App. June 24, 2005) (finding “I think I might want an attorney” ambiguous and noting that the police officer stopped interrogating defendant solely because he had to interrogate two other suspects); *Hernandez v. State*, No. 04-01-00271-CR, 2002 Tex. App. LEXIS 2183, at \*9–11 (Tex. App. Mar. 27, 2002) (determining “I might want to talk to my lawyer first” was ambiguous); *State v. Jennings*, 2002 WI 44, ¶36, 252 Wis. 2d 228, ¶36, 647 N.W.2d 142, ¶36 (finding “I think maybe I need to talk to a lawyer” was ambiguous).

192. *Davis*, 512 U.S. at 462. *But see infra* note 282 and accompanying text.

193. See, e.g., *State v. Neal*, No. 2000 CA 16, 18, 2002 Ohio App. LEXIS 6572, at \*25 (Ohio Ct. App. Dec. 6, 2002) (finding “I probably ought to talk to an attorney” was not an invocation of right to counsel); *State v. Ake*, C.C.A. No. 01C01-9603-CC-00094, 1997 Tenn. Crim. App. LEXIS 527, at \*20–21 (Tenn. Crim. App. June 6, 1997) (finding statement “I—probably need to get a lawyer, don’t I . . .” ambiguous).

194. Ainsworth, *supra* note 12, at 276. Ainsworth predicted that women use hedges more than men when in custodial interrogation settings because they are not used to demanding outright things they desire.



emphatically. Furthermore, use of the terms “I think” or “I guess” is usually, though not always, deemed ambiguous. This typically indicates that the person is contemplating making a request, but is not making a definitive one now.<sup>195</sup>

For example, the Ohio Supreme Court held that a suspect’s statement, “I think I need a lawyer,” is just as ambiguous as the statement made in *Davis*, “[m]aybe I should talk to a lawyer.”<sup>196</sup> According to the court, a suspect who uses the term “I think” is really reserving final judgment on the issue until another day.<sup>197</sup> Similarly, the court in *Baker v. State*<sup>198</sup> held that the suspect, who said, “I think I’m going to need one. I mean it looks like that,” made an equivocal request for counsel.<sup>199</sup> As the Court explained, “[t]his response [by Baker was] prospective, indicating Baker thought he might need an attorney at some time in the foreseeable future.”<sup>200</sup> Or, as another court explained, “[w]hen introduced by ‘I think,’ the meaning indicated a thought in process, but not yet concluded. The speaker was still considering or weighing the decision, was still testing alternatives.”<sup>201</sup>

Use of other terms such as “rather,” “like,” “feel” or “guess” have also caused courts to label certain statements ambiguous. In *State v. Mills*,<sup>202</sup> a suspect made several comments about a lawyer, including, “I’d rather have my attorney here if you’re going to talk stuff like that.”<sup>203</sup> The court concluded that, “while this statement

195. *Roberts v. Cohen*, No. 02-56105, 2004 U.S. App. LEXIS 24051, at \*6 (9th Cir. Nov. 18, 2004) (noting “Well I think I need a lawyer” was similar to the statement “Maybe I should talk to a lawyer” in *Davis*); *Clark v. Murphy*, 317 F.3d 1038, 1047 (9th Cir. 2003) (“There is simply not enough of a distinction between ‘maybe I should’ and ‘I think I would’ to say that in the former case there is no invocation of the right to counsel, but in the latter there is.”).

196. *State v. Henness*, 679 N.E.2d 686, 696 (Ohio 1997); *accord* *Burket v. Angelone*, 208 F.3d 172, 198 (4th Cir. 2000) (finding “I think I need a lawyer” equivocal); *People v. Powell*, 757 N.Y.S.2d 297, 298 (N.Y. App. Div. 2003) (finding “thought he would wait for a lawyer” equivocal “when viewed in context of the totality of circumstances, particularly with respect to events following the comment”) (citations omitted).

197. *See Clark*, 317 F.3d at 1049.

198. 214 S.W.3d 239 (Ark. 2005).

199. *Id.* at 242.

200. *Id.* at 243. This result is ironic given that the *Davis* court itself seemed to treat the statement “I think I want a lawyer before I say anything else” as unambiguous. 512 U.S. at 455, 462.

201. *Pritchett v. Commonwealth*, No. 1430-99-3, 2000 Va. App. LEXIS 807, at \*7 (Va. Ct. App. Dec. 12, 2000); *accord* *State v. Shifkowski*, 57 S.W.3d 309, 313 (Mo. Ct. App. 2001) (“I’m thinking about talking to an attorney.”).

202. No. CA96-11-098, 1997 Ohio App. LEXIS 5232 (Ohio Ct. App. Nov. 24, 1997).

203. *Id.* at \*20.

expresses appellant's preference for an attorney, it falls *short* of the unambiguous request for counsel described in *Davis*.<sup>204</sup> In *State v. Stover*,<sup>205</sup> the court seemed to rely on the term "like" to distinguish the statement made by the defendant from an unambiguous demand for an attorney.<sup>206</sup> The defendant, after making a number of statements about an attorney, said, "Well, I mean, I'd still like to have my lawyer here."<sup>207</sup> The court concluded that "a reasonable officer would have viewed it as a continuation of defendant's thinking aloud about whether he wanted his counsel present."<sup>208</sup> At best, a reasonable officer could have thought that defendant '*might* be invoking the right to counsel.'<sup>209</sup> Similarly, the comment, "I feel as though I should have an attorney" was deemed ambiguous, reflecting only a suspect's beliefs, not a request.<sup>210</sup>

Finally, the Indiana Supreme Court held that a suspect made an ambiguous request when he said, "I guess I really want a lawyer, but, I mean, I've never done this before so I don't know."<sup>211</sup> The court called the statement an "expression of doubt, not a request. A reasonable police officer in the circumstances would not understand that Taylor was unambiguously asserting his right to have counsel present."<sup>212</sup>

*f. Requests that become ambiguous by context.*<sup>213</sup>

Seemingly clear requests for counsel may become ambiguous when other factors are considered. For example, a court is likely to deem an unequivocal demand for counsel made prior to the initiation of the custodial interrogation as ambiguous and insufficient because

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204. *Id.* (emphasis added).

205. No. 96CA006461, 1997 Ohio App. LEXIS 1493 (Ohio Ct. App. Apr. 16, 1997).

206. *Id.* at \*7.

207. *Id.* at \*4.

208. *Id.* at \*8.

209. *Id.*

210. *Stemple v. State*, 2000 OK CR 4, ¶34-36, 994 P.2d 61, 69.

211. *Taylor v. State*, 689 N.E.2d 699, 702 (Ind. 1997).

212. *Id.* at 703. The court also found it relevant that the detective did not understand the statement as an assertion of the right to counsel. See discussion *infra* Part IV.A.2.c.

213. "All circumstances existing prior to the purported invocation can be used to help determine whether an accused unambiguously and unequivocally requested the presence of an attorney." *Valdez v. State*, 900 P.2d 363, 374 (Okla. Crim. App. 1995) (citing *Smith v. Illinois*, 469 U.S. 91, 98 (1984)).

it is anticipatory.<sup>214</sup> In other words, a suspect who says upon arrest, “I want an attorney,” but never repeats such a request hours later during questioning, after being read his *Miranda* rights, is not likely to be deemed to have invoked his *Miranda* or *Edwards* rights. Most courts, relying on Supreme Court dicta, have held that such a request should be deemed ambiguous and therefore can be ignored.<sup>215</sup> The suspect’s demand for an attorney could be for trial purposes, and not necessarily a request for assistance of counsel during interrogation.<sup>216</sup> Hence, the request becomes ambiguous.<sup>217</sup>

Even in the custodial interrogation setting, courts may deem unequivocal requests for counsel ambiguous because of context. A suspect’s clear assertion of his “rights” generally is not deemed an invocation of right to counsel. For example, in *Medley v. Commonwealth*, the suspect’s assertions that he “did not wish to waive [his] rights,”<sup>218</sup> and that he wanted “all of his rights,”<sup>219</sup> was held insufficient “to convey to police a clear and unequivocal request for counsel.”<sup>220</sup>

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214. See, e.g., *State v. Adams*, No. 2003-T-0064, 2005 Ohio App. LEXIS 317 (Ohio Ct. App. January 28, 2005) (holding that there was no *Edwards* effect where defendant invoked right to counsel during non-custodial interrogation). In *McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991), the Supreme Court noted in a footnote that “we have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than ‘custodial interrogation’ . . . . Most rights must be asserted when the government seeks to take the action they protect against.” *Id.* at 182 n.3. An “overwhelming number of federal courts have also held that a defendant cannot invoke his *Miranda* rights outside the context of custodial interrogation.” *People v. Villalobos*, 737 N.E.2d 639, 644 (Ill. 2000); see also *Saldivar v. State*, 980 S.W.2d 475, 488–90 (Tex. App. 1998) (the defendant did not invoke right to counsel during custodial interrogation, but during earlier hostage negotiation).

215. See *supra* note 214; see also *infra* notes 216–17.

216. *Gresham v. United States*, 654 A.2d 871, 874 (D.C. 1995).

217. See, e.g., *State v. Payne*, 2001-3196, p.10 (La. App. 2 Cir. 12/4/02); 833 So. 2d 927, 936. Even a more clear request, “I want an attorney during interrogation” could be ignored if not made in the context of a custodial interrogation, if the Supreme Court dicta against anticipatory invocations of rights becomes law. After all, accepting anticipatory invocations could mean that anyone could send a letter to the police department declaring his desire to always be questioned with an attorney present. The court would likely find that honoring such a request—much less keeping track of it—would be too onerous an imposition on the police. *But cf.* *People v. Obieke*, 712 N.Y.S.2d 919, 922 (Sup. Ct. 2000) (an invocation of the right to counsel when interrogation is imminent and the suspect is in custody is effective).

218. 602 S.E.2d 411, 418 (Va. Ct. App. 2004).

219. *Id.* at 421.

220. *Id.* at 417.

Moreover, a clear request for counsel that is mumbled or simply unheard by the police will not trigger the *Edwards* protections.<sup>221</sup> Thus, in *State v. Hullum*,<sup>222</sup> a suspect's invocation of counsel, which, according to a transcript of the taped interview, included the statement, "I believe for now I want to talk to a lawyer," was deemed ambiguous because the police officer credibly testified that he couldn't understand the defendant's mumblings.<sup>223</sup> When the officer asked what he said, and whether he wanted a lawyer, the suspect said, "No."<sup>224</sup>

Moreover, courts may deem a seemingly clear invocation ambiguous because it is inconsistent with a suspect's other statements or demeanor.<sup>225</sup> For example, a suspect might say, in the

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221. See, e.g., *State v. Lewis*, No. 03 MA 36, 2005 Ohio App. LEXIS 2550 (Ohio Ct. App. May 24, 2005) (describing a situation where the defendant claimed he asked for an attorney and that the police told him he couldn't have one; police insisted that they heard no such request; the trial court accepted police officer's version, and court of appeals deferred to lower court.). Of course, when there is no video or audio tape, it becomes a "swearing contest" between the defendant and the police officer, and a question of credibility for the trial court to resolve. Not surprisingly, these claims are almost invariably resolved in favor of the officer. See, e.g., *Diaz v. Senkowski*, 76 F.3d 61, 65 (2d Cir. 1996) (failing to consider a statement that the police officer claimed he did not hear); *People v. Kennedy*, No. 251372, 2005 Mich. App. LEXIS 471, \*2-4 (Mich. Ct. App. Feb. 22, 2005) (holding that the defendant's request to speak to his mom, his attorney and Detective Baker was ambiguous in context); *State v. Ward*, No. 9-99-39, 1999 Ohio App. LEXIS 5656 (Ohio Ct. App. Dec. 2, 1999); *State v. Bailey*, 677 A.2d 407, 410 (R.I. 1996); *State v. Brewster*, No. E2004-00533-CCA-R3-CD, 2005 Tenn. Crim. App. LEXIS 326 (Tenn. Crim. App. Jan. 25, 2005).

222. 43 P.3d 806 (Kan. 2002).

223. *Id.* at 809.

224. *Id.*; see also *State v. Maestas*, 2006 MT 101, ¶6, 332 Mont. 140, ¶6, 136 P.3d 514, ¶6 ("Now, give me a fucking lawyer 'cause I don't have to sit here and fucking put up with this bullshit, 'cause I ain't done nothin'. You can ask Jim, the owner, what time we left." The police officer then asked, "Do you want a lawyer?" and suspect said, "I don't need a lawyer. I ain't done nothin'. I don't need a lawyer."); *State v. Simmons*, 2000 MT 329, ¶7, 303 Mont. 60, ¶7, 15 P.3d 408, ¶7 (describing how at first the defendant replied "yes" when asked whether he wanted to have an attorney present during questioning, but later stated that he "[did] not wish to have an attorney present just for this part, no").

225. See, e.g., *People v. Marks*, No. B145935, 2001 Cal. App. Unpub. LEXIS 2224, at \*13 (Cal. Ct. App. Oct. 29, 2001). In *People v. Marks*, the court held that the statement "I really want to talk to my attorney, too, though" was ambiguous. *Id.* The "too" insertion shows that the suspect wanted to talk to both an attorney and the police. *Id.* Of course, this could be read as consistent with an *Edwards* assertion that the suspect wanted to talk to the police only in the presence of the attorney. However, the court did not choose to provide this construction. See *id.*; cf. *United States v. Acosta*, 363 F.3d 1141, 1144 (11th Cir. 2004) (suspect did not want to sign waiver, but said he would "collaborate" and "I can talk with you now"); *People v. Adams*, 627 N.W.2d 623, 626 (Mich. Ct. App. 2001) (holding that the defendant made an ambiguous, but limited, request for counsel, but said police could continue questioning on other issues: "I'm not going to answer that question 'till I have a lawyer present . . . But I'll answer—you can keep asking me questions and I'll answer the ones I feel I can answer for you.").

same sentence, “I want an attorney, but I don’t know . . . .”<sup>226</sup> Generally, these inconsistent (and perhaps incoherent) statements are deemed ambiguous. Thus, the California Court of Appeals held the following defendant’s statements equivocal when considered as a whole:

I want to cooperate with you 100 percent, but I think that a lawyer should be present if I’m really talking to you. . . . Because I don’t—you know, I’m willing to cooperate with you. . . . A hundred percent. . . . [The suspect sighed heavily, as if exhibiting indecisiveness.] I just don’t know, you know.<sup>227</sup>

In another case, the suspect, after being read his rights, responded with a willingness to talk *and* a desire for counsel: “I’ll give you some statements. . . . I would like to talk to an attorney.” The court found the statements inconsistent and thus ambiguous.<sup>228</sup> In another case, the Wyoming Supreme Court held the following statement equivocal: “I do want a lawyer, yes. But I mean, I do, I want to get this on the way. You know, . . . get this over with. Because I didn’t do what I’m being charged for.”<sup>229</sup>

Finally, another court found a suspect’s written statement, “yes,” next to the question, “Do you wish to have an attorney at this time?” to be ambiguous because she previously had agreed to speak to the police.<sup>230</sup> Additionally, the police officers testified that suspects sometimes put down “yes” because they had written “yes” to the previous two questions (i.e., questions dealing with whether the suspect had read the rights and whether the suspect understood those rights).<sup>231</sup> Thus, the police officers were justified in questioning the

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226. See, e.g., *Brewster*, 2000 Tenn. Crim. App. LEXIS 370, at \*11. (holding that the defendant’s statement was ambiguous where the defendant, “in the same breath,” asked for a lawyer and said he did not want an attorney).

227. *People v. Goodman*, No. C036702, 2002 Cal. App. Unpub. LEXIS 2816 at \*7–8 (Cal. Ct. App. Mar. 21, 2002).

228. *Parker v. State*, 917 P.2d 980, 984 (Okla. Crim. App. 1996); accord *State v. Whited*, No. M2005-00167-CCA-R3-CD, 2006 Tenn. Crim. App. LEXIS 202 (Tenn. Crim. App. Mar. 7, 2006).

229. *Hadden v. State*, 42 P.3d 495, 502 (Wyo. 2002); see also *Commonwealth v. Auclair*, 828 N.E.2d 471, 478–79 (Mass. 2005) (holding that “I’ll get a lawyer” was not an affirmative request for an attorney, but rather the defendant’s acknowledgement that the police suspected that he was lying, and that the charges against him were becoming more serious).

230. *Edmonds v. State*, 840 N.E.2d 456, 459 (Ind. Ct. App. 2006).

231. *Id.* at 460.

woman to determine if she intended to write “yes” and correctly concluded that her seemingly clear assertion was actually ambiguous.<sup>232</sup>

### *g. Incoherent requests*

The *Davis* Court suggested that a defendant’s statement can be ignored unless it is clear and unambiguous.<sup>233</sup> An incoherent statement that mentions the word “lawyer” generally fails both parts of the test. For example, in *Jolley v. State*,<sup>234</sup> the suspect’s statement: “I told you this is why . . . if we was going to do this I’d want a lawyer. You guys are . . . I don’t know” was not sufficiently clear for a reasonable police officer to understand it as a request for an attorney.<sup>235</sup> Similarly, the court found the following statement ambiguous and unclear: “I talked to a lawyer or something, man, you know what I mean, ‘cause I, I mean, I ain’t got time to just keep on . . . .”<sup>236</sup>

## 2. Unambiguous Requests

Out of the hundreds of cases examined, roughly nineteen percent of all suspect’s statements were found to constitute unambiguous requests for counsel (and thus, triggering the protection of *Miranda* and *Edwards*).<sup>237</sup> But how do these cases provide an identifiable framework?

These cases fall into five categories: (1) the language was perfectly clear, and there were no imprecise terms or contradictory circumstances; (2) the language might be deemed ambiguous (i.e., was phrased as a question or used modal verbs), but relying on

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232. *Id.* at 461; *Jones v. State*, 748 So. 2d 1012, 1020 (Fla. 1999).

233. *Davis v. United States*, 512 U.S. 452, 461 (1994).

234. 684 N.E. 2d 491 (Ind. 1997).

235. *Id.* at 493; *see also* *Murphy v. State*, 2002 OK CR 24, ¶23, 47 P.3d 876, 886 (deeming as a vague and noncommittal statement that didn’t even rise to the level of an ambiguous request for counsel the defendant’s statement: “Well, I can’t answer that right now. I don’t know this, this I’m not for sure if I’m gonna have an attorney.”).

236. *State v. Jackson*, 107 Ohio St. 3d 300, 2006-Ohio-1, 839 N.E.2d 362, at ¶86; *accord* *State v. Schwebke*, No. 4-485/03-1194, 2004 Iowa App. LEXIS 1084, at \*12 (Iowa Ct. App. Sept. 29, 2004) (deeming as incoherent the statements, “That’s why . . . that’s why . . . that’s why I want . . . want to talk to the lawyer because I don’t. . . I disapprove of this . . . I don’t . . . was not . . . I was not in a plan . . . No, it . . . I just want . . . I want . . . want my lawyer just to . . .”).

237. *See* discussion *infra* Part IV.B (noting that courts at the state and federal levels determined that a suspect unambiguously invoked the right to counsel in seventy-three of the 391 cases studied).

linguistic analysis, the court deemed the request unequivocal; (3) potentially ambiguous requests that police officers understood to be invocations of the right to counsel at the time; (4) language that could be deemed ambiguous, but where the reviewing court was disturbed by the police officer's response; and (5) the seemingly inexplicable.

*a. Use of clear, precise language demanding a lawyer*

In some cases, the suspect's language was perfectly clear (i.e., the request was made like an "English don"). For example, in one case, the suspect said, "Get me a lawyer."<sup>238</sup> In another case, the suspect said, "You say that it's something serious. I need an attorney."<sup>239</sup> Less dignified, but equally effective, was a suspect's demand, "Shit, I need a lawyer, man."<sup>240</sup> There the court concluded, "we recall few requests which exceed the clarity and lack ambiguity as illustrated by Spang's request for counsel."<sup>241</sup> Similarly, a court

238. *People v. Howerton*, 782 N.E.2d 942, 945 (Ill. App. Ct. 2003) (affirming the trial court's granting of the defendant's motion to suppress). Interestingly, although this statement is, by all accounts, clear and unambiguous, the court also depicted as unequivocal invocations of *Miranda* the defendant's other statements, which included, "Well, can I have a lawyer then?" and "Take me upstairs then if I'm under arrest. Either that or I want a lawyer . . ." *Id.*

239. *People v. Zavala*, No. E032425, 2003 Cal App. Unpub. LEXIS 9470, at \*16 (Cal. Ct. App. Oct. 1, 2003).

240. *State v. Spang*, 2002 MT 120, ¶7, 310 Mont. 52, ¶7, 48 P.3d 727, ¶7.

241. *Id.* at ¶25; *see also* *People v. Adkins*, 113 P.3d 788, 793 (Colo. 2005) (en banc) (holding that the defendant's statement, "Why don't I have [a lawyer] now" was unambiguous because he was responding to *Miranda* warnings, and that the defendant's use of the word "now" was significant because it "sufficiently demonstrated his desire for the assistance of counsel during the interrogation"); *McDougal v. State*, 591 S.E.2d 788, 791 (Ga. 2004) (holding that the defendant's statement, "Before I sign anything . . . I would like to get [my wife] so she can call my lawyer. Because I haven't done anything[, and] I feel like the words that I'm saying are like being pushed against me right now," was clear and not equivocal, and that his reason for the request demonstrates that he wanted the assistance of counsel during the interrogation (alterations in original)); *State v. Poullard*, 03-940 (La. App. 3 Cir. 12/31/03); 863 So. 2d 702, 709, 718 (holding that the defendant's statement, "no lawyer, can't talk, . . . I can't talk without my lawyer" was unambiguous, but that admission of the statement was harmless error); *State v. Ray*, 659 N.W.2d 736, 740 (Minn. 2003) (holding that the defendant's demand to "get me a public defender down here" was an unmistakable request for counsel); *State v. Matthews*, No. C4-97-866, 1997 Minn. App. LEXIS 1198, at \*3 (Minn. Ct. App. Oct. 28, 1997) (holding that the defendant unequivocally invoked his right to counsel where he asked, "Is there any way I can have [my] lawyer present right now?" (alteration in original)); *State v. Koffman*, No. M2004-01793-CCA-R3-CD, 2006 Tenn. Crim. App. LEXIS 174, at \*12, \*18-19, \*24 (Tenn. Crim. App. Feb. 23, 2006) (holding that the defendant's statement, "I want to call Judge Wiseman and Ms. Woosten" was unambiguous when everyone knew that Ms. Woosten was the public defender, and that the lower court's admission of statement was harmless error); *State v. McCormick*, No. E2003-02689-CCA-R9-DD, 2004 Tenn. Crim. App. LEXIS 1005, at \*10, \*49 (Tenn. Crim. App. Nov. 15, 2004) (affirming the trial court's suppression of the defendant's statement, "I'd like to have a

noted that the word “no” in response to a question of whether the suspect wants to waive his right to counsel was a clear invocation:

Although the meaning of “is” has been recently debated in extrajudicial circles, we can emphatically state (much to the relief of the bar and public, we’re sure) that “no” means “no.” There cannot be a more unambiguous response to a written waiver than a written, unconditional “no.”<sup>242</sup>

*b. Language that potentially may be ambiguous, but was found precise through linguistic analysis*

In some cases, the courts deem a request for counsel to be unequivocal by considering the linguistic circumstances or the usual meaning of a word. For example, the Virginia Court of Appeals held that a suspect’s request, “I think I would rather have an attorney here to speak for me” constituted an invocation by discussing the meaning of the terms “think” and “rather.”<sup>243</sup> As the court noted, “[t]he word ‘think’ is generally defined ‘to have in one’s mind as an intention or desire,’ and the word ‘rather’ . . . means ‘more readily’ or ‘prefer to.’ The statement was an appropriate response to the warnings . . . . By indicating his preference, McDaniel made his choice clear.”<sup>244</sup>

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lawyer . . . at this point. . . . I still think I, you know, like to have a lawyer with me”); *State v. Munn*, No. 01C01-9801-CC-00007, 1999 Tenn. Crim. App. LEXIS 304, at \*53 (Tenn. Crim. App. Apr. 1, 1999) (holding that the defendant’s statement, “Get a lawyer, that would probably be the best thing, get lawyer” was a clear assertion of his right to counsel); *Mayes v. State*, 8 S.W.3d 354, 357 (Tex. 1999) (holding that the defendant clearly and unambiguously asserted his right to counsel by stating, “I have to get [a lawyer] for both of us”); *Jamail v. State*, 787 S.W.2d 372, 374 (Tex. Crim. App. 1990) (en banc) (holding that the defendant made an unmistakable request for counsel when he stated, “Now it’s time for me to call my lawyer”).

242. See *United States v. Johnson*, 400 F.3d 187, 191, 197 (4th Cir. 2005) (deeming as unambiguous the defendant’s written “no” next to the question, “Do you want to make a statement at this time without a lawyer?”); *Rafferty v. State*, 799 So. 2d 243, 245–46 (Fla. Dist. Ct. App. 2001) (holding that the defendant’s affirmative response to the question of whether he wanted a lawyer was unequivocal and should have ended the police interrogation); *Billups v. State*, 762 A.2d 609, 615–16 (Md. Ct. Spec. App. 2000) (deeming as unambiguous the defendant’s written “no” next to his signature at the bottom of a *Miranda* advisement). *But see* *People v. Sanchez*, No. E034304, 2005 Cal. App. Unpub. LEXIS 5794, at \*10–12 (Cal. Ct. App. June 30, 2005) (finding that the trial court reasonably found that the Spanish word “si” in the context of a *Miranda* waiver meant “if” and not “yes” and concluding that the defendant effectively waived his *Miranda* right).

243. *McDaniel v. Commonwealth*, 518 S.E.2d 851, 853–54 (Va. Ct. App. 1999).

244. *Id.* at 853 (citations omitted).



The Rhode Island Supreme Court took a similar approach when analyzing the phrase, “[c]an I get a lawyer?”<sup>245</sup> Although the Court remanded the case to determine precisely what the suspect had said,<sup>246</sup> it held that the statement could be sufficiently clear in some circumstances to constitute an invocation of a suspect’s rights under *Miranda*.<sup>247</sup> As the Court explained:

In normal parlance, this syntactic phraseology is an acceptable and reasonable way to frame a request. . . . [A] customer at a restaurant may ask the server, “Can I get a cup of chowder?” An impatient shopper might ask a sales clerk, “Can I get some service over here?” In each case, it is clearly understood that the speaker is making a request for a particular desired object or action. On the other hand, a patron at a pizza parlor might ask, “Can I get a slice of pepperoni pizza?” and in that case the question might be understood to mean, “Is pepperoni pizza available, and does this establishment sell pizza by the slice?” The reasonably-understood meaning of this phrase will depend upon the circumstances in which the words are uttered.<sup>248</sup>

On remand, after an expert analysis of the videotape demonstrated that the suspect did say, “Can I get a lawyer?” the trial court held that the statement was unequivocal.<sup>249</sup> The court noted that the statement came twelve hours into the interview and followed the advisement of his rights as his status changed from witness to suspect in a murder case and that the suspect made no contrary statements.<sup>250</sup>

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245. See *State v. Dumas*, 750 A.2d 420, 425 (R.I. 2000) (holding that such a statement could reasonably constitute a request for a lawyer in some circumstances); see also *People v. Romero*, 953 P.2d 550, 557 (Colo. 1998) (holding that the word “should” used in the statement, “I should talk to a lawyer,” “means to express duty, obligation . . . and also to express a desire or request in a polite or unemphatic manner. An archaic definition of ‘should’ is ‘might’ or ‘could.’” (quoting WEBSTER’S THIRD NEW INT’L DICTIONARY 2104 (1961))).

246. *Dumas*, 750 A.2d at 425–26.

247. *Id.*

248. *Id.* The court’s discussion of the request for a slice of pizza is somewhat confusing. Although asking “Can I have a slice of pepperoni pizza?” may carry the implicit sub-questions of whether the restaurant has pepperoni and whether it sells it by the slice, any employee of the pizza parlor getting such a request would understand that if such a slice was available, the customer was requesting it.

249. *Id.* at 423.

250. *Id.* at 422.

Similarly, when a female suspect said “[c]an I have a lawyer present when I do that?” in response to a request by the police officer that she tell her side of the story, the court held that the request was unequivocal.<sup>251</sup> “Her desire for counsel was not ambiguous simply because it was articulated in the form of a question; it is common for people to ask for things by saying, ‘can I have . . . .’”<sup>252</sup>

*c. Potentially ambiguous statements,  
but courts are influenced by the police officer’s  
contemporaneous belief that the suspect’s request  
invoked the Miranda right to counsel*

Although the *Davis* test is objective—whether a “reasonable police officer” would believe that the suspect had invoked his rights<sup>253</sup>—courts often point to the particular officer’s response as support for the conclusion that the suspect had—or had not—invoked his rights.<sup>254</sup>

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251. *Taylor v. State*, 553 S.E.2d 598, 602 (Ga. 2001).

252. *Id.* at 601–02.

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

254. *See, e.g., Harper v. State*, No. 03-00-00677-CR, 2001 Tex. App. LEXIS 7497, at \*14–18 (Tex. Ct. App. Nov. 8, 2001) (holding that deference was owed to the police officer’s view that the defendant’s statement was ambiguous where the defendant stated, “I don’t even want to talk unless I have me a lawyer and go through this shit. I don’t have to go through this shit, right?”). To rely on the police officer’s subjective belief and reaction that the suspect did *not* invoke his rights is troubling, because it would grant police officers the power to thwart *Edwards* simply by ignoring an invocation and thus demonstrate that they did not believe it was unequivocal. If the officer’s subjective reaction to the assertion was determinative, police officers could always circumvent *Miranda* by ignoring the defendant’s statements. Such a fear seems born out by the holding of the court in *State v. Hughes*, 1st Dist. No. C-30489, 2005-Ohio-2453, ¶¶ 23-28. There, the court deferred to the subjective conclusion of the police officer. *Id.* at ¶25. The court considered the significance of the interrogating detective’s handwritten note, where he wrote that the suspect, a young African-American male, said, “I’ll just talk when my lawyer gets here.” *Id.* The court, without any other explanation, concluded, “we cannot conclude that the detective’s handwritten note reflected an unambiguous request by Hughes for an attorney. Detective Heinlein, who was the only witness to testify regarding Hughes’s statements, stated that he did not believe that Hughes’s comment was a request for an attorney. The trial court, sitting as the trier of fact, was in the best position to assess the detective’s credibility.” *Id.*

Courts provide varying weight to the actual officer’s reaction. The officer’s reactions might be most relevant when she acts in a way or says something that indicates a belief that the suspect has asserted the right to counsel. One court found an unambiguous invocation through the notes of one of the officers which were made during the interrogation. *See State v. Jackson*, 497 S.E.2d 409, 412 (N.C. 1998). “The notes say—‘2:04 P.M. on 12-20-94, wants a lawyer present.’ Although not binding on us, this is an indication of how a reasonable officer conducting an interrogation would have interpreted the defendant’s statement.” *Id.* *But see State v. Anonymous*, 694 A.2d 766, 770, 774–75 (Conn. 1997) (rejecting deference to an individual officer’s belief, instead opting for “inquiry [into] solely whether a *reasonable* police officer *objectively* would have accepted the defendant’s statement as . . . unambiguous”); *People v.*

For example, in one case where the defendant said “I think I need a lawyer present” the North Carolina Court of Appeals held that this was an unambiguous request for counsel.<sup>255</sup> Without explaining precisely why this was an unambiguous statement, the court noted that its decision was “reinforced” by the fact that the interrogating officer’s contemporaneous notes indicated the officer’s belief that the suspect had requested counsel.<sup>256</sup> Similarly, in *Morgan v. State*,<sup>257</sup> the Indiana Court of Appeals took a statement that seems ambiguous under most post-*Davis* interpretations and found it to be a clear invocation at least in part because of the officer’s interpretation of the statement.<sup>258</sup> There the suspect said, “I feel more comfortable with a lawyer.”<sup>259</sup> In finding the statement unambiguous, the court pointed to the follow-up discussion:

POLICE OFFICER: So you don’t want to talk to me at this time?

SUSPECT: [*shook head no*]

POLICE OFFICER: [*Tells suspect about the evidence against him, and that it is in his best interest to cooperate*]. Are you willing to talk or *do you still want a lawyer?*

SUSPECT: [*Nods*]

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Burnfield, 692 N.E.2d 412, 413–14 (Ill. App. Ct. 1998) (determining that the fact that the police officers stopped questioning the suspect did not mean that the officers felt that the suspect had invoked his rights). Though such a conclusion could have been reached, to some extent, relying on the police officer’s subjective belief that the suspect made an unambiguous request is less troubling, because it goes against the officer’s interest in continuing the interrogation. *See, e.g.,* *Rivera v. State*, No. 03-04-00235-CR, 2005 Tex. App. LEXIS 3997, at \*15 n.4 (Tex. Ct. App. May 26, 2005) (holding that the police officer’s “subjective belief that he should stop the interrogation is not determinative of our objective inquiry into whether Rivera unambiguously invoked his right to counsel”); *cf. State v. Mason*, No. CR-98-026, 1998 Me. Super. LEXIS 193, at \*6, \*8 (Me. Super. Ct. July 31, 1998) (noting that where the police officer ended interrogation after the defendant’s ambiguous assertion that “she should get an attorney or would probably get one,” the police officer’s reaction was simply the “exercise of legally unnecessary care . . . to avoid violating a suspect’s rights”).

255. *Jackson*, 497 S.E.2d at 412.

256. *Id.* at 411–12; *see also* *Abela v. Martin*, 2004 Fed App. 0283P (6th Cir.), 380 F.3d 915, 926 (holding that the statement “maybe I should talk to an attorney by the name of William Evans” was unambiguous because the suspect used a specific name, gave the police officer the attorney’s business card, and the police officer left the room to call the attorney). The *Abela* court noted that the police officer’s “action confirm[ed] that a reasonable officer would understand Abela’s statement to be a clear request for counsel.” *Id.*

257. 759 N.E.2d 257 (Ind. Ct. App. 2001).

258. *See id.* at 262.

259. *Id.* at 260.

The police officer then obtained a waiver and continued interrogating the suspect.<sup>260</sup> The court found it significant that the officer's own words demonstrated his subjective belief that the suspect had invoked his right to counsel (yet he still continued interrogating).<sup>261</sup>

In another case, the suspect's comment, "I think I would like to have a lawyer, if I could" was found to be unequivocal.<sup>262</sup> There was only one fact pointed to by the court: that immediately after the suspect made this statement, the police officer left the room and discussed the possibility of getting the suspect an attorney.<sup>263</sup> The court found it was clear that the officer understood the defendant's comment as a request for a lawyer.<sup>264</sup>

*d. Ambiguous statements,  
but courts are disturbed by the behavior of the police officers*

In a number of cases involving statements that could be viewed as ambiguous, the courts seem to be influenced by what they deem unacceptable or disturbing behavior by the police. Although *Davis* held that ambiguous requests can be ignored,<sup>265</sup> courts are clearly uncomfortable when police ignore such a request, particularly when it is in the form of a question that goes unanswered. Thus, for example, the Colorado Supreme Court noted that a police officer's

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260. *Id.* (alteration to original).

261. *Id.* at 261–62.

262. *DeFrancisco v. Commonwealth*, No. 1427-99-1, 2000 Va. App. LEXIS 391, at \*4 (Va. Ct. App. May 23, 2000).

263. *Id.*

264. *Id.*; *accord Cannady v. Dugger*, 931 F.2d 752, 755 (11th Cir. 1991) (finding that the statement, "I think I should call my lawyer," was understood by the police officer to be a request for one); *State v. Munson*, 594 N.W.2d 128, 139–40 (Minn. 1999) (finding that the statement, "I think I'd rather talk to a lawyer," was sufficiently clear for a reasonable police officer to understand it as an invocation of the right to counsel where the defendant made the statement immediately after he was read his *Miranda* rights, and the officers actually considered it to be a request for counsel); *State v. Bohn*, 950 S.W.2d 277, 281 (Mo. Ct. App. 1997) (finding that the statement, "I feel like I ought to have a good counselor," was unambiguous, and deeming as significant the fact that the interrogator understood the statement to be clear and unequivocal); *State v. Kennedy*, 510 S.E.2d 714, 715–16 (S.C. 1998) (finding that the statement, "[w]ell, I think I need a lawyer," was unambiguous, and finding that the record showed that everyone involved viewed the request as an invocation of the right to counsel); *Commonwealth v. Chen*, No. K101486, 2002 Va. Cir. LEXIS 299, at \*6–9 (Va. Cir. Ct. Nov. 7, 2002) (finding that the suspect's question, "Can I call my lawyer?" was unambiguous, and noting that the detective had acknowledged the defendant's request for a lawyer).

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

failure to respond to a defendant's question, "why don't I have one now[?]" (referring to an attorney) was a determinative factor that the statement was unambiguous.<sup>266</sup> Similarly, the Massachusetts Court of Appeals seemed disturbed by a police officer's use of trickery and "guise" in an interrogation of a suspect who did not speak English well.<sup>267</sup> Thus, the court concluded that when the suspect said he wanted to call for a translator and a friend who was a paralegal, "[a] reasonable police officer would [have understood this] to be a request for legal counsel."<sup>268</sup> Other courts similarly point to police officers' behavior as relevant without precisely explaining the exact significance of that behavior.<sup>269</sup>

*e. The inexplicable*

There are a number of cases where the court's finding that a request was unambiguous is not clearly explained, nor easily determined by context. In other words, the courts provide little explanation for their conclusions in these cases. For example, one court held that the statement, "I'd rather have my lawyer" was unambiguous,<sup>270</sup> while another court held that the comment, "I think I need a lawyer" was a clear invocation.<sup>271</sup> In both cases, neither the

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266. *People v. Adkins*, 113 P.3d 788, 793 (Colo. 2005) (en banc). It should be noted that Colorado courts "must give broad, rather than narrow, interpretation to a defendant's request for counsel." *Id.* at 792 (citations omitted); *see also supra* note 285 and accompanying text.

267. *Commonwealth v. Segovia*, 757 N.E.2d 752, 758 (Mass. App. Ct. 2001). The court may also have been influenced by the fact that the defendant was not a native English speaker.

268. *Id.*

269. *See, e.g., McDougal v. State*, 591 S.E.2d 788, 791, 793-94 (Ga. 2004) (noting that after the suspect used clear words, the police continued their questioning and became "increasingly insistent" that the suspect sign the waiver, which he refused to do); *Taylor v. State*, 553 S.E.2d 598, 602 (Ga. 2001) (describing how the court was disturbed by the fact that the police officers seemed to be trying to steer the suspect away from requesting the assistance of counsel); *Mayes v. State*, 8 S.W.3d 354, 359-62 (Tex. Ct. App. 1999) (discussing the police officer's continued interrogation and badgering of the defendant, reversing the trial court's admission of the statement and holding this was not harmless error); *Commonwealth v. Chen*, No. K101486, 2002 Va. Cir. LEXIS 299, at \*7 (Va. Cir. Ct. Nov. 7, 2002) (describing how the defendant was diverted from his request to call counsel and instead was made to acquiesce to the officer's agenda).

270. *See Commonwealth v. Ball*, No. 1915-99-4, 2000 Va. App. LEXIS 107, at \*2, \*7, \*10 (Va. Ct. App. Feb. 15, 2000).

271. *State v. Kennedy*, 510 S.E.2d 714, 715-16 (S.C. 1998); *see also Commonwealth v. Contos*, 754 N.E.2d 647, 655 (Mass. 2001) (noting that the statement "I think I'm going to get a lawyer" was not ambiguous); *Tiede v. State*, 104 S.W.3d 552, 561 (Tex. Ct. App. 2000) (finding that "I think I need a lawyer" not "the clearest of terms" but still invoked his right to counsel; however, the court determined the defendant subsequently waived his right to counsel by initiating conversation with police, making his statements admissible).

case opinions, nor contexts, provide any real explanation for their divergent outcomes. A final example, and perhaps the most inexplicable in light of the other case holdings, is one court's decision that the suspect's statement was unambiguous when he said, "Cause I, ya know, I'm not gunna lie man . . . I mean I should wait, and I should talk to a lawyer and this and that and ya know . . ." <sup>272</sup>

### B. *An Empirical Glance*

After examining the caselaw, several trends and statistics are worth noting.

There were 391 cases at both the state and federal level where the court discussed *Davis* in any level of detail. In seventy-three of these cases (approximately nineteen percent), the court ultimately held that the suspect unambiguously invoked his right to counsel. In fact, the appellate court overturned the trial court's initial decision in most of these cases. <sup>273</sup>

Additionally, the defendants' ethnic background could only be determined in 253 of the 391 cases. Of these defendants, one hundred twenty-five were Caucasian, eighty-five African-American, thirty-eight Latino, four Asian, four Native American, and one was Middle Eastern.

The defendant was female in twenty-eight of the cases studied. Of these female defendants, ethnic background could only be determined in only fourteen cases. Five of these female defendants were Caucasian, six Latina, two were African-American, and one was Asian. The requests of female suspects were deemed ambiguous in twenty-one of these twenty-eight cases.

Of the seventy-three cases where the court deemed the defendants' requests unambiguous, the ethnicity of twenty-eight defendants was unknown. Of those that could be determined, twenty-one were Caucasian, fourteen were African-American, eight were Latino, one was Asian, and one was Native American.

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272. *People v. Romero*, 953 P.2d 550, 556-57 (Colo. 1998) (en banc) (emphasis omitted). The trial court found that the suspect asserted the right to counsel based on the totality of the circumstances. *Id.* Perhaps this decision is explained by the fact that Colorado has said it must give a broad interpretation to defendant's requests for counsel. *Adkins*, 113 P.3d at 793; *see also supra* note 266.

273. Out of the seventy-three cases where the court found the defendants' requests unambiguous, twenty-one affirmed a decision below, forty-three reversed a decision, and nine were trial court decisions.

## V. WHAT CAN WE LEARN FROM THIS INFORMATION?

The primary purpose of this article was to present a comprehensive look at the caselaw on the invocation of the *Miranda* right to counsel since the *Davis* decision, and to provide a framework for conceptualizing these cases. Hopefully, a consideration of the caselaw by itself provides useful insight into how the courts are applying the *Davis* rule. Nonetheless, here are a few additional areas that warrant further research and discussion.

First, one thing is clear: where the trial court denied the suspect's claim that he invoked his *Edwards* rights and unequivocally requested an attorney, such a finding is overwhelmingly upheld on appeal. However, this finding is not that surprising since appellate courts tend to defer to the trial court's judgment on credibility issues, and are thus loath to overturn trial court determinations concerning things like the suspect's demeanor and interactions with the police.<sup>274</sup>

Second, there is some evidence to support the theory that women and minorities often phrase requests for counsel in ways that the courts interpret as ambiguous. In the cases set forth, female suspects were involved in only twenty-eight cases. In twenty-one of those cases, the female suspects' requests were deemed ambiguous.<sup>275</sup> In most of these cases, the female suspects' ambiguous requests involved questions about needing a lawyer.<sup>276</sup> Other ambiguous requests by these female suspects involved imprecise statements,<sup>277</sup> or the use of modal verbs and hedges.<sup>278</sup>

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274. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. App. 1997) (stating that appellate courts "should afford almost total deference to a trial court's determination of the historical facts that the record supports especially when the trial court's fact findings are based on an evaluation of credibility and demeanor").

275. See *supra* notes 230–232 and accompanying text. *But see Taylor v. State*, 553 S.E.2d 598 (Ga. 2001) (discussing an unambiguous request by a woman).

276. See, e.g., *State v. Varie*, 26 P.3d 31, 34 (Idaho 2001) ("Am I supposed to have a lawyer?"); *State v. Barrera*, 2001-NMSC-014, ¶25, 130 N.M. 227, 234, 22 P.3d 1177, 1184 ("Do I need an attorney?"); *State v. Greybull*, 1998 ND 102, ¶9, 579 N.W.2d 161, 162 ("Do I have to get a lawyer? Do I need to get a lawyer . . ."); *Rocha v. State*, Nos. 14-02-00653-CR, -00654-CR, 2003 Tex. App. LEXIS 1381, at \*11 (Tex. App. Feb. 13, 2003) ("And the lawyer, how can you have one?"); *Maley v. State*, No. 01-93-01129-CR, 1996 Tex. App. LEXIS 3099, at \*23–24 (Tex. App. July 18, 1996) (noting that the suspect asked numerous questions about what a lawyer might say and how to get one).

277. See *State v. Kirk*, No. E2004-01263-CCA-R3-CD, 2005 Tenn. Crim. App. LEXIS 1068, at \*13–14 (Tenn. Crim. App. Sept. 30, 2005) (noting that the defendant wanted to call her mother because she did not know any attorneys); *Moreno v. State*, No. 04-00-00527-CR, 2001 Tex. App.

Admittedly, the ultimate conclusion—that a majority of women in custodial interrogation settings make ambiguous requests—is impossible to draw. As discussed earlier, since we do not know how many women made unambiguous requests in the unpublished cases, we cannot draw any firm conclusions about the ultimate number of women who successfully invoked their right to counsel. A similar point can be made about men and ethnic minority groups. Our database shows that more ambiguous requests were made by members of ethnic minority groups than unambiguous ones.<sup>279</sup> This observation is true for Caucasian males as well.<sup>280</sup>

Of course, we cannot compare *all* custodial interrogations. Since we can only review interrogations challenged in court, the most that can safely be said is that most people, when faced with police power and authority in a custodial situation, often resort to imprecise, uncertain requests, rather than making clear demands. To this extent, the prophesy that certain groups find it difficult to claim the *Miranda* protection is verified. While this is not an absolute conclusion, there is clear evidence to support the proposition that women, minorities, and Caucasian males fail to demand an attorney in declarative, clear language. Instead, the use of questions, hedges and imprecise language in the custodial interrogation setting is very common among all suspects of any race or gender.

Such a result should not be surprising. It doesn't take an expert in linguistics to predict that most individuals in police custody will express intended requests for counsel indirectly.<sup>281</sup> As one scholar noted:

In treating verbal equivocation as ambiguity, the *Davis* majority suggests a suspect has not invoked his right to counsel unless he has intoned it verbatim—"I hereby

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LEXIS 3854, at \*7 (Tex. App. June 13, 2001) (describing how the suspect wanted to call her husband because "he might be getting her an attorney").

278. See *Moreno*, 2001 Tex. App. LEXIS, at \*7 ("[S]he asked to call her husband because 'he might be getting her an attorney . . . .'"); *State v. Aten*, 927 P.2d 210, 216 (Wash. 1996) ("I think I better have an attorney present just to see if maybe, ah, I might be messing up somewhere . . . .").

279. See *supra* Part IV.B.

280. Of the seventy-three unambiguous requests, twenty-one were made by Caucasian males. See discussion *supra* Part IV.B.

281. In the context of consent searches, I make a similar argument that individuals will view a police officer's permission for consent to search as a command, not a request. See Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 241 (2001–2002).



demand my right to speak to a lawyer forthwith.” But this is the sort of formulistic statement no actual person other than a lawyer would ever utter. In ordinary life, of course, statements of desire are considered perfectly clear even when they are much less blunt. What the *Davis* majority takes as equivocation in a phrase like, “Maybe I should talk to a lawyer,” viewed in terms of actual linguistic practice, may in reality simply reflect the way ordinary people are inclined to express requests, particularly requests directed to persons in authority.<sup>282</sup>

Third, while some officers after *Davis* do try to clarify the suspect’s statement, it appears that most do not. In response to ambiguous requests, police officers use four different responses. The first is to clarify and specifically ask whether the suspect wants an attorney.<sup>283</sup> Alternatively, the officers may answer the question, or respond to the statement, and then move on. For example, when asked, “Can I have an attorney?” the officer may simply say, “That’s up to you,” and *not* follow up by asking “Do you want one now?”<sup>284</sup> Third, the officer can ignore the request, and simply continue talking or questioning.<sup>285</sup> Finally, the police officer may answer and deflect by saying something that actually discourages obtaining counsel. For example, the officer may say, “That’s up to you, but I won’t be able to get a lawyer right now,” or “you can have a lawyer, but then I won’t be able to hear your side of the story. Wouldn’t you like to tell me your side?”<sup>286</sup>

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282. Kaiser & Lufkin, *supra* note 117, at 758.

283. See, e.g., *State v. Hickles*, 929 P.2d 141, 146 (Kan. 1996) (“Are you asking for an attorney?”).

284. See, e.g., *People v. Torres*, No. B159761, 2003 Cal. App. Unpub. LEXIS 7043, at \*7–8 (Cal. Ct. App. July 22, 2003) (stating that suspect asked if he could have an attorney and officer told him no attorney was available on Easter Sunday).

285. See, e.g., *State v. Ninci*, 936 P.2d 1364, 1381 (Kan. 1997) (noting that the officers ignored the suspect’s request for an attorney); *State v. Barrera*, 2001-NMCA-14, ¶22, 130 N.M. 227, 22 P.3d 1177 (noting that when the suspect asked if he needed an attorney, the officer told him he would answer the question after booking); *State v. Brown*, 100 Ohio St. 3d 51, 2003-Ohio-5059, 796 N.E.2d 506, at ¶6 (noting that the officers denied the suspect’s multiple requests for an attorney).

286. See *State v. Foster*, No. 2000-T-0033, 2001 Ohio App. LEXIS 5840, at \*23–24 (Ohio Ct. App. Dec. 21, 2001) (noting that when the defendant asked, “Well, can I have a lawyer present?” the police officer said, “If that’s what you want, you know. It’s just that I’m not gonna go into anything we haven’t already talked about,” and the suspect responded, “Ok,” and continued talking); *State v. Taylor*, 759 N.E.2d 1281, 1283 (Ohio Ct. App. 2001) (noting that when the defendant asked if he needed a lawyer, police officer said, “We will take care of that when we get

Prior to *Davis*, the majority of courts had adopted a requirement that ambiguous requests for counsel must be clarified before any further interrogation could occur.<sup>287</sup> Thus, when faced with a possible request for counsel, the police officer had to stop the interrogation and could only ask questions to determine whether the suspect wanted to invoke *Edwards*. Even *Davis* suggested that such an approach, while not required by *Miranda*, may be desirable.<sup>288</sup> The evidence suggests, however, that the clarification approach is not being used in most circumstances post-*Davis*.<sup>289</sup> Indeed, as some of the examples indicate, police officers have deflected requests without court disapproval.<sup>290</sup> Such examples are troubling to those who had hoped that the *Davis* decision would encourage such a clarification approach.

The danger is not only that the suspect's ambiguous request might be deemed insufficient to invoke the right to counsel. When the police ignore an ambiguous response altogether, or try to deflect a request for counsel, any future invocation of the right to counsel by the suspect is unlikely.<sup>291</sup> If a suspect believes that his request for counsel was ignored or minimized, they are unlikely to believe that any future request will be honored.<sup>292</sup> Rather, once ignored, most suspects will assume that any future assertion would be futile, and hence no further mention of counsel occurs.<sup>293</sup> Thus, the concern is that suspects who are culturally inclined to try to please the police, or who are afraid to counter the obvious wishes of the police, will easily back down or be dissuaded from what they want and what is likely in

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back to Ohio"); *State v. Saylor*, 117 S.W.3d 239, 243 (Tenn. 2003) (noting that when the defendant spoke about needing a lawyer and claimed to have done nothing wrong, the police officer said, "Well if you haven't done anything, then you don't need a lawyer, right?"); *cf.* *McHam v. State*, 2005 OK CR 28 ¶29, 126 P.3d 662, 671–72 (noting that when the defendant asked, "Don't I need a lawyer?" the police officer said, "No, they'll just tell you not to answer any questions"); *Commonwealth v. Corrales*, No. 2360-00-2, 2001 Va. App. LEXIS 109, at \*11–12 (Va. Ct. App. March 6, 2001) (noting that the defendant unambiguously requested an attorney three times, but the officers did not cease questioning and claimed that they had trouble hearing the defendant's request for counsel).

287. *See supra* note 83 and accompanying text.

288. *See supra* note 112 and accompanying text.

289. *See supra* notes 142–148 and accompanying text.

290. *See supra* note 286 and accompanying text.

291. *Davis v. United States*, 512 U.S. 452, 472–73 (1994).

292. *Id.*

293. *Id.*

their best interest—the assistance of counsel.<sup>294</sup> It was precisely this concern that police might “wear down” the will of the suspect that motivated the *Edwards* bright-line rule against further interrogation in the first place.<sup>295</sup>

If this is true, it suggests that adherence to the *Edwards* principle requires a policy of strict clarification rules or, alternatively, a rule that treats all ambiguous invocations as asserting *Edwards*.<sup>296</sup> However, a rule which cajoles police officers to clarify a request does not sufficiently encourage that behavior. Not only do officers ignore ambiguous requests, but they frequently use them to subtly or overtly encourage suspects to waive their right to counsel.<sup>297</sup>

Fourth, very few courts in these cases refer to linguistic studies or evidence on the cultural significance of particular phrasing or words choice.<sup>298</sup> In fact, only a handful of cases even delved into

294. See *supra* notes 135–137 and accompanying text.

295. See Strauss, *supra* note 18, at 376.

296. Such an approach, while appearing draconian, does not preclude all future interrogations. First, even *Edwards* acknowledged that the police may re-interrogate a suspect who initiates a conversation with the police about the investigation (and thus waives his rights). *Oregon v. Bradshaw*, 462 U.S. 1039, 1043 (1983) (stating that after a suspect invokes the right to counsel, all interrogation must cease and no police-initiated interrogation may ensue; however, if the suspect initiates further conversation and waives his right to counsel and to silence, interrogation may resume). Initiation must be more than an inquiry or statement relating to a routine incident of the custodial relationship. See *id.*; see also *People v. Sapp*, 73 P.3d 433, 453–54 (Cal. 2003) (finding that the defendant unequivocally asked for an attorney but later asked for the investigators to come back); *State v. Walker*, 80 P.3d 1132, 1138 (Kan. 2003) (finding that defendant invoked right to counsel, and then immediately re-initiated conversation with police); *State v. Henry*, 44 P.3d 466, 471 (Kan. 2002) (noting that defendant said, “I want to talk to a lawyer,” but followed by asking to resume shortly after the detectives stopped the interrogation). Therefore, a suspect who truly wants to speak to the police, has “the ball in [his] court.” Moreover, the police may interrogate a suspect in the presence of his attorney.

297. See *supra* Part IV.A.2.d.

298. Typical is the comment of the court in *People v. Mitchell*, 810 N.E.2d 879, 882 (N.Y. 2004) (“Whether a particular request is or is not unequivocal ‘must be determined with reference to the circumstances surrounding the request including the speaker’s demeanor, manner of expression, and the particular words found to have been used.’” (quoting *People v. Glover*, 661 N.E.2d 155, 156 (N.Y. 1995))).

In one case, the California Court of Appeals came close to using cultural factors when it analyzed whether a defendant was sophisticated enough to understand the difference between charging and booking in his request for counsel. *People v. Gonzalez*, No. B154557, 2003 Cal. App. Unpub. LEXIS 11981, at \*21–25 (Cal. Ct. App. Dec. 19, 2003), *rev’d*, 104 P.3d 98 (Cal. 2005). The California Supreme Court criticized it for focusing on defendant’s ability to clearly articulate his desire for counsel. *Gonzales*, 104 P.3d at 106–07. *But cf.* *Commonwealth v. Ball*, No. 1915-99-4, 2000 Va. App. LEXIS 107, at \*2 (Va. Ct. App. Feb. 15, 2000) (finding the questions “What have I been charged with? . . . And what is that?” enough to be a voluntary waiver).

dictionary definitions or linguistic studies concerning the meaning of words like “could” or “should,” or “questions” like “Can I have an attorney?”<sup>299</sup> Furthermore, the court never considered the possibility that women or minorities might speak in a different voice.<sup>300</sup>

Of course, the failure to consider these factors may be explainable in part by the standard set forth by the Supreme Court in *Davis*. Since the *Davis* test requires the reasonable person’s perception of the alleged request, an argument that the suspect intended to assert the right and did it in the most direct way possible given his cultural background might seem irrelevant. So long as the test remains the same, the use of cultural studies might be useless indeed.<sup>301</sup> But at least expert testimony might demonstrate that the question, “Can I have a lawyer?” or the statement, “I’d like a lawyer if possible please,” or even, “I think I should” would be understood by most “reasonable persons” to be a clear request in the intimidating and difficult circumstances of custodial interrogation.

Finally, and perhaps most disturbing, the evidence suggests gross inconsistencies in the approaches of the courts.<sup>302</sup> Some courts deem seemingly clear demands as ambiguous. Yet in other cases, virtually identical language is treated differently in ways inexplicable by the context.<sup>303</sup> It is drastically unfair that a suspect in one jurisdiction who says, “I think I would like to talk to my attorney,”

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Interestingly, in the context of waiver, certain factors related to a suspect’s cultural heritage have been considered. For example, in *Lui v. State*, the defendant argued that his Chinese heritage demanded “unquestioning cooperation with authority figures,” which led him to instinctively waive his *Miranda* rights. 628 A.2d 1376, 1380 (Del. 1993). The court found the defendant’s heritage relevant, but nonetheless concluded that his waiver was not due to his Chinese background. *Id.* at 1381–82. But the question in waiver is more attuned to the suspect’s perceptions: a heavy burden is placed on the State to show that the defendant “knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.” *Miranda v. Arizona*, 384 U.S. 436, 475 (1966); *see also* *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). But even here, subjective factors are limited. Personal characteristics of the accused are relevant only as they relate to police overreaching. *See Colorado v. Spring*, 479 U.S. 564, 573–74 (1987).

299. *See supra* Part IV.A.1.e.

300. *See supra* notes 135–137 and accompanying text.

301. However, there should remain powerful arguments against such a test. If a reasonable person’s perception is incapable of calculating what different ethnic groups are trying to express, the validity of relying on a reasonable person test is definitely suspect.

302. This has even been acknowledged by the courts. *See Clark v. Murphy*, 317 F.3d 1038, 1045 (9th Cir. 2003) (“Ninth Circuit law is somewhat inconsistent on what qualifies as unequivocal and what constitutes an equivocal request for a lawyer.”).

303. *Compare supra* note 270, with note 271.

can be ignored, while a similar statement in another jurisdiction is treated as invoking *Edwards*.<sup>304</sup> It makes no logical sense whatsoever that the police may continue questioning a suspect who says, “Can I call my lawyer?” in one station house, while in another one the comment, “Can I have my lawyer present when [I tell you my story]?” is deemed an invocation of rights requiring the cessation of questions.<sup>305</sup> Such contradictory results are not only unfair, they are pernicious.

The right to counsel embodied in *Miranda* is more than “window-dressing.”<sup>306</sup> It is a critical component of the protection of individual rights.<sup>307</sup> When a suspect who feels helpless to deal with the power of the State is denied an attorney because of a tentative request for counsel, the rights during interrogation are not the only rights at risk. Without representation during custodial interrogation, the right to a fair trial may be jeopardized.

[T]he state constitutional guarantees for a fair and full trial and an attorney at trial would be hollow rights if a conviction at trial is already assured because the suspect incriminates himself or herself during custodial questioning. . . . A suspect’s right to an attorney at custodial questioning to protect the privilege against self-

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304. *Id.*

305. Compare *Dormire v. Wilkinson*, 249 F.3d 801, 805 (8th Cir. 2001) (noting that “Could I call my lawyer?” was not considered an ambiguous or unequivocal request for counsel), with *Taylor v. State*, 553 S.E.2d 598, 601–02 (Ga. 2001) (finding that the statement, “Can I have a lawyer present when I do that,” was unambiguous). Moreover, as Professors Tiersma and Solan point out, the results are inconsistent across areas of criminal law. Tiersma & Solan, *supra* note 117, at 248–56. Courts employ selective literalism—requiring clear and direct language in some cases, and allowing imprecise language to suffice in others.

[T]he problem is not merely that judges sometimes interpret the utterances of ordinary people in an overly literal way by failing to take pragmatic information into account. Rather, judges are selective in when they take pragmatic factors into consideration. Whether consciously or not, their interpretive practices tend either to ignore or to take into account pragmatic information when it benefits police and prosecutors. The utterances that police officers make in seeking consent to a search are almost invariably deemed to be requests . . . . And in evaluating language crimes, judges readily view indirect threats as real threats. This makes it easier for police to obtain consent to a search and for prosecutors to obtain convictions. In contrast, people subject to interrogation are held to a higher linguistic standard than are the police. . . .

*Id.* at 256.

306. Tiersma & Solan, *supra* note 117, at 259.

307. “[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege . . . .” *Fare v. Michael C.*, 442 U.S. 707, 719 (1979) (quoting *Miranda v. Arizona*, 384 U.S. 436, 469 (1966)).

incrimination is thus intricately intertwined with an accused's . . . constitutional right to a . . . fair trial . . .<sup>308</sup>

After examining the hundreds of decisions since *Davis*, it is clear that this critical right too often turns on the whimsy of the court. Hopefully, this review of the caselaw will raise anew the calls for a reconsideration of the *Davis* decision.

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308. *State v. Jennings*, 647 N.W.2d 142, ¶ 67 (Wis. 2002).

