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The Sounds of Silence: Reconsidering the Invocation of the Right
to Remain Silent Under *Miranda*

Marcy Strauss*

*“If the exercise of constitutional rights will thwart
the effectiveness of a system of law enforcement,
there is something very wrong with that system”***

In 1966, the Supreme Court handed down one of its best-known decisions—*Miranda v. Arizona*.¹ In that decision, the Court attempted to provide the appropriate balance between law enforcement interests in obtaining a confession and a suspect’s Fifth Amendment right not to incriminate himself. The opinion decreed that this balance is preserved by “giving the defendant the power to exert some control over the course of the interrogation.”² Thus, the decision mandates that the suspect be informed prior to any custodial interrogation that he has the right to remain silent and the right to an attorney and that no interrogation can occur until the suspect waives these rights. Moreover, the suspect can assert these rights at any point during the interrogation and, if he does, questioning must immediately cease.

Although these protections seem on first blush to effectively empower a suspect to choose whether to speak to the police, many have deemed *Miranda* a “spectacular failure.”³

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

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

² *Moran v. Burbine*, 475 U.S. 412, 426 (1986).

³ Sandra Guerra Thompson, *Saving Miranda: How Seibert and Patane Failed to ‘Save Miranda’*, 40 VALPAIRASO L. REV. 645 (2006); see also George C. Thomas III, *Miranda’s Illusion: Telling Stories in the Police Interrogation Room Miranda’s Waning Protections*, 81 TEX. L. REV. 1091, 1092, 1094 n. 16 (2003) (by most accounts, *Miranda* has been a spectacular failure”) (hereinafter, “*Miranda’s Illusion*”); Christopher Slobogin, *Toward Taping*, 1 OHIO ST J. CRIM. L. 309 (2003). Although *Miranda*’s success or failure may be a subject of debate and dispute, most would agree that the Court, in the 40 odd years since that decision has “restricted some of the generous language of *Miranda*.”

Although there are numerous critics of the *Miranda* decision and its progeny on a variety of levels,⁴ what has received too little attention is whether the most basic protection of the *Miranda* decision operates effectively. That is, can a suspect effectively assert the right to remain silent and, perhaps as importantly, do the police appropriately respect such an assertion?

This paper explores that question by considering what constitutes an assertion of the right to remain silent. Although *Miranda* suggested that if “an individual indicates *in any manner* at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease,”⁵ subsequent cases have required a more explicit invocation of the desire not to speak. Relying on *Davis v. United States*,⁶ a Supreme Court decision addressing the invocation of the right to counsel, the bulk of lower courts currently require that a suspect unambiguously invoke the right to remain silent.⁷ Such a transposition of the requirements for asserting the right to remain silent with the right to counsel is wrong as a matter of law, unwise as a matter of policy and threatens to eviscerate the core protection of *Miranda*.

This article argues that the lower courts, by requiring that the right to remain silent be unambiguously asserted, have gone astray from what was intended in *Miranda*. The passage of time since *Miranda* and *Davis* has revealed one indisputable fact: rarely do suspects invoke their rights. Only 20 percent initially assert their rights rather than waive them; and almost no suspects assert their rights after a valid waiver.⁸ While some suspects

Charles Shreffler, *Judicial Approaches to the Ambiguous Request for Counsel Since Miranda v. Arizona*, 62 NOTRE DAME L. REV. 460 (making this comment with respect to the first 20 years). *But see* Lawrence Rosenthal, *Against Orthodoxy: Miranda is not Prophylactic and the Constitution is not Perfect*, 10 CHAP. L. REV. 579, 584 (2007).

⁴ Yale Kamisar, one of the most prominent criminal procedure scholars, wrote that *Miranda* is one of the most criticized and most misunderstood criminal procedure cases in American legal history. Yale Kamisar, *How Earl Warren's Twenty-Two Years in Law Enforcement Affected his Work as Chief Justice*, 3 OHIO ST. J. OF CRIM. L. 11, 26 (2005). *See also* Mark Godsey, *Reformulating the Miranda Warning in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781 (2006) (discussing some of the criticism); Jackie Anne Moreno, *Faith Based Miranda: Why the New Missouri v. Siebert Bad Faith Police Test is a Terrible Idea*, 47 ARIZ. L. REV. 395 (2005) (criticizing the Court's recent post-*Miranda* decision: *Siebert v. Patane*). One recent, persistent and fairly successful cry for reform involves the use of videotaping confessions. Steven A. Drizin and Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619 (2004).

⁵ *Miranda*, 384 U.S. at 473–74.

⁶ 512 U.S. 452 (1994).

⁷ *See infra* notes 47–58 and accompanying text.

⁸ *See infra* notes 150–152 and accompanying text.

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

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

In Section IV, I briefly sketch and discuss an alternative approach to that in *Davis*: a version of the stop and clarify approach for ambiguous invocations in conjunction with some modification of the *Miranda* warnings. While a rule requiring that all interrogation must cease at *any* invocation, clear or not, is most faithful to the language and values of *Miranda*, such a position is unlikely to be adopted. Thus, this paper urges that at a minimum, the courts should require that any ambiguous or equivocal request be clarified prior to continued questioning of a suspect. Moreover,

the *Miranda* warnings should be altered to include an explicit reminder to the suspect they can assert their right to remain silent at any time, and that such an assertion would not be used against them.

I. The Development of the *Miranda* Rights

The *Miranda* decision was an attempt to establish clear, bright line rules to protect a suspect from police coercion during custodial interrogation.⁹ Prior to 1966, the law of interrogations was largely governed by the Due Process Clause of the Fourteenth Amendment, which employed a “totality of circumstances approach” to condemn police misconduct that overbore the will of the suspect.¹⁰ While such an approach ensured that the most egregious police behavior such as physical abuse was condemned, “it left largely uncontrolled a myriad of other practices that did not reflect physical abuse but operated to coerce a suspect into making a statement.”¹¹ Believing that law enforcement officers were becoming more sophisticated in their interrogation tactics and that coercion was often difficult to ascertain, the Court shifted from a due process approach to one that emphasized the Fifth Amendment privilege against self incrimination.¹²

In the four cases that were consolidated in *Miranda*, the Court ruled that the Fifth Amendment privilege against self-incrimination protected a suspect during custodial interrogation which contain “inherently compelling pressures” that could undermine a suspects right to remain silent.¹³ To protect a person’s opportunity to exercise his privilege, the Court developed the now famous set of warnings: the suspect must to told he has a right to remain silent and that anything said may be used against him;¹⁴ the suspect must be informed he has a right to have an attorney present during questioning, and that an attorney will be appointed

⁹ See Weisselberg, *supra* note 1 at 113 (pre-*Miranda* rules were difficult for the courts to follow and the police to apply; *Miranda* recognized the need for clear rules).

¹⁰ See, e.g., *Brown v. Mississippi*, 297 U.S. 278 (1936); *Chambers v. Florida*, 309 U.S. 227 (1940); *Leyra v. Enno*, 347 U.S. 556 (1954). *Lisenba v. California*, 314 U.S. 219 (1941).

¹¹ Marcy Strauss, *Re-interrogation*, 22 HASTINGS CONST. L. Q. 359, 364 (1995).

¹² In between the Court flirted with a right to counsel approach. See *Escobedo v. State*, 378 U.S. 478 (1964); see also Thomas, *Miranda’s Illusion*, *supra* note 3, at 1120 n. 91.

¹³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁴ Some commentators have persuasively argued that several additional warnings should be provided, including a statement that if you don’t talk that won’t be held against you and reminding the suspect that he or she can assert these rights at any time in the interrogation. See *infra* note 156 and accompanying text.

if the person cannot afford one.¹⁵ These warnings must be provided even if the suspect is otherwise aware of his rights because the “warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere.”¹⁶

Once the warnings have been provided, 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 produce of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present....¹⁷

Alternatively, if interrogation continues, a “heavy burden” rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self incrimination and his right to retained or appointed counsel.”¹⁸

¹⁵ Of course, most suspects who invoke the right to an attorney won’t be provided with an attorney during interrogation. Since police officers know that any attorney worth their salt would simply advise their client to stop talking, providing an attorney during interrogation is generally seen as a waste of money and time. See Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 734–35 (1992) (“virtually any competent lawyer would advise his client in the strongest possible terms to remain silent”). Thus, once a suspect invokes the right to counsel, questioning simply ceases. Timothy O’Neil, *Why Miranda Does not Prevent Confessions: Some Lessons from Albert Camus, Arthur Miller and Oprah Winfrey*, 51 SYRACUSE L. REV. 863, 874 n.100 (“In reality, the *Miranda* promise of a right to counsel is somewhat illusory. If a suspect asks for counsel, police will usually end all attempts at interrogation. Since the police know that an attorney will simply tell the suspect not to answer questions, it is easier to simply stop attempts to interrogate.”). Of course, the Sixth Amendment guarantees the suspect the actual provision of an attorney at critical stages in the proceeding, including interrogation, once judicial proceedings have been initiated. *Massiah v. U.S.*, 377 U.S. 201 (1964), *Brewer v. Williams*, 430 U.S. 387 (1977).

¹⁶ *Miranda*, 384 U.S. at 469. But see *Duckworth v. Eagan*, 492 U.S. 195, 202–05 (1989) (holding that warnings need not be given in the exact form provided by the *Miranda* decision).

¹⁷ *Miranda*, 384 U.S. at 473–74.

¹⁸ See generally *Johnson v. Zerbst*, 304 U.S. 458 (1938) (setting forth the waiver rule generally employed in *Miranda*). Post-*Miranda* cases have made clear that the burden is not as heavy as originally envisioned. See *North Carolina v. Butler*, 441 U.S. 369 (1979) (implied waiver valid); *Moran v. Burbine*, 475 U.S. 412 (1986) (suspect need not be provided with flow of information to help

Despite the length of the *Miranda* decision, significant questions remained on virtually every aspect of the decision.¹⁹ It would be left to subsequent courts to sort out the meaning of “custody” and “interrogation”—the perquisites before warnings are even required.²⁰ Most important for this discussion, both the meaning of invocation and the consequences of invoking rights remained grist for further development. It was the latter issue—the precise consequences of invoking the right to remain silent or the right to counsel—that engaged the courts first. Almost a decade after the *Miranda* decision, the Supreme Court considered whether the police could resume questioning a suspect after he asserted his right to remain silent.²¹ Although *Miranda* clearly stated that once a person invokes the right to remain silent any questioning must immediately cease, the Court provided no real guidance beyond this rather minimalist provision. Does this mean that questioning must cease *forever*?

In *Michigan v. Mosley*, the Court rejected the notion that a suspect who invokes his right to remain silent is forever barred from being interrogated.²² In that case, the defendant was arrested for several robberies and was provided his *Miranda* warnings prior to custodial interrogation. After waiving his rights and answering some initial questions, interrogation stopped when Mosley stated that he did not want to discuss the robberies any longer. About two hours later, different detectives approached Mosley and questioned him at a different location about a fatal shooting that had occurred during a different robbery than the ones that were the subject of the earlier interrogation. Mosley was issued new *Miranda* warnings, and agreed to talk about the murder. After 15 minutes of questioning, Mosley confessed to the murder after being told that a confederate had implicated him as the shooter.²³

calibrate decision to waive; thus suspect need not be told that an attorney would like to see him).

¹⁹ Indeed, the number of decisions elaborating upon the various principles set forth in *Miranda* is vast and many believe that most post-*Miranda* decisions have weakened the original safeguards. See, e.g., Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogator's Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397, 402–07 (1999) (as a result of the Burger and Rehnquist Court's post *Miranda* decisions, *Miranda* is no longer one case” but a group of them “imposing less strict safeguards than the original decision.”). Professor Yale Kamisar noted that he considers this comment “an understatement.” *On the Fourtieth Anniversary of the Miranda Case: Why we Needed It, How We Got It—And What Happened to It*, 5 OHIO ST. J. CRIM. L. 163, 178 n.69 (2007).

²⁰ For a sampling of cases dealing with the issue of custody, see *Oregon v. Mathiason*, 429 U.S. 492 (1977); *Berkemer v. McCarty*, 468 U.S. 420 (1984). For the meaning of interrogation, see *Rhode Island v. Innis* 446 U.S. 291 (1980).

²¹ *Michigan v. Mosley*, 423 U.S. 96 (1975).

²² *Id.*

²³ *Id.*

Mosley's confession was admitted at trial and he was convicted of murder. On appeal, Mosley argued that his Fifth Amendment rights had been violated when the government re-questioned him after he had asserted his right to remain silent. The Supreme Court disagreed. The Court held that *Miranda's* admonition that interrogation must immediately cease upon assertion of the right cannot "sensibly be read to create a per se prohibition of indefinite duration upon any further questioning by any police officer on any subject."²⁴ Such a reading would "transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police activity."²⁵ On the other hand, the Court recognized that repeated rounds of questioning after a defendant has stated his desire to remain silent will almost certainly undermine a suspect's free will; such an occurrence would convey to the suspect that the police were not prepared to honor his invocation. Hence, the Court held that a determination must be made whether, considering the totality of circumstances, a suspect's right to cut off questioning was "scrupulously honored."²⁶

The Court concluded that Mosley's rights were scrupulously honored even though questioning resumed. In so holding, the Court emphasized six factors. First, the questions immediately ceased after Mosley initially asserted his right to remain silent. Second, there was some passage of time between the invocation of the right and the second interrogation. Third, the officers re-read the *Miranda* warnings, reminding the suspect of his rights and their willingness to adhere to them. Fourth, the second interrogation was conducted by different officers than the first one. Fifth, the new interrogation involved a different topic than the earlier one. And sixth, and finally, the second interrogation occurred at a new location than the first one.²⁷ In these circumstances, the Court held, a suspect would not feel that he was being subjected to one continuous interrogation or that his will was being worn down. Nor would he feel that his original request to remain silent was being ignored and that therefore, re-asserting his rights would be futile. Rather, a suspect in these circumstances would feel that his right to remain silent had been scrupulously honored.

Since *Mosley*, lower courts have provided different weight to the six factors noted there. Nonetheless, most agree that the first three factors are inviolate. A suspect would not believe that his right to remain silent had been respected if the interrogation did

²⁴ *Id.* at 102.

²⁵ *Id.*

²⁶ *Id.* at 104.

²⁷ *Id.*

not immediately cease, if some (undefined) time period did not pass, and if new rights were not provided.²⁸ The other three factors (new officers, new location, new crime) are not essential and seem to “play off” against the passage of time.²⁹ That is, the longer the passage of time between the invocation of the right to remain silent and the new interrogation, the less these three factors are needed. The shorter the passage of time, the more important one or more of them might be to dispelling any indicia of one continuous interrogation. Thus, in *Mosley*, which involved a relatively short passage of time (only about 2 hours), the presence of these other elements was important factors that militated against the interrogation seeming like “one continuous interrogation.” In a case where the same officer approaches the suspect about the same crime but does so several days later, the absence of these factors likely would be insignificant.

Mosley, of course, involved the invocation of the right to remain silent. What if the suspect invokes the right to an attorney instead? Should the courts utilize the “scrupulously honored” standard employed in the right to remain silent? Six years after *Mosley*, the Court addressed this question and rejected the *Mosley* test in favor of a bright line rule that made re-interrogation more difficult once a suspect asks for an attorney rather than requests to remain silent. In *Edwards v. Arizona*, the Supreme Court adopted a per se proscription upon further questioning of indefinite duration after the suspect invokes the right to counsel; only if the suspect initiated conversation and then waived his rights would interrogation outside the presence of counsel be permissible.³⁰

In *Edwards*, the defendant was arrested for burglary, robbery and first degree murder. After being read his *Miranda* rights at the police station, he waived his rights and agreed to talk. After being told that another suspect had implicated him in the crimes, Edwards sought to “make a deal.” When the officer told him he didn’t have the authority to deal, Edwards then stated: “I want an attorney before making a deal.” At this point, questioning stopped, and Edwards was taken to jail.³¹

²⁸ See *State v. Jackson*, 640 A.2d 863, 873 (the re-issuance of *Miranda* warnings is a bright line, inflexible, minimum requirement).

²⁹ See, e.g., *People v. Wellhausen*, 2006 WL 1083906 *2–3 (police scrupulously honored defendant’s rights when, after 12–14 hours after invoking his right to remain silent, police approached him again, read him his rights and he waived those rights); *Commonwealth v. Tyree*, 2001 WL 379131 (Va. App) (“police did not properly honor defendant’s rights by resuming interrogation with respect to an offense then subject to his right to silence exercised only three hours previously”).

³⁰ *Edwards v. Arizona*, 451 U.S. 477 (1981).

³¹ *Id.* at 479.

Early the next morning, two different detectives came to the jail to speak to Edwards. While initially Edwards resisted seeing the detectives, he was told that he “had to;” after being read his rights again, Edwards agreed to talk so long as he could hear the taped statement of the accomplice who had fingered him. After listening to the tape, Edwards agreed to make a statement so long as it wasn’t on tape. He then implicated himself in the crime.³² His confession was introduced at trial and he was convicted.³³ On appeal, Edwards argued that his *Miranda* rights had been violated when the police officers interrogated him after he had invoked his right to counsel, and the Supreme Court agreed:

“When an accused has invoked his right to have counsel present during custodial interrogation, any valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation even if he had been advised of his rights. An 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.”³⁴

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

Although by the early 1980’s, the Supreme Court had established that the implication of invoking the right to counsel is

³² *Id.*

³³ Edwards was tried without the confession and convicted. A retrial was ordered (on different grounds) and on the day he was to be retried, Edwards pled guilty in return for a 15 year sentence. Stephen Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 460 n.62 (1987).

³⁴ *Edwards*, 451 U.S. at 484–85. For a discussion of the standards for initiation, see *Oregon v. Bradshaw*, 462 U.S. 1039, 1045–46 (1983), where the Court held that a suspect initiates under *Edwards* by saying something related to the investigation as opposed to a comment made incident to being in custody. As the Court explained, initiation occurs by an inquiry that can “be fairly said to represent a desire on the part of the accused to open up a more generalized discussion relating directly or indirectly to the investigation. Asking for a drink of water or to use the telephone would not constitute initiation because they are routine incidents of the custodial relationship.” See also *infra* note 128.

different than asserting the right to remain silent, it was not for another 13 years that the Court considered the threshold question of what constitutes an invocation in the first place. In 1994, the Supreme Court considered whether a suspect who ambiguously asks for an attorney had “invoked” his right to counsel under *Miranda*.

Prior to this time, the lower courts were split among three different approaches. Some court had held that if the suspect makes any request that can be construed as a request for counsel, ambiguous or not, any interrogation must immediately cease. In other words, even an ambiguous request for counsel constituted an invocation of the right to counsel.³⁵ Other courts took the exact opposite approach: the police may ignore any ambiguous requests for an attorney, and need stop interrogations only if the request is clear and unequivocal.³⁶ Most courts, however, took a middle approach: when faced with an ambiguous request for counsel, the police may ask questions, but only to clarify whether the suspect does or does not want the presence of an attorney during interrogation. If the suspect unambiguously indicates a desire for counsel, then all questions must cease. If the response to the clarifying questions indicates that the suspect is willing to speak without an attorney present, the interrogation may proceed.³⁷

Almost 30 years after *Miranda* had been decided, the Supreme Court, in *Davis v. United States*, finally addressed this critical question: what exactly triggers the protections set forth in *Miranda* and *Edwards*?³⁸ Davis, a member of the U.S. Navy, was accused of killing a fellow officer over a game of pool. He was arrested, brought to an interrogation room, and read his rights. Davis waived his rights both orally and in writing. After more than an hour of questioning, Davis said, “Maybe I should talk to a lawyer.” 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 manner 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.’”³⁹

After a short break and after re-reading of the *Miranda* rights, the interrogation resumed. About an hour later, Davis made some incriminating statements, and then said, “I think I want a

³⁵ See, e.g., *Maglio v. Jago*, 580 F.2d 202 (6th Cir. 1978).

³⁶ See *People v. Kendrick*, 459 N.E.2d 1137, 1140 (Ill. App. Ct. 1984); *State v. Moore*, 744 S.W.2d 479 (Mo. Ct. App. 1998).

³⁷ See *Nash v. Estelle*, 597 F.2d 513 (5th Cir.) (en banc), *cert denied*, 444 U.S. 981 (1979).

³⁸ 512 U.S. 452 (1994).

³⁹ *Id.* at 455.

lawyer before I say anything else.” At this point, all questioning ceased.

At his court martial, Davis’ motion to suppress the statements made during the interrogation was denied. The statements were admitted, Davis was convicted of unpremeditated murder, and he was sentenced to life in prison.⁴⁰ After his conviction had been affirmed up the military chain of appeals, the Supreme Court granted certiorari to decide how law enforcement officers should respond when faced with an ambiguous request for counsel during custodial interrogation.

Justice O’Connor, writing for the majority, held that after suspects waived their Miranda rights, law enforcement officers may continue questioning them unless they clearly and unequivocally requested an attorney.⁴¹ “If a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning...Rather the suspect must unambiguously request counsel.”⁴² The test for determining whether a request is unambiguous is an objective one. Although a suspect need not “speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.”⁴³ Here, the Court accepted the lower court’s conclusion that Davis’ statement “Maybe I should talk to a lawyer” was not a reasonably clear request for counsel. Thus, the NIS agents did not have to cease questioning Davis, and his subsequent statements were admissible in court.⁴⁴

In embracing this approach, O’Connor emphatically rejected the alternative suggested by some lower courts that any invocation, ambiguous or not, constitutes an invocation of

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Davis*, 512 U.S. at 459.

⁴³ *Id.*

⁴⁴ Interestingly, later courts often rely heavily on this part of the decision to conclude that statements like this are ambiguous. However, the Supreme Court assumed, without discussion that the statement was ambiguous. *Davis*, 512 U.S. at 462 (“The court below found that petitioner’s remarks to the NIS “maybe I should talk to a lawyer” was not a request for counsel and we see no reason to disturb that conclusion.”). The petitioner wanted to argue that the statement was not ambiguous; the government argued that the issue was not properly before the court because it was not included within the questions to which the Court granted certiorari. See James Faulkner, Note, *So U Kinda, Sorta, Think You Might Need a Lawyer, Ambiguous Requests for Counsel after Davis v. U.S.*, ARK. L. REV. 275, 303 n. 134 (1996).

Edwards. As the Court noted, “if we were to require questioning to cease if a suspect makes a statement that might be a request for an attorney...police officers would be forced to make difficult judgment calls about whether the suspect in fact wants an attorney even though he hasn’t said so, with the threat of suppression if they guess wrong. Such an approach “would transform *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity.”⁴⁵

The “stop and clarify approach” received a more favorable review; O’Connor suggested that it might be good police practice to ask clarifying questions when the suspect makes an ambiguous comment or request for an attorney. Nonetheless, such a practice is not required and police are free to ignore an ambiguous invocation of the right to counsel.

II. Importing *Davis*: Requiring that the Right to Remain Silent be Asserted Unambiguously

Davis involved a post-waiver invocation of the right to counsel; no Supreme Court decision has explicitly or implicitly applied the reasoning in that case to invocations of the right to remain silent. Nonetheless, those lower courts that have considered the question have almost unanimously done so. With few exceptions, the majority of jurisdictions have imported the ruling in *Davis* beyond its terms to apply to both *Miranda* rights.⁴⁶ This section explores that phenomenon in two ways. First, a precise description of the caselaw is provided: a listing of which jurisdictions have embraced the *Davis* rule for the right to remain silent, which have rejected it and which have not yet decided as of February, 2008 is provided. Second, what this means in practice is explored. In other words, what types of statements by defendants have been deemed ambiguous? What constitutes an explicit assertion according to the courts?

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

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

1. The Federal Courts

⁴⁵ *Davis* 512 U.S. at 460.

⁴⁶ Indeed, many secondary sources state the rule as an established principle of criminal law. See, e.g., *Thirty-Fifth Annual Review of Criminal Procedure: Investigation and Police Practices; Custodial Interrogation*, 36 GEO L. J. ANN. REV. CRIM. PROC. 183 (2007) (“If an invocation of the right to remain silent is ambiguous or equivocal, further questioning is permissible.”). See 2 LAFAYETTE ET AL., *Criminal Procedure* § 6.9(g) (3d ed. 2007)(stop and clarify position with respect to right to remain silent debatable now in light of *Davis*).

In the federal courts, seven out of the eleven circuits and the District of Columbia have either expressly held that a suspect must unambiguously invoke the right to remain silent⁴⁷ or that it would not be an unreasonable application of clearly established federal law to apply *Davis* to the right to remain silent.⁴⁸ One circuit—the Second Circuit-- assumed that *Davis* applied to the right to remain silent, although it did not hold that it did so.⁴⁹ No appellate court has yet held that *Davis* is limited to invocation of the right to counsel and should not be employed to determine whether a suspect has invoked his right to remain silent. Thus, as the Tenth Circuit recently noted, “every circuit that has addressed the issue

⁴⁷ Sixth Circuit: *U.S. v. Hust*, 228 F.3d 751, 760 (6th Cir. 2000); *McGraw v. Holland*, 257 F.3d 513 (6th Cir. 2001) (applying *Davis* and finding request unambiguous); Seventh Circuit: *U.S. v. Sherrod*, 445 F.3d 980, 982 (7th Cir. 2006) (defendant’s statement did not constitute unambiguous assertion of right to remain silent); *U.S. v. Banks et al.*, 78 F.3d 1190, 1197 (7th Cir. 1996); *U.S. v. Mills*, 122 F.3d 346, 350 (7th Cir. 1997); Eighth Circuit: *Simmons v. Bowersox*, 235 F.3d 1124, 1131 (8th Cir. 2001); *U.S. v. Nelson*, 450 F.3d 1201, 1211-12 (10th Cir. 2006). Eleventh Circuit: *U.S. v. Acosta*, 363 F.3d 1141, 1154-55 (11th Cir. 2004); *Manuel Valle v. Secretary for the Dept of Corrections*, 2006 U.S. App. Lexis 20594, *17 (11th Cir. 2006); *U.S. v. Del Rio*, 168 Fed. Appx 923, 927 (11th Cir. 2006). District of Columbia: *U.S. v. Anderson*, 1996 U.S. App. Lexis 7286 (per curiam) (applying *Davis* rule).

⁴⁸ For many of the cases, the case is heard in federal court under a habeas petitions under the Antiterrorism and Effective Death Penalty Act (AEDPA). Under this statute, federal courts review state judgments only to determine whether those judgments construe or apply federal law in a manner that is contrary to or an “unreasonable application of” the Supreme Court’s “clearly established” precedent. *See e.g.*, *Bui v. DiPaulo*, 107 F.3d 232, 239 (1st Cir. 1999). Courts taking this approach include the First, Fourth, Fifth and Ninth Circuits. First Circuit: *James v. Marshall*, 322 F.3d 103, 108 (1st Cir. 2003); Fourth Circuit: *Burket v. Angelone*, 208 F.3d 172 (4th Cir. 2000) (noting that although the Fourth Circuit had not yet determined whether *Davis* is applicable to invocations of the right to remain silent, under Sec. 2254, the court need only decide whether the Virginia’s Supreme Court’s decision to admit the suspect’s statement was contrary to clearly established federal law as determined by the Supreme Court; in light of *Davis* “we cannot say that it was.”) Fifth Circuit: *Hopper v. Dretke*, 106 Fed. Appx. 221, 229 (5th Cir. 2004) (applying, without discussion, *Davis*). *But see*, *Soffer v. Cockrell*, 300 F.3d 588, 594 n. 4 (5th Cir. 2002) (stating that it was not addressing whether *Davis* standard applies but nonetheless finding that the defendant did not invoke his right because it was not a clear invocation) Ninth Circuit: *Evans v. Demosthenes*, 98 F.3d 1174, 1176 (9th Cir. 1996); *Arnold v. D.L. Runnels*, 421 F.3d 859, 865 n.8 (9th Cir. 2005) (court found that suspect unambiguously asserted right to remain silent and thus again left open the question of whether *Davis* applies equally to the invocation of the right to silence) *But see* *Monzano v. Pliler*, 192 Fed Appx. 605, 606 (9th Cir. 2006) (California Court of Appeal decision that defendant did not unambiguously invoke his right to remain silent is not contrary to or involved an unreasonable application of clearly established federal law and therefore the defendant is not entitled to habeas relief on this claim; citing *Davis* and stating that *Arnold v. Runnels*, 421 F. 3d 859, 865 (9th Cir. 2005), had applied *Davis* to the right to remain silent).

⁴⁹ *U.S. v. Ramirez*, 79 F.3d 298, 305 (2d Cir. 1996).

squarely has concluded that *Davis* applies to both components of *Miranda*; the right to counsel and the right to remain silent.”⁵⁰

Although the majority of courts may have applied *Davis* to the right to remain silent, they did so perfunctory. None of the courts provided any detailed explanation for why that Supreme Court decision transcended the right to counsel and applied as well to the right to remain silent. The Tenth Circuit simply referred to the weight of authority applying *Davis* to both components of *Miranda*, the right to counsel and the right to remain silent, and stated: “we agree with this reasoning.”⁵¹ Even when some analysis is provided, it is extraordinarily cursory. Typical is the approach of the Eleventh Circuit, which recited the justifications provided in *Davis*, and concluded simply that because the justifications apply “with equal force to the invocation of the right to remain silent and because we have previously held that the same rule should apply in both contexts, we hold that the *Davis* rule applies to invocations of the right to remain silent.”⁵² The Seventh Circuit explained its decision to follow *Davis* this way: “If an ambiguous request for counsel—a request that if it were more clear, would amount to a per se invocation of Fifth Amendment rights—does not require the cessation of all questioning, we do not believe that *Davis* permits our imposing such a rule on any other ambiguous invocation of the right to silence.”⁵³

2. *The State Courts*

State court decisions follow a similar pattern to the federal: the vast majority of states that have considered the question have applied the *Davis* rule to the right to remain silent.⁵⁴ No state which adopted *Davis* as the prevailing doctrine for the right to counsel rejected it for the right to remain silent. In other words, only a few states did not adapt *Davis* for invoking all *Miranda* rights; those states either have not yet considered the issue or are the few states that rejected *Davis* altogether under their state constitution.⁵⁵

⁵⁰ U.S. v. Nelson, 450 F.3d 1201, 1211–12 (10th Cir. 2006).

⁵¹ *Id.*

⁵² Coleman v. Singletary, 30 F.3d 1420, 1424 n.5 (11th Cir. 1994), *cert. denied* 514 U.S. 1086 (1995). *See, e.g.*, U.S. v. Stepherson, 152 Fed. Appx. 904, 906 (11th Cir. 2005).

⁵³ United States v. Banks, 78 F.3d 1190 (7th Cir. 1996).

⁵⁴ People v. Arroya, 988 P.2d 1124 (Co. 1999) (In adopting the “clear articulation rule,” we follow the majority of states that have considered [the issue.]”) *See* Appendix I for a listing of each state and the rules followed.

⁵⁵ The following states do not follow *Davis* to require that an invocation of counsel must be made unambiguously because their state constitution provides greater rights to a suspect than the federal constitution. Minnesota: *State v. Risk*, 598 N.W.2d 642, 648–49 (Minn. 1999); Hawaii: *State v. Wallace*, 94 P.3d 1275, 1286 (Haw. 2004); *State v. Hoey*, 881 P.2d 504, 522 (Haw. 1994); New Jersey: *State v. Chew*, 695 A.2d 1301, 1318 (N.J. 1997); West Virginia: (*State v.*

Similar to the federal cases, the adoption of *Davis* by the state courts is typically fairly perfunctory.⁵⁶ With one exception, the courts did not address any of the possible reasons why the rights perhaps should be treated differently.⁵⁷ Rather, the approach of the Supreme Court of Vermont is representative, when it simply declared, “Without doubt, [the holding in *Davis*] applies equally to situations in which the defendant who has waived his *Miranda* rights ambiguously invokes the right to remain silent during the subsequent interrogation.”⁵⁸

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

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

There are familiar patterns in the cases where the suspect’s statements are found to be ambiguous assertions of the right to remain silent.⁵⁹ The statement made by suspects typically fit into

Farley, 452 S.E.2d 50, 59 n. 12 (W.Va. 1994). *But see* State v. Bradshaw, 457 S.E.2d 456, 470 (W.Va. 1995) (any doubt created by an ambiguous statement would be resolved in favor of the police).

⁵⁶ See, e.g. State v. Gerpard, 709 So.2d 213, 220 (“if invocation of the right to counsel must be unambiguous, then certainly the invocation of the right to remain silent must also be unambiguous.”).

⁵⁷ One obvious exception was the analysis of the Wyoming Supreme Court, which expressed significant doubts about the application of the *Davis* rule to the right to remain silent similar to those articulated in this paper, but ultimately determined that it need not decide the issue since the officers here properly clarified the ambiguous invocation. *Pena v. State*, 98 P.3d 857 (Wyo. 2004).

⁵⁸ State v. Bacon, 658 A.2d 54, 65 (Vt. 1995).

⁵⁹ For a similar analysis with respect to the invoking the right to counsel, see Marcy Strauss, *Understanding Davis v. United States*, 40 LOYOLA L. REV 122 (2007) (hereinafter, *Understanding Davis*). In many ways, though, classifying and analyzing the right to remain silent presented a more difficult challenge. At a minimum, virtually every comment in the right to counsel cases involved the use of the word lawyer or attorney or counsel, and the only question is whether that was sufficiently clear to constitute an invocation. In the right to silence cases, that is not true—there are no magic words like “attorney or lawyer” that signals a possible assertion, and the statements involve an almost infinite range of ideas, including requests to be somewhere else or silence. Moreover, at times

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

1. questions concerning the right

One type of possible invocation of counsel occurs when the suspect asks about the right rather than directly asserts it. At times, the suspect appears to be seeking the advice of the police: the suspect may ask if they think they should remain silent or obtain a lawyer.⁶⁰ But at other times the question appears to be a fairly clear substitute for a direct assertion of the right. For example, the suspect may ask about the right instead of asserting it directly: “I have the right to stop don’t I....answering questions?”⁶¹ Or, instead of saying that they don’t want to talk at this time, as suspect may “ask” if they could talk later.⁶² Using questions, or even making statements with a voice raised at the end is a frequent form of elocution for persons who find themselves in an intimidating position or who feel powerless.⁶³ And in everyday parlance, using a question to make a request is commonplace. For example, a school child might raise her hand and ask “Can I go the

it may be difficult to determine whether the suspect is invoking the right to counsel or the right to remain silent---and perhaps the suspect may not be certain as well. For example, is a suspect who says “I’m asserting my rights” asserting both? Most courts would likely find that to be an assertion only of the right to remain silent (at best). *See* *Medley v. Commonwealth*, 602 S.E.2d 411, 417–18 (Va. App. 2004). Of course, most suspects are totally unaware of the significant different consequences of invoking one right versus the other. *See* *State v. Farley*, 452 S.E.2d 50, 59–60 n.11 (W.Va. Ct. App. 1994).

⁶⁰ *See, e.g.,* *Gilbert v. State*, 20004 Ark App. Lexis, 861 (Ct. App. Ark. 2004) (“do I need a lawyer or something?” held to be ambiguous invocation of right to remain silent).

⁶¹ *People v. Moore*, 2003 WL 21771296 *4(Mich. Ct. App) (question, along with, “So what do I have to do to get out of here, Cause I haven’t sleep (sic) all day” held not to be request, let alone unambiguous request to remain silent).

⁶² *See* *Smith v. State*, 236 S.W.3d 282, 289-90 (Tex. App. 2007) (statement- “Could I go upstairs because I’m hungry?”- was ambiguous). *See, e.g.,* a pre-*Davis* decision—*Martin v. Wainwright*, 770 F.2d 918, 922-24 (11th Cir. 1985) (finding that “can’t we wait until tomorrow invoked right to cut off questions) *modified in respects not relevant*, 781 F.2d 185 (11th Cir. 1986).

⁶³ Peter Tiersma and Lawrence Solan, *Cops and Robbers: Selective Literalism in American Criminal Law*, 38 LAW & SOC’Y REV. 229, 251-52 (2005). Professors Tiersma and Solan point out that in other context, when *the police* phrase statements as questions, even ambiguous questions, courts will view it as clear requests. For example, in *Schneloth v. Bustamonte*, the Supreme Court held that the police officer, by asking “does the trunk open?” had requested consent to search the trunk. *Id.* at 255.

bathroom?” While it is possible that that child does not really want to go the bathroom, and may be simply assessing if it is possible, virtually all would assume that a “yes” answer would lead the child to leave the room. In other words, it would appear clear to most that the child is saying, “I want to go to the bathroom—is that ok?”

In the context of the interrogation room, however, questions like that are usually deemed ambiguous. Take for example, the approach of the Minnesota Court of Appeals involving a suspect, Gilmer, and the interrogator, Carlson:⁶⁴

Gilmer: Can I go?

Carlson: uh?

Gilmer—Can I go?

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

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

The court held that Gilmer’s requests to leave—twice saying “Can I go?” --were not an unambiguous and unequivocal invocation of the right to silence. This conclusion was buttressed by Gilmore’s behavior after he asked to leave; because Gilmore continued to answer questions, “he did not demonstrate a general refusal to answer any of the questions the detective wanted to ask.”⁶⁵

2. use of modal verbs like maybe, might or could

As predicted by critics of *Davis*, many suspects subjected to the intimidation inherent in custodial interrogation employ modal verbs—indirect, tentative speech patterns. Thus, suspects might say things like, “I might not want to talk,” or maybe I’ll stay quiet.” Although there are not many cases along these lines, courts invariably find these kinds of statements to be ambiguous. For example, one court found the statement, “I’m not sure what I want to do” was ambiguous and thus, not an invocation of the right to remain silent.⁶⁶ Another found that a suspects comment, “I want to

⁶⁴ State v. Gilmer, 2004 WL 333137 (Minn. Ct. App).

⁶⁵ *Id* at *8. This conclusion appears contrary to law—the subsequent answering of questions after a possible invocation should not be used as evidence that the invocation was ambiguous. Rather, it’s a testament to the ability of the police, once they ignore an invocation, to obtain the suspect’s cooperation since most suspects would then believe they have no real option. Of course Gilmer talked—he had twice asked to leave and was essentially ignored. I discuss this phenomenon elsewhere as well. *See infra* Section III A 3.

⁶⁶ State v. Morris, 255 Kan. 964, 975–76, 880 P.2d 1244 (1994). *See* People v. Furness, 2006 Ca App. Unpub. Lexis 6249 *8 (“I’m thinking I might just want to keep my mouth shut, I don’t know”....held ambiguous; police also asked

give ya'll a statement but I don't...I'd rather not be doing it. Another time if we could man," was ambiguous and allowed the police to continue questioning.⁶⁷

Perhaps the oddest interpretation of a modal verb involves one court's analysis of the use of the word "can't." In a strange use of linguistic logic, the Michigan court of appeals found that the trial court did not err in finding that a suspect, who, after viewing a video, said "I can't say anything more now because that's blowing my mind away," was not unambiguously asserting the right to remain silent.⁶⁸ The court's reasoning: "defendant's expression of his inability to respond to the allegation based on shock and disbelief is not an unequivocal assertion of the right to remain silent. The fact that the defendant referred to his ability to respond to the allegations using the word "can't" and referenced his shock as the reason for being unable to speak further supported the trial court's finding that defendant was referring not to his desire to remain silent but to his inability to respond to the charges in light of his shock."⁶⁹

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

3. *hedges*

"Hedges" are lexical expressions that function to attenuate the emphasis of a statement or to make it less precise."⁷⁰ As will be discussed more fully later, Janet Ainsworth and others scholars predicted that women and members of certain cultures particularly use hedges when in custodial settings because they are not used to demanding outright and directly what they desire.⁷¹ Similarly, Professors Tiersma and Solan noted that people use hedges not only when they are uncertain about something, but also as a means of expressing politeness or being deferential.⁷² Thus, a person might say things like "I think I should stop talking," or I guess I won't talk," or "maybe I shouldn't talk" rather than say directly

clarifying questions); *State v. Hassel*, 696 N.W.2d 270, 274 (Ct. App. Wis. 2005) ("I don't know if I should speak to you" held ambiguous).

⁶⁷ *State v. Reed*, 809 So.2d 1261, 1273-74 (La. Ct. App. 2003).

⁶⁸ *People v. Anderson*, 20007 WL 1429631 *1 (Mich App).

⁶⁹ *Id.*

⁷⁰ Janet Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogations*, 103 YALE L. J. 259, 276 (1993). See Strauss, *Understanding Davis*, *supra* note 59.

⁷¹ *Id.*

⁷² Tiersma and Solan, *supra* note 63 at 249-50.

that they are not going to answer any questions, or “demanding” their rights. Although my survey of the caselaw was not able to assess whether women are more likely to speak like this than men, it did establish that whomever used these expressions were likely to be found to be making an ambiguous request. For example, the Kansas Court of Appeals found that the statement, “you are scaring me I think, yeah, I shouldn’t say anymore,” constitutionally indistinguishable from the ambiguous comment in *Davis*.⁷³ Another court found that the suspect’s statement, “I don’t think I can talk, I guess I don’t want to discuss it right now” was ambiguous.⁷⁴ Similarly, a suspect who, when asked if he wanted to talk said, “naw, I don’t think so,” was held to be making an ambiguous request.⁷⁵

Another way a suspect could “hedge” their comments without using terms like “think, or “guess,” is to “blame” the request on others. Again, the court often deems these ambiguous requests. For example, one defendant, after talking for a bit said, “from here on, I’m not supposed to talk about it. Mr. Stanfield told me not to talk about the rest of this.”⁷⁶ The court held that the subsequent statements were admissible because it was an ambiguous statement (which the police officers clarified.).⁷⁷

⁷³ *State v. Morfitt*, 956 P.2d 719 (Ct. App. Ks. 1998). *Accord* *People v. Stitely*, 108 P.3d 182, 196 (Cal. 2005) (“I think it’s about time for me to stop talking” held ambiguous).

⁷⁴ *People v. Peracchi*, 86 Ca. App. 4th 353 (2001).

⁷⁵ *People v. Patterson*, 2005 Cal. App. Unpub. Lexis 9594 *35 (1st Dist.). *See* *Burket v. Angelone*, 208 F.3d 172, 200 * (4th Cir. 2000) (“I just don’t think that I should say anything,” and “I need somebody that I can talk to,” held not to constitute unequivocal request to remain silent); *State v. Garbow*, 2005 WL 221676 (Minn. App.) (“I don’t know” when asked if wanted to speak inherently ambiguous). *State v. Holmes*, 102 P.3d 406 (Sup Ct. Ks. 2004) (after suspect said: “I think I’ll just quit talking, I don’t know,” police officer moved interrogation in another direction, thinking suspect just uneasy talking about particular subject.—asking “you’d you like to talk about something else? Suspect said yes. Court held statement was ambiguous--could be construed as not wanting to talk but not knowing if should stop, or as invocation. Here, appropriate to clarify); *State v. Wright*, 2007 WL 456247 (Ohio App. 2007 *6-7 (“You know man, I really don’t even want to keep going through these questions and stuff man, because you are all getting ready to charge me with something. I don’t know man. You know what I am saying,” held ambiguous and police asked appropriate clarifying questions like, “You don’t want to answer any more questions?”). *Cf* *State v. Deen*, 953 So.2d 1057, 1058-59 (La. App. 2007) (defendant’s statement: “Okay, if you’re implying that I’ve done it, I wish to not say any more. I’d like to be done with this. Cause that’s just ridiculous. I’d wish I’d...don’t wish to answer any more questions,” held to be ambiguous because it was conditioned on police officer’s implying that he committed the brutal assault.).

⁷⁶ *Alvarez v. State*, 890 So.2d 389 (Fl. Ct. App. 2005).

⁷⁷ *Id.* While “clarifying,” the police also told the suspect that this would be his only opportunity to tell his side of the story.

4. *simply silence*

What if the suspect simply stays silent? Is that an invocation of the right? In one way, it could be deemed the ultimate invocation—not only is the person saying what they want to do, they are also doing it! On the other hand, the conclusion is complicated because a person may pick and choose what to respond to, so it may be that they haven't yet found a topic they wanted to discuss. Not surprisingly, then, the courts have reached conflicting conclusions with respect to silence. For example, one district court held that the suspect had invoked the right to remain silent when he did not answer any of the first set of questions in a twenty minute period.⁷⁸

Most courts, however, seem to deem silence, even lengthy silence, as ambiguous. For example, a court of appeals held that the trial court's determination was not clearly erroneous when it held that a 30-40 minute period of silence did not express an unwillingness to continue the questioning but rather a 'time used by [the suspect] to redevelop his strategy and decide how he wished to respond to the discovery of the receipt for the bag of lime.'⁷⁹ Similarly, a court held that the suspects' statement that he would not confess to something he did not do, that the police should 'buckle up for the long ride,' accompanied by the suspect turning his chair away, closing his eyes, and remaining silent for two and one half hours did not constitute a clear and unambiguous assertion of the right to remain silent.⁸⁰

5. *requests to do something besides talk*

One of the difficult aspects of analyzing cases involving the right to remain silent is the myriad of almost limitless ways to invoke the right. For example, a person may inform the police that they did not want to talk by saying that they want to do something else instead.⁸¹ Or they may ask to speak to someone else—a mom, another suspect---before speaking to the police.⁸² Almost

⁷⁸ State v. Rossignol, 627 A.2d 524 (Me. 1993).

⁷⁹ Commonwealth v. Sicari, 752 N.E.2d 684, 695–96. (Mass. 2001).

⁸⁰ Green v. Conn, 500 S.E.2d 835, 839 (Va. App. 1998). *See* State v. Ross, 552 N.W.2d 428 (Wis. App. 1996) (suspect's silence, standing alone is insufficient to unambiguously invoke the right to remain silent).

⁸¹ *See, e.g.*, State v. Curren, 2005 WL 1995101 *2-3 (Oh. App.) (request to reschedule the conversation for another time, which was denied by the police who said they wanted the matter cleared up that day did not constitute an unambiguous invocation of right to remain silent); State v. Gaspard, 709 So.2d 213, 218-19 (La. Ct. App. 1998) ("I'm ready to go [to jail]" does not unambiguously invoke right to remain silent).

⁸² *See, e.g.*, Davis v. State, 2007 WL 1704071 *4–5 (Tex. Crim App) (suspect asked to speak to his mom, asked to go home for an hour and then return and tell the truth ambiguous and satisfied by police getting mom on phone because suspect just wanted to reassure himself that his mom felt ok before continuing); *see also* Draper v. State, 2002 Del. Lexis 51 (Dela Sup. Ct. 2002) (suspect

invariably, the courts have found these statements to be ambiguous. Thus, the Kansas Supreme Court held ambiguous the suspect's statement: "[a]nd since we're not getting anywhere I just ask you guys to go ahead and get this over with and go ahead and lock me up and let me go and deal with the Sedgwick County. I'm ready to go to the Sedgwick County, let's go." Such a statement, according to the court, did not constitute an unequivocal statement that he wished to remain silent.⁸³ Similarly, the Florida Court of Appeals held that the suspect, who three times said, "just take me to jail," was making an ambiguous assertion of the right to remain silent, and therefore the police did not have to stop questioning.⁸⁴ Another court held that a female suspect who said, "Then put me in jail. Just get me out of here. I don't want to sit here anymore, alright. I've been through enough today," was ambiguous. In so doing, the court indicated the high threshold level it was establishing: "a suspect's claimed unequivocal invocation of the right to remain silent must be patent...[The rule] allows no room for an assertion that permits even the possibility of reasonable competing inferences: there is no invocation of the right to remain silent if *any* reasonable competing inference can be drawn."⁸⁵ Under such a standard, it is not surprising that the court held that the suspect's ostensibly clear assertion was ambiguous. The court conceded that a reasonable interpretation of the statement is that the suspect was invoking her right to remain silent, but concluded that an equally reasonable interpretation was that she was "merely fencing with [her interrogator] as he kept repeatedly catching her either in lies or at least differing versions of the event."⁸⁶

Finally, and perhaps most disturbing, a court found no assertion of the right to remain silent despite the persistent requests throughout the interrogation from a suspect with diminished mental abilities to go home-- "I want to go home to the house man," "I'll come up to talk to you later because man, don't have time to think," "I gotta go home," "can I go home now?"⁸⁷ As the court concludes, "His statements more accurately reflect a desire to

requested to speak to his mom before he talked to the police was ambiguous statement, but under Delaware law court held police obligated to clarify, not interrogate, which they did not do, thus statements elicited after this comment were suppressed).

⁸³ State v. Speed, 961 P.2d 13, 23 (Kan. 1989). See Smith v. State, 236 S.W.3d 282, 289-90 (Tex. App. 2007) ("Man, whatever's gonna happen, cause I'm just ready to go up there and eat....could I go upstairs because I'm hungry," indicated only that the suspect was hungry and not that he wanted to end the interrogation!).

⁸⁴ Ford v. State, 801 So.2d 318, 319-20 (Fl. Ct. App. 2002), *review denied*, 821 So.2d 292 (Fl. 2002), *cert. denied*, 537 U.S. 1010 (2002).

⁸⁵ State v. Markwardt, 742 N.W.2d 546, 556-57 (Wis. App. 2007).

⁸⁶ *Id.*

⁸⁷ Delao v. State, 2006 WL 3317718 *5 (Tex. App).

have time to formulate answers or an inquiry as to whether he would be allowed to go home if he confessed rather than a request to terminate the interview. At most, Delao's statements are ambiguous as to his desire to terminate the interview."⁸⁸

6. *temporally vague comments*

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

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

Instead, many courts considering comments like "I don't want to talk now," have determined that the invocation itself was equivocal or momentary and thus no sort of *Mosley* analysis is even necessary since the interrogation can simply continue (although it's nice to give the suspect a quick break!).⁸⁹ For

⁸⁸ *Id.*

⁸⁹ See *Anderson v. Terhune*, 467 F.3d 1208 (9th Cir. 2005) (state court's holding that the following statement was ambiguous is not unreasonable: "I don't even wanna talk about this no more. We can talk about it later or whatever. I don't want to talk about this no more...I plead the fifth." According to the appellate court, the police here also engaged in clarification, not continued interrogation, by asking the suspect: "plead the fifth. What's that?") In another case, the suspect said, "I can't say no more right now...my head is splitting, I need some rest. I really do," held not to invoke right to remain silent, simply that the defendant felt that he was physically unable to continue. Thus, the court found no problem with the police response when the suspect said he could say no more: "yes you can....It's got to come out... It's going to kill you if it doesn't." *Douthit v. State*, 93 S.W.2d 244, 257 (Tex. Crim App. 1996); *State v. Galli*, 967 P.2d 930, 935 (Utah 1998) (the only reasonable interpretation of the suspect's statement: "I can't even talk right now," is that his emotion had temporarily overcome his ability to speak and thus it was not an unambiguous assertion of right to remain silent). Accord, *Franks v. State*, 90 S.W.3d 771, 786-87 (Tex. App. 2002) (suspect with low IQ said, "I don't want to talk anymore. I'm tired," held to be ambiguous).

While most courts appear to find it ambiguous, not all reach that conclusion. See, e.g. *State v. Nelson*, 1998 De. Super Lexis 477 ("I have nothing else to say now" held unambiguous invocation); *State v. Iowa*, 602 N.W.2d 190

example, a recent court of appeals decision held that a suspect's comment "I don't want to talk about it right now" was ambiguous as to whether the suspect wants to talk after a "quick break." Thus, the re-interrogation after a short period was held valid, not under *Mosley* or some other theory, but because there was no clear invocation; the statement was ambiguous as to whether the suspect wanted to speak at that point.⁹⁰ Similarly, the Rhode Island Supreme Court held that the defendant's statement, "I don't want to talk about it right now," operated to limit the defendant's invocation of his right to remain silent to the moment and was equivocal.

Other courts similarly have found angry outburst that included the intent not to say anything indicated only a temporary-- and thus ambiguous-- assertion of the right to remain silent. For example, when the suspect, after getting upset with the police officer, said, "I'm not going to talk...That's it. I shut up," the court concluded that this statement "reflected only momentary frustration and an animosity toward one of the officers and not an invocation of the right to remain silent."⁹¹ Similarly, the Minnesota Supreme Court held that the suspects statement, "I don't have to take any more of your bullshit," accompanied by his walking out of the interview room did not invoke the right to remain silent. Rather, the court sanctioned the re-interrogation that occurred after a "cooling off period" because the suspect did not specifically state that he wanted to stop answering questions.⁹²

7. statements indicating a desire not to talk about certain subjects or with a particular person

In a similar vein, some courts interpret what looks like an unambiguous invocation to be ambiguous because it did not indicate a generalized wish to remain silent but rather simply suggested a desire to change subjects or interrogators.⁹³ For

(Io. Ct. App. 1999) ("Well I'm done. You're just repeating the same questions...Well your done. I gotta go. I gotta go eat...I'm done. " found to be unambiguous but admission of subsequent statements found to be harmless error); *State v. Hukowicz*, 2000 WL 1246430 *3(Tenn. Ct. Crim App) ("although the defendant did not stand mute or assert that he did not want to answer any questions, we find ample evidence to support the trial court's finding that the defendant invoked his right to remain silent [when he told the detective] that he could not comment and that, although he wanted to comment, he knew better.").

⁹⁰ *State v. Bieker*, 123 P.3d 478 (Ks. Ct. App. 2006).

⁹¹ *People v. Jennings*, 46 Ca. 3d 963 (Ca. 1988).

⁹² *State v. Williams*, 535 N.W.2d 277, 285 (Minn. 1995). *See also* *State v. Gilmer*, 2004 WL 333137 (Minn. App).

⁹³ *See e.g.* *State v. Golphin*, 533 S.E.2d 168 (N.C. 2000). There, the suspect's statement that "he didn't want to say anything about the jeep. He did not know who it was or he would have told us" was not unambiguously invoking right to

example, one court held that a defendant's statement—"I don't want to talk about it anymore, it hurts too much," was not invoking the right to remain silent but expressing a desire not to continue talking about the murder.⁹⁴ Such a conclusion is especially likely to be reached if the suspect says something like "I don't want to talk about *that* or *it*."⁹⁵ But even when the comment seems more

remain silent. Rather the suspect was suggesting that if he knew he would have said and thus further questioning on the jeep was perfectly acceptable. Of course, even a change of subject does not offer much protection to the suspect. For example, in one case when the suspect said he "had nothing to say" to the detective, the detective interpreted that as a desire not to say anything on the subject asked about (a particular robbery). The detective then asked him if he had committed any other robberies, and the defendant responded, "No other than the one today." The court held the statement inadmissible on the ground that the suspect had invoked his rights. *Smith v. State*, 915 So.2d 692, 294 (Fl. Ct. App. 2005).

⁹⁴ *State v. Fristschen*, 802 P.2d 558 (Kan 1990). *Accord*, *State v. Jackson*, 839 N.E. 2d 362 (Sup. Ct. Ohio, 2006 (I don't even like talking about it man ... cause you know what I mean, its fucked for me, mean... I told you... what happened man.... I mean I don't even want to , you know what I'm saying, discuss no more about it man...." Held ambiguous). *Cf.* *People v. Troutman*, 344 N.E. 2d 1088 (Ill. Ct. App. 1977) (suspect's statement that she was not going to confess did not invoke the right to remain silent but just indicated that she didn't want to incriminate herself); *Vargas v. State*, 2005 WL 729460 (Tex. App.) (15 year old said twice, "I don't want to do this, court held ambiguous because it was reasonable to believe it meant he didn't want to relive the gruesome details of the death); *Clark v. State*, 2004 WL 1043156 (Tex. App.) ("don't want to answer" held ambiguous); *Milburn v. State*, 2004 WL 21620 (Tex. App.) ("I don't have nothing to say," held ambiguous). *But see* *U.S. v. Stewart*, 51 F. Supp. 2d 1136, 1142-45 (D. Kan. 1999) (defendant invoked right to remain silent when he said "he did not want to talk about a robbery, " and "I don't want to talk to you motherfuckers,"), reconsidered in part, 51 F.3d 1338 (19th Cir. 2000); and pre-*Davis* decision, *U.S. v. Posle*, 784 F.2d 263, 465-67 (9th Cir. 1986) (defendant stated he had 'nothing to talk about' invoked right to remain silent).

⁹⁵ *See. e.g.*, *Ramos v. State*, 2006 WL 1232896 (Tex App) ("I don't want to talk about it," ambiguous; could just be a desire not to talk about particular subject); *People v. Silva*, 45 Cal.3d 604, 629-30 (Ca. 1988) ("I don't want to talk about that did not amount to an invocation of *Miranda* but an unwillingness to talk about certain subjects); *Owens v. State*, 862 So.2d 687 (Fl. 2003) (suspect said "I'd rather not talk about it... I don't want to talk about it." Court, with little explanation concluded was ambiguous); *State v. Crawford*, 2005 WL 757582 (Minn. App.) ("I don't know anything about it, so I don't' got nothing to say about it," in response to whether he sold amphetamines not assertion of right to remain silent but denial that he sold drugs); *State v. Marden*, 674 A.2d 1304, 1309-10 (Me. 1996) (defendant's "no comment" to several questions was ambiguous—"his responses viewed individually only indicated his desire not to answer the particular question asked, not that he wanted the questioning to stop); *State v. Bacon*, 658 A.2d 54, 65-66 (Vt. 1995) (A defendant may express an unwillingness to discuss certain subjects without indicating a desire to terminate an interrogation already in progress); *Hale v. Commonwealth*, 2005 WL 2938306 (Va. App. 2005) ("that's probably really all I can say" held ambiguous); *State v. Fitzgerald*, 2007 WL 1241518 (Wash. App.) (suspect's comment, "I'd rather not answer that, remained silent in response to questions

encompassing, courts often suggest it is just in response to the most immediate question. For example, a court held that the suspects statement, “I’m not saying anything right now” was ambiguous because the “statement only indicated an unwillingness to talk about certain subjects. At most it sought to alter the course of the detective’s questions, not stop the interview altogether.”⁹⁶ In another case, the suspect who answered a lengthy question, and then concluded, “So that’s all I [got] to say” was deemed ambiguous because “It could just have easily been interpreted as a statement that he had finished his explanation of the matter.”⁹⁷

Other times, the courts depict the statement as ambiguous because it merely indicates a desire to speak to someone else, not to stop talking altogether. Thus, a suspect’s comments, “well you guys, do I have to talk to you guys?” was described by the court as indicating only unease with the trend of the questioning or an unwillingness to respond to a particular interrogator.⁹⁸

and turned away from police officers,” did not indicate that he wished to remain silent generally). *But see* United States v. Stewart, 51 F. Supp. 1136, 1142-45 (D.Kan. 1999) (“I don’t want to talk about robbery, don’t want to talk to you motherfucker” held unambiguous) *reconsidered in part*, 51 F.Supp. 2d 1147 (D.Kan. 1999), *aff’d* 215 F.3d 1338 (10th Cir. 2000); State v. Day, 619 N.W.2d 745, 750 (Minn.2000) (“I don’t want to tell you guys anything to say about me in court” unambiguous and unequivocal invocation of right to remain silent); People v. Douglas, 8 A.D. 3d 980, 778 N.Y.S.2d 622, 623 (N.Y. App. Div. 2004) (“I have nothing further to say” is an invocation of rights); U.S. v. Reid, 211 F.Supp 2d 366, 372 (D. Mass. 2002) (“I have nothing else to say” sufficient “pellucid invocation of his right to remain silent.”); Commonwealth v. Chen, 2002 WL 31803389 *3 (Va. Cir. Ct) (“I don’t want to talk about it” cannot be viewed as anything other than an invocation of his right to remain silent;” stated in context where follow up question were about same topic); People v. Calderon-Hernandez, 2004 WL 2881765 (“I do not want to answer at this time,” did not unambiguously restrict questioning).. *Cf.* State v. Teidemann, 162 P.3d 1106 (Utah 2007) (statement, “I don’t want to talk about it” clear invocation with respect to questions concerning female murder victim, and all of defendant’s responses to police questions concerning female victim were inadmissible).

⁹⁶ People v. Bates, 2005 Cal. App. Unpub Lexis 11604. *Cf.* State v. King, 708 A.2d 1014 (Me. 1998) (defendant said he didn’t want to talk without a particular detective present, then said, “I’m just saying you know, I ain’t saying nothing,” held to be ambiguous). Zelaya v. State, 2006 WL 2689911 (Tex. App.) *4 (when suspect asked if he wants to talk he said “No. I’ll listen, okay?” and “listen to you now but I have to see,” held to be ambiguous and simply meant that he would decide whether to answer particular questions).

⁹⁷ State v. McCorkendale, 979 P.2d 1239, 1247 (Ks. 1999). The police officer ignored the statement and continued questioning.

⁹⁸ People v. Lopez, 2004 Cal. App. Unpub. Lexis 9635. *But see* U.S. V. Stewart, 51 F. Supp.2d 1136, 1142-45 (D.Kan. 1999) (defendant invoked right to remain silent when he said that he did not want to talk about a robbery and stated “I don’t want to talk to you motherfucker.”), *reconsidered in part*, 51 F.Supp. 1147 (D. Kan. 1999); *aff’d* 215 F.3d 1338 (10th Cir. 2000). *But see* Ramos v. State, __S.W.3d__ (Tex. Crim App. 2008) (“any reasonable police

The problem with such an interpretation is that it makes it almost impossible for a suspect to assert the right to remain silent after the waiver of rights. A suspect in the midst of an interrogation who decides that he no longer wants to talk—a choice embraced in *Miranda*--will almost always make this request in response to a question. If a suspect's statement after being asked a question--"Ok, that's it, I'm done talking--" will inevitably be interpreted as only expressing a desire not to answer that *particular* question, the police are then free to ignore the comment by asking about something else (and working their way back to that topic!)⁹⁹. A suspect who felt he had asserted his right but was ignored will now be convinced that any further attempt to assert his rights will be futile. No wonder a suspect so often not only continues to respond to questions, but often soon thereafter make an incriminating statement.¹⁰⁰

Judge McKeown, in dissent, recognized the potentially devastating impact that finding an invocation is limited to a specific topic can entail. In *Anderson v. Terhane*, the Ninth Circuit had held that the police properly treated the suspects comment "I plead the Fifth," to be ambiguous, and that the police in any event were justified in asking clarifying questions to determine what precisely the suspect wanted to talk about. Judge McKeown first rejected the notion that "I plead the Fifth" was ambiguous: "Nothing was ambiguous about the statement . . . The effort to keep a conversation going was almost comical. The

officer would construe suspect's statement--'I don't want to talk to you...I don't want to talk about it anymore' as unambiguous).

⁹⁹ Assuming the courts even require the police to change the subject. That is not at all clear, although a change certainly seems to assuage the reviewing court. Of course, the police then can easily work their way back to the subject after an appropriate period of time.

¹⁰⁰ See, e.g., *State v. Erdahl*, 2002 Lexis 1198 (Io. Ct. App. 2002) ("I don't want to talk about it" not an invocation of right to remain silent but a desire not to talk about his relationship with his father, which was topic at the time; police officer therefore free to ignore it and officer here did. Police officer said, "you are sorry though, aren't you; Erdahl said he was and the confessed to sexual abuse, stabbing and mutilation.). The ease with which suspects can be persuaded to change their minds is also demonstrated by the behavior described in *Dooley v. State*, 743 So.2d 65. The defendant, after being read his rights was asked if he wanted to waive them. He said "Um, I don't wish to waive my rights." The police then continued saying, "By waiving your rights now doesn't mean that you waive them in the future. All you're saying here now is that you're talking to me without the presence of an attorney. If one is required later on, if that's your wish, one can be appointed to you. Do you understand that?" Suspect then said, "Um, I'm going to talk to you. The questioning continued and the suspect soon confessed. The court held that *Davis* only applies post-waiver (*see infra* notes 139-145), and that here there was no valid waiver. *Id.* at 68-70. But it aptly demonstrates how easily the police can "persuade" a suspect to change his or her mind.

Officer knew what “I plead the Fifth” meant.”¹⁰¹ Moreover, and most significant, the Judge criticized the notion of “clarifying” questions on the assumption that “I plead the 5th” only applied to a particular topic: “Every time a suspect unequivocally invokes the right to remain silent, the police can ask follow up questions to clarify whether he *really really* wants to invoke the right and to parse the subject matter---‘what specifically do you not want to talk about?’ The majority’s holding allows the police officer to turn the Fifth Amendment into a game of 20 questions, permitting the police to continue to interrogate and forcing the suspect to take a multiple choice quiz. Such a practice is tantamount to endless re-interrogation....The net result is that...it allows the authorities through badgering or overreaching...to wear down the accused and persuade him to incriminate himself.”¹⁰²

8. comments that are seemingly clear but become ambiguous given other comments or conduct

Some courts have found a clear, direct invocation to be ambiguous because of the circumstances. For example, in one case, a suspect said, “no sir” when asked if he was willing to speak to the interrogating officer during the final taped interview. The interrogators tried to clarify the response, and the suspect then agreed to talk. The trial court held that even the attempt to clarify was unlawful because the invocation was clear. The court of appeals disagreed: “Since Pitts had just agreed to talk with them, the officers would understandably be surprised or confused by the “no sir” response. When viewed in the context of Pitt’s immediately preceding agreement to talk with the officers, a ‘reasonable police officer in the circumstances’ would have been justified in believing either that Pitts had misunderstood the question, that Pitts had misspoken in response to the question, or that the officer had misunderstood the response. The ambiguity of uncertainty arose not from the words of the response—which in themselves admittedly are not ambiguous—or from Pitt’s subsequent responses to continued police questioning but from the circumstances leading up to Pitts utterance of that response.”¹⁰³

¹⁰¹ Anderson v. Terhune, 467 F.3d 1205 (9th Cir. 2005).

¹⁰² *Id.* at 1217–18.

¹⁰³ State v. Pitts, 936 So.2d 1111, 1130-31 (2d Dist. 2006). *Accord* Medina v. Singletary, 59 F.3d 1095, 1102 (11th Cir. 1995). State v. Murphy, 747 N.E.2d 765 (Sup Ct. Ohio. 2001) (“I’m ready to quit talking and I’m ready to go home took” was ambiguous; although the first part could seem like unambiguous invocation, the second part made it equivocal because it meant that the suspect really just wanted to be released which might require that he keep talking to persuade this of his innocence.) *But see* cases where no means no: People v. Hernandez, 840 N.E.2d 1254 (Ill. Ct. App. 2005 (defendant invoked right when,

Some courts, however, have used the fact that the suspect proceeded to answer questions to establish that the suspect's "invocation" was ambiguous. For example, the Supreme Court of North Dakota held that a suspect's repeated comments during an interrogation—"you can't make me say nothing," and "Do I need to get a lawyer," were ambiguous. "Danielle's inquiry about an attorney was, at best ambiguous. It could have been seeking advice from the officers, rather than a request for counsel. Similarly, her comments about not saying anything were equally unclear, *especially since she continued to respond to the officer's comments.*"¹⁰⁴ If the fact that the suspect continued to answer questions after an invocation casts retrospective doubt in the nature

after being read his rights, asked if he wanted to talk to them now, and he said, "no, not no more."); *State v. Marshall*, 642 N.W.2d 48, 53 (Minn. App. 2002), review denied, Minn. May 28, 2002) ("No, I don't wish to say anything," after being read her *Miranda* rights was unequivocal); *Green v. State*, 570 S.E.2d 207 (Ga. 2002) (Defendant said "I don't want to talk." In response, police officer tried to persuade him to talk, saying, "Just hear me out. It's gonna get to a point where you're gonna be going, 'shit, maybe I should have said this, and maybe I should have said that.'" Defendant did start to talk. The trial court had found that there had been assertion of rights; that the suspect had engaged in "mere banter" with the police! The court of appeals reversed.). *But see Simpson v. State*, 227 S.W.3d 855 (Tex. App. 2007) ("No I don't even want to talk about because- it'll really tell" held to be unambiguous and questions should have immediately ceased).

¹⁰⁴ *State v. Greybull*, 579 N.W.2d 161, 163-64 (N.D. 1998) (emphasis supplied). *Accord State v. Griffith*, 2003 WL 2299450 *5 (Oh. App.) (statements like, "I'm done," and "you got what you wanted, okay," were ambiguous assertions and such ambiguity is confirmed when suspect continued to answer questions). *See Cuervo v. State*, 929 So.2d 640 (Fl. Ct. App. 2006) (defendant said, "No I do not want to declare anything, I just- I do not want to declare anything) after being read his rights and asked if he wants to talk about the matter. Court uses subsequent discussion to render this statement ambiguous); *Mitchell v. Commonwealth*, 518 S.E.2d 330, 333 (Va. App. 1999) ("I aint got shit to say to y'all" held ambiguous when defendant later volunteered information); *Hargrove v. State*, 162 S.W.3d 313, 319-20 (Tex. App. 2005) ("let's just terminate it....why should we go on because I'll be spinning my wheels. You're spinning your wheels..." held to ambiguous because defendant never explicitly answered police officer's question whether he wanted to stop now, and continued answering questions); *Commonwealth v. Cupp*, 2004 WL 2391944 *2 (Va. Cir. Ct) (defendant's "no" after asked whether he wanted to make a statement could mean that he didn't want to make a statement, not that he'd be unwilling to answer questions); *State v. Robertson*, 712 So.2d 8, 31 (La. 1998) (defendant's "uh huh," when police officer said, "so you don't want to say no more about what happened over there at them old people's house," was not an invocation of right to remain silent; defendant was willing to talk to authorities as indicated by the fact that he continued to answer questions); *State v. Chesson*, 856 So.2d 166, 183 (La. Ct. App. 2004) (police officer said, "are you telling me you don't want to talk to me any more, John," and John said, "Not right now. Y'all trying to pressure this on me," was not an invocation of the right to remain silent but a statement that he had no more to say and that he continued to speak freely with the police).

of the invocation, the right to remain silent becomes an empty one. The police could render virtually any invocation ambiguous by ignoring it, since most suspects would likely keep responding once their attempt to remain silent was unsuccessful.

A similarly troubling approach was taken by the court in *State v. Whipple* when it held that a suspect's statement, "I don't want to say man...I don't wanta say that...I don't want to....No more, no more," was ambiguous in light of all the circumstances, including the fact that the suspect had voluntarily came to the station house: "The Court is abundantly satisfied that defendant was not invoking or attempting to invoke any right to silence...His words clearly appear to be...an expression of disbelief in the events of the day...of an unwillingness, albeit passing, to confront reality. Further it is inconsistent that defendant would present himself to the Sheriff's office, request an audience, with an officer, ramble for an hour, and then say he did not want to talk to anybody."¹⁰⁵

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

III. A Mistaken Application: The Problems with Applying *Davis* to the Right to Remain Silent

¹⁰⁵ *State v. Whipple*, 5 P.3d 478 (Id. Ct. App. 2000). *See* *Marshall v. State*, 210 S.W. 3d 618, 628 (Tex. Crim 2006) (suspect's "No sir," in response to question as to whether suspect agreed to talk to police held to be ambiguous because suspect had contacted the police about to talk).

Not only does the court in *Whipple* misconstrue *Miranda*, it also indulges in some pop-psychology: "We conclude that an objective view of the facts would lead a reasonable police officer to conclude that Whipple was merely having a difficult catharsis...needing to express himself but not having an easy time coming to grips with the reality that he had bludgeoned his wife with a hammer." The willingness of the court to take a seemingly clear invocation and use "pop psychology" to recast it as ambiguous was also evident in a recent decision of the Seventh Circuit. In that case, a suspect told the police that "he was not going to talk about nothing." The court dismissed it as ambiguous: "it was as much a taunt—even a provocation—as it is an invocation of the right to remain silent." *U.S. v. Sherrod*, 445 F.3d 908, 982 (7th Cir. 2006). What makes this a taunt—and what would ever differentiate any assertion of a desire to remain silent from such a "taunt" is never made clear. *Accord* *State v. Lockhart*, 830 A.2d 433, 443 (Me. 2003) ("I don't know," "I can't do this," "I can't, don't ask, don't," "I want to go to sleep," could be understood to express Lockhart's internal conflict and pain in being asked to recount what happened.).

Drawing upon the descriptions of how courts have applied the “clear invocation” rule, this section argues against the application of that rule to the right to remain silent for several reasons. First, the rule in *Davis* is simply wrong, and should be overruled whether with respect to asserting the right to counsel or the right to remain silent. Second, even if *Davis* may be appropriate for determining invocation of the right to counsel, it is an inappropriate standard for determining whether a valid assertion of the right to remain silent has been made. Both as a matter of law and as a matter of policy, courts should not import the *Davis* rule to the right to remain silent. The application of *Davis*, in conjunction with other rules regarding the right to remain silent, has a synergistic effect that is undesirable. In other words, the combination of *Davis* with *Mosley* and some other post-*Miranda* decisions eviscerate the protections of *Miranda*. Finally, even if *Davis* is appropriate for assessing invocations of both *Miranda* rights, it should only be applied to post-waiver invocations.

A. *Davis* was wrongly decided: Interpreting ambiguous invocations as no invocation at all is inconsistent with the premise of *Miranda*

The Court in *Davis* construed ambiguity as the functional equivalent of saying nothing—of no invocation at all. Given that no one can be certain as to the meaning of an unclear or indirect invocation, the question really becomes, what are the costs of assuming it is an assertion of the right versus the risks of assuming it is not. Where, in other words, should the presumption lie: in potentially protecting someone who may not desire protection, or in not extending protection to someone who is trying to assert their rights? There are three reasons why the presumption might favor viewing an ambiguous statement as an irrelevancy and thus allow the police to continue with the interrogation. First, that position may more accurately reflect what the suspect wanted. In other words, the ambiguous statement most likely reflects true equivocation—a person is unsure, unclear and undecided about whether to make up their mind. They have not yet decided that they want to remain silent. Thus, continued questioning is not inconsistent with the suspect’s desires. Second, even if we are not certain about what an ambiguous statement means, law enforcement needs requires that interrogation proceed in the light of an ambiguous statement. Requiring police officers to construe the request as an invocation would thwart the effort to solve crime by obtaining confessions or incriminating statements. Third, these costs of construing it as an invocation outweigh any benefit that might be incurred if the ambiguous invocation is deemed an assertion of a *Miranda* right. There are no significant consequences

to treating such comments as though the suspect were asking for a glass of water; ignoring the ambiguous assertion in no way detrimentally affects the suspect's ability, once he makes up his mind, to unambiguously and clearly asserting his rights.

None of these assumptions is persuasive when closely examined. The most reasonable (or at least as reasonable) interpretation of an ambiguous statement is that it reflects an attempt by the suspect, to the best of their ability given the inherently intimidating circumstances, to assert their rights. Moreover, the cost of treating an ambiguous statement as an invocation is minimal, at least with respect to the right to remain silent. Finally, the costs of ignoring a possible invocation are grave for any possible protection of the suspect's right. . Thus, I think the answer was evident at the time of *Miranda* and even clearer now: in the face of ambiguity, the presumption should lie in favor protecting the suspect's rights. An ambiguous invocation should not be ignored; it should either constitute an invocation of rights or, at worst, be clarified.

1. *An ambiguous statement most likely reflect the suspect's intent to assert the right to remain silent*

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

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

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

But it is at least as plausible, if not more plausible, that a suspect who ambiguously invokes his or her rights is, albeit

imperfectly, attempting to invoke one or more rights.¹⁰⁶ The ambiguity does not reflect uncertainty, but rather is a function of the cultural background of the suspect, combined with the inherent pressures of interrogation.

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

Criminal 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 proportion 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.¹⁰⁷

Justice Souter's concerns have been echoed by scholars who prophesied that the *Davis* rule would have a disproportionate effect on minorities, women and the powerless. Most prominent is the work of Professor Janet Ainsworth whose research cogently supports the second hypothesis: that a person ambiguously asserts his rights because cultural factors and/or an intimidating environment inherently lead to equivocation. As Professor Ainsworth wrote, "discrete segments of the population-particularly women and ethnic minorities-are far more likely than others to adopt indirect speech patterns. An indirect mode of expression is characteristic of the language used by powerless persons, both those who are members of certain groups that have historically been powerless within society as well as those who are powerless because of the particular situation in which they find themselves. Because criminal suspects confronted with police interrogation may feel powerless, they will often attempt to invoke their rights by using speech patterns that the currently refused to recognize."¹⁰⁸

¹⁰⁶ See, e.g., David Aram Kaiser, *Reconstructing Davis v. United States: Intention and Meaning in Ambiguous Requests for Counsel*, 32 HASTINGS CONST. L.Q. 737 (Spring 2005) (the kind of statement required in *Davis* is the sort of "formalistic statement no actual person other than a lawyer would ever utter. In ordinary life, of course, statements of desire are considered perfectly clear even when they are much less blunt....[in actual linguistic practice, statements like "maybe I should talk to a lawyer"] may, in reality simply reflect the way ordinary people are inclined to express requests, particularly requests directed to persons in authority.").

¹⁰⁷ *Davis*, 512 U.S. at 469-70 (citation omitted).

¹⁰⁸ Ainsworth, *supra* note 70, at 261. See Antoniette 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*

In sum, it is inevitable that people react to custodial interrogation with some degree of intimidation.¹⁰⁹ It is normal to respond to intimidation by sounding meek or tentative rather than precise, clear and assertive.¹¹⁰ This tendency to talk in equivocal language while being interrogated is reinforced by cultural and gender norms that makes such tentative elocution likely as well. Thus, it is not surprising that studies demonstrate that the people who are most likely to clearly assert their rights are “hardened” criminals who may be less intimidated and more accustomed to the custodial interrogation setting.¹¹¹

The examples provided in Section II demonstrate how suspects are likely to use hedges, modal verbs, or imprecise statements rather than assert their rights in an unambiguous manner during custodial interrogation. Although in a small proportion of cases the courts found the assertion unambiguous, in the vast majority of cases reported, no assertion was found.¹¹² Of course, drawing definitive empirical conclusions from studying

Culture: The Interaction of Miranda and Diversity, 90 J. CRIM L. & CRIMINOLOGY, 1, 32-33 (1999); Samira Sadeghi, Comment, *Hung up on Semantics: A Critique of Davis v. United States*, 23 HASTINGS CONST. L. Q. 313, 330 (1995). See Adam Finger, *How Do you Get a Lawyer Around Here? The Ambiguous Invocation of a Defendant’s Right to Counsel under Miranda v. Arizona*, 79 MARQ. L. REV 1041, 1061-62 (making a similar argument that the use of indirect language is preferred in Asian society: “A member of an Asian society would be much less likely to assert his rights in the face of authority. To do so would be in contravention of a societal standard that is firmly ingrained within the Asian culture...The use of indirect method of speech is preferred in Asian societies and is considered sophisticated.”).

¹⁰⁹ Indeed, I make the argument elsewhere that simply interacting with the police, even in a non-custodial situation is inherently intimidating and coercive. See, e.g., Marcy Strauss, RECONSTRUCTING CONSENT, 92 J. OF CRIM LAW & CRIM. 211 (2001-02).

¹¹⁰ See Ainsworth, *supra* note 70, at 283.

¹¹¹ “There is evidence that suspects with felony records are much more likely to invoke silence than those whose records are clear.” Duke, *supra* note 1 at 557 n. 30. See Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996).

¹¹² Of course, the mere fact that different courts reach such different conclusions in seemingly similar situations is troubling; suspects should not be treated differently with respect to these critical rights depending on what court or police department evaluate the request. My recent study of the ways in which people invoke the right to counsel also lend support to the scholarly conclusion that persons subject to custodial interrogation tend to phrase things in indirect, equivocal fashion. For example, the use of modal verbs like “maybe, might or could,” are commonly employed when referencing the right to counsel. Even more common are the use of hedges—“lexicon expressions that function to attenuate the emphasis of a statement or to make it less precise.” Thus, a person might say, “I think I want an attorney,” or I guess I shouldn’t say anything? Or a person might phrase a request as a question, “can I get a lawyer?” These are routinely treated by the court as ambiguous requests. See Strauss, *Understanding Davis*, *supra* note 59.

appellate decisions is not only difficult but misleading because it may be that the invocations that are truly clear--“I am asserting my right to remain silent and do not want to answer any questions of any kind--” never make their way into the caselaw. “[S]ince very few cases go to trial and fewer still are appealed, the pool of appellate cases is unlikely to be a representative sample.”¹¹³ But my “rough” conclusion based upon a reading of the cases is buttressed by the clearly established empirical evidence that very few people assert their rights, and almost no one invokes the right to remain silent after a waiver.¹¹⁴

My point is that in many, perhaps even most, of the cases described in Section II, where the court found the assertion to be ambiguous, the suspects were attempting to invoke their right to remain silent. Scientific data and experts in linguistics support such a conclusion. Common sense, moreover, also compels such an interpretation. The use of hedges or modal verbs and even questions in most every-day situations are typically treated as unambiguous. For example, if a waitress was taking an order from a customer who said, “I think I’ll take a tuna sandwich,” most people would deem it the epitome of rudeness if the waitress treated it as an ambiguous request and responded, “well, do you want one or not?” A boss asking her secretary for coffee by saying “can I get a cup?” would assume that coffee was forthcoming without further clarification.¹¹⁵ Yet in the hostile, frightening environment of an interrogation setting, the police can ignore these comments or treat them as though the suspect asked about the weather.

In addition to cultural and background factors explaining why an assertion of rights may be phrased ambiguously, a suspect may also act out of fear of repercussions. Although clearly related to, and overlapping with the second theory, I am referring here to a slightly different phenomenon, especially with respect to the right to remain silent. One of the problems with the *Miranda* warnings is that they fail to inform the suspect that if they invoke their rights and remain silent, no adverse inferences will be drawn. A suspect is never told (or at least is not required to be told) that their refusal

¹¹³ George C. Thomas III, *Stories about Miranda*, 102 MICH. L. REV. 1959, 1962 (2004).

¹¹⁴ See *infra* notes 150-152 and accompanying text.

¹¹⁵ See *State v. Dumas*, 750 A.2d 420, 425-26 (R.I. 2000) (“In normal parlance, this syntactic phraseology is an acceptable and reasonable way to frame a request... [A] customer at a restaurant may ask the server, “Can I get a cup of chowder? An impatient shopper might ask a sales clerk, “Can I get some service over here?” In each case, it is clearly understood that the speaker is making a request for a particular object or action.”).

to talk cannot be used against them in a court of law.¹¹⁶ In other words, the suspect is informed that *if* they talk, what they say can be used against them, but are never told that if they *don't* talk, that failure to cooperate *cannot* be used against them. Thus, some individuals might be tentative in requesting their rights out of fear that this assertion will actually harm them or be construed in an adverse manner.¹¹⁷ The ambiguity does not reflect uncertainty or lack of desire; the suspect truly wants to remain silent but fears the consequences of invoking that right. That fear likely manifests itself in tentative, uncertain language or stating the invocation as a request or a question. Thus, a suspect may say something like, “I can’t talk now,” or, “I’d like to go home now and come back later,” out of a belief that such a request is less likely to sound uncooperative.

The fear that silence may be used against them, moreover, may become magnified when a suspect, after making a tentative attempt to remain silent, is either ignored by the officer, or, perhaps worse, responded to by an officer trying to convince her to talk. For example, when a suspect indicates in some imprecise manner that she wants to remain silent, and the police officer says something like, “are you sure, this is your only chance to tell your side,” or, “that might not look too good for you, if you have something to say, you should say it now,”¹¹⁸ the belief that staying silent will somehow “hurt” her is reinforced.

My point thus far is simple: of the three possible explanations for an ambiguous statement described above, it is at least as reasonable, if not more reasonable, to believe that the

¹¹⁶ A suspect’s pre-arrest, pre-*Miranda* silence can be used against a suspect. In *Fletcher v. Weir*, 455 U.S. 603 (1982), the Court allowed a suspect’s silence after his arrest to impeach his trial claim of self defense. But post *Miranda* warning silence cannot be used against the defendant (unless the defendant puts his silence into issue) because such silence may be nothing more than the arrestee’s exercise of their rights. *Doyle v. Ohio*, 424 U.S. 610 (1976). See generally, Marcy Strauss, *Silence*, 35 Loyola of L.A. L. Rev. 101 (2001).

¹¹⁷ See, e.g., Timothy O’Neill, *Why Miranda Does not Prevent Confessions: Some Lessons from Albert Camus, Arthur Miller and Oprah Winfrey*, 51 SYRACUSE L. REV. 863, 873 (2001) (one explanation for high *Miranda* warning waivers is that silence seems like it will be used against them); Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1828 (1987) (“My clients and my colleague’s clients often report that, notwithstanding the warnings, they believed either that their silence could be used against them as evidence of guilt or, more frequently, that by remaining silent they forfeit their opportunity to be released on bail.”).

¹¹⁸ See, e.g., *State v. Mares*, 664 N.W.2d 683 (Ct. App. Wis. 2003) (police told suspect who said he did not want to talk that “it was in his best interest” to speak to them and that he would “feel better and get a weight off his chest if he explained his side of the incident.” In this case, court held these were invalid promptings after the suspect invoked his right to remain silent).

ambiguity reflects a person's best attempt, given the circumstances, to invoke the right to remain silent. The kind of requests that courts routinely treat as ambiguous are a normal, rational way of invoking the right to remain silent given the suspect's characteristics and the inherently intimidating custodial environment. It is an inevitable type of phrasing when the invocation itself may be viewed as costly or risky. In other words, it is highly likely that, for a variety of reasons, what is deemed an ambiguous invocation is intended by the suspect as a clear assertion of her rights.

But what if some of the ambiguity does reflect true uncertainty? For example, a suspect who says, "maybe I should stay quiet, I don't know what to do," may truly be experiencing conflicted emotions. Or what if there is really no way to know what an ambiguous statement reflects. The question then becomes, what are the risks and costs of assuming it is an assertion of the right versus the risks of assuming it is not.

2. The Cost Calculus: treating an ambiguous assertion as invoking the right to remain silent (or right to counsel) would not thwart effective law enforcement

One of the concerns clearly animating the *Davis* majority was the desire not to hamper law enforcement by foreclosing a valuable opportunity to question a suspect. The Court in *Davis*, however, calculated the costs incorrectly. Requiring that ambiguous assertions be clarified or even that they be deemed effective assertions of the right, however, would not be unduly costly. I say this for three reasons. First, confessions should be viewed with skepticism rather than awe, especially when dealing with an unwilling or confused suspect who believes that the police are not honoring her rights. Second, any suspect who is willing to speak to the police can easily do so even if deemed to have invoked his rights by initiating further conversation. Finally, even if the suspect does not re-initiate contact, the police still can attempt to re-interrogate a suspect who previously invoked his right to remain silent.

First, obtaining a confession should not be deemed the ultimate law enforcement objective. The core of the *Miranda* decision reflects a belief that confessions, though a potentially important tool for law enforcement, should not be pursued at all costs. Not all crimes are solved by confessions; physical evidence may render a statement by the suspect unnecessary. And when physical evidence is weak or nonexistent, reliance on a confession—particularly one obtained by ignoring a potential invocation by a vulnerable, non-sophisticated suspect—is wrought

with problems.¹¹⁹ The notion that confessions should be viewed with some skepticism has only garnered additional scientific support in the last 40 years. Research has shown that innocent people do falsely confess.¹²⁰ And, the advent of DNA testing has made clear that innocent people are convicted on the basis of false confessions. In one study, twenty-five percent of those exonerated by DNA evidence were convicted largely on the basis of a confession.¹²¹

My claim, of course, is not that all confessions are false nor that confessions are worthless or not worth pursuing. Clearly, interrogation remains an important part of the law enforcement arsenal.¹²² Rather, my point is that the benefits of interrogation should be put in the proper perspective. Not all interrogations successfully lead to confessions, not all confessions are necessary

¹¹⁹ Confessions are less important where there is strong corroboration and much more important where there is little, and it is in the latter cases that the primary risk of false confession exists.” Duke, *supra* note 1, at 568 n.85.

¹²⁰ See *infra* note 121 and accompanying text.

¹²¹ John Wilkens, Untrue Confessions, The San Diego Union-Tribune, April 15, 2004 at E-1. See Richard A. Leo & Richard J. Ofshe, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U.L. REV. 979 (1997) (police tactics cause “normal” people to falsely confess); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 Harv. C.R. –C.L. L. Rev. 105 (1997). And, of course, the ones we know about are just the tip of the iceberg. Thomas H. Maugh, *Glendale Cases Raises Issue of Reliability of Confessions*, L.A. TIMES, April 2, 1998 at A1. Part of the problem is that a confession is viewed by the jury as virtually “irrefutable presumption of guilt.” See Richard Leo, False Confession: Causes, Consequences, and Solutions, in *Wrongly Convicted: Perspectives on Failed Justice* 36, 45 (Saundra D. Westervelt & John A. Humphrey eds. 2001); see also Sharon Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. L & SOC. CHANGE 209, 253 (“The Central Park jogger case shows that once a jury is exposed to a confession of guilty it is difficult for jurors to put it aside, even when it is uncorroborated or flatly contradicted by other evidence.”). And the police are notoriously poor judges of whether a suspect’s confession is reliable. Drake Bennett, *The War of the Mind*, BOSTON GLOBE, November 27, 2005 p. KI; Saul Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUMAN BEHAV. 381 (2007).

The advent of DNA testing and other scientific development may also render less pressing the need for a suspect’s confession. See Thomas, *supra* note 3 at 1116 (DNA testing can remove the vast majority of innocent suspects from the system and will only be more useful over time as tests become more sophisticated.). The growth in scientific technology may render it less essential for law enforcement agencies to center an investigation on information “cajoled” from a suspect, especially in the most serious of crimes like murder and rape.

¹²² The concern that law enforcement will be hampered is one of the main justifications for the *Davis* rule and its application to the right to remain silent. See *State v. Owens*, 696 So.2d 715 (Fl. Sup. Ct. 1999) (“To require the police to clarify whether an equivocal statement is an assertion of one’s *Miranda* rights places too great an impediment upon society’s interest in thwarting crime.”).

to the solving of crimes, and not all confessions are reliable. The incidence of false confessions is not insignificant, and “there is no greater injustice than the conviction of one innocent person.”¹²³ Moreover, those persons most likely to falsely confess—those who are highly suggestible or highly compliant, mentally handicapped, cognitively impaired, children, the mentally ill and those particularly vulnerable to the pressures of police interrogation¹²⁴—are precisely the group least capable of directly and unambiguously asserting the right to remain silent. Thus, the risk that suspects who ambiguously assert their rights but are ignored by police will falsely confess may well be greater than that of the average suspect.

Second, even if confessions are deemed a reliable and a valuable law enforcement tactic, treating ambiguous assertions as invocation of rights does not necessarily preclude police questioning. My argument here is simple: a suspect who truly wishes to talk to the police—who did *not* want to invoke their rights when they made an ambiguous comment-- can do so even if their request is treated as an invocation of rights. That is, any suspect who wants to tell his story can affirmatively initiate conversation at any time with the police, and waive his rights.¹²⁵

¹²³ Boaz Sangero, *Miranda is not Enough: A New Justification for Demanding “Strong Corroboration” to a Confession*, 28 CARDOZA L. REV. 2791, 2792 (2007).

¹²⁴ Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 517-18. See Dale Ives, *Preventing False Confessions: Is Oickle up to the Task?* 44 SAN DIEGO L. REV. 477, 481-83 (2007).

¹²⁵ The facts of the case in *Bui v. DiPaolo*, 107 F.3d 232 (1st Cir. 1999) aptly demonstrate this. The suspect, a Vietnamese immigrant, was read his rights. The police officer asked him if he had anything to say about his arrest. The suspect said no. He then added “who said I did this?” At this point interrogation continued. The court held that “no” was ambiguous, in part due to his continued talking. Instead of using subsequent comments to cast doubt on the clarity of his invocation in order to conclude that the petitioner did not unequivocally assert his right, (or reading the entire event as a waiver of rights), the “No” should have been deemed an invocation of the right to remain silent, but the question which immediately followed it should be deemed an initiation by the suspect which allows for a waiver and subsequent interrogation. The police could talk to the suspect under all approaches described above, but analyzing it under the initiation doctrine avoids setting a precedent that “no” does not mean “no,” or that subsequent statements can render an invocation ambiguous. The point is, the ability of the police to interrogate a willing suspect is not hampered even if the “no” were viewed as unambiguous. It only prevents talking to those suspects who really don’t want to talk and whose free will is thus subverted by the police. See also, *Davis v. State*, 2007 WL 858782 (Tex. App) *3 (suspect who said “I really don’t want to talk about it,” and then followed it up with “I mean I ain’t the one who did it,” did not unambiguously invoke his rights and even if he did, his latter statement reinitiated interrogation); *State v. Aleksey*, 538 S.E.2d 248, 254 (S.C. 2000) (statement, “that’s all I’ve got to say” was ambiguous because it could simply be end of story; even if it wasn’t, suspect shortly thereafter

Thus, if a suspect who said, “I don’t want to talk now,” meant only a momentary pause in the conversation, he can, after what *he decides* is a sufficient passage of time, say to the officers, “ok, I’m ready to talk,” and the interrogation can proceed. The only difference between this scenario and the one allowed by *Davis* is that the suspect controls the interrogation process—precisely the result anticipated in *Miranda*.

Finally, and most significantly, even if a suspect does not initiate further contact with the police, the police can attempt to re-question the suspect. Under *Mosley*, an invocation of the right to remain silent does not preclude later police initiated interrogation—even potentially only two hours later, according to *Mosley* itself. *Mosley* requires only that the suspects’ rights be “scrupulously honored.”¹²⁶ Although the Supreme Court noted six factors to consider in determining whether a suspects rights were scrupulously honored, in reality most courts only require three: the original interrogation immediately cease, that there be a significant passage of time, and that the suspect be afforded a fresh set of *Miranda* warnings.¹²⁷ Clearly, none of these pose onerous obstacles to a resumption of police initiated questioning.

initiated by asking about the status of some people involved in the crime, and thus further interrogation was permissible).

¹²⁶ See *supra* notes 123-130 and accompanying text. See also *Commonwealth v. Brant*, 395 N.E.2d 1320 (Mass. App. 1979) (fourteen minute period between questioning not insignificant given that the defendant had initiated the resumption of questioning). But see *Commonwealth v. Taylor*, 374 N.E.2d 81, 85-86 (Mass. 1978) (5 minute interval between questioning on same crime not sufficient).

¹²⁷ See *State v. Mares*, 664 N.W.2d 683 (Wis. Ct. App. 2003) (“...the presence or absence of the *Mosley* ...factors is not controlling and the factors do not establish a test that can be ‘woodenly’ applied...”). What is imperative under *Mosley* is that the defendant receive the message that “all he needs to do to foreclose or halt questioning is to give a negative response when asked if he will submit thereto. To communicate this message, the interrogation must stop for some period of time.” *Latimer v. State*, 433 A.2d 1234 (Md. Ct. App. 1981). See *People v. Nielson*, 717 N.E.2d 131, 142-43 (Ill. 1999) (defendant’s right to remain silent was scrupulously honored when the first interview halted immediately after the suspect invoked his right to remain silent, there was about 2 and a half hours between interviews and the suspect received new *Miranda* warnings; fact questions concerned same crime not determinative); *State v. Culp*, 1999 Lexis 369 (Del. Super)*6 n.14 (police may later resume questioning after the passage of a significant period of time and after the accused has received new warnings—not met here because not enough time passed--only a bathroom break--and no re-issuance of warnings. But see *State v. Rossignol*, 627 A.2d 524 (Me. 1993) (requiring that subsequent questions be about a different topic); *Cf. Freeman v. State*, 857 A.2d 557 (Md. Ct. App. 2004) (court scrupulously honored rights when there was a reasonable time lapse --2 hours-- and a different interrogator, although it was same locale and same topic.); *State v. Bucklew*, 973 S.W.2d 83, 88-90 (Mo. 1998) (*Mosley* met by the passage of 5 days even though interrogation was about same crime).

Concededly, the cost of invoking the right to counsel under *Davis* and *Edwards* appears greater: interrogation must cease and police initiated interrogation is not possible. Even under *Edwards*, however, re-interrogation is possible, albeit on the suspect's terms. That is, a suspect who desires to tell her story can initiate a conversation with the police (and waive her rights) or talk to them with a lawyer present. Given the fairly broad reading of initiation, moreover, this possibility is not an obscure one.¹²⁸ Even without

The most lenient application of *Mosley* that I discovered was that undertaken by a Court of Appeals in Michigan. A suspect had expressed some confusion about his rights, and the police had clarified and explained it. The court held that even if the suspect's comments constituted an unequivocal assertion of the right to remain silent, that right was scrupulously honored by the clarification questions. Although there was no meaningful passage of time, the questioning was by the same officers in the same location on the same topic, the court held: "Although courts have enumerated relevant considerations in determining whether questioning after an assertion of the right to remain silent is proper, the 'scrupulously honored standard does not required that any mandatory criteria be satisfied...[T]he ultimate inquiry is whether the police have scrupulously honored a defendant's assertion of the right to cut off questioning. Here the detectives' questions merely sought to make sure that defendant truly understood what the assertion of the right to silence entailed given that defendant had just waived his right to counsel and had asked a question about his right to remain silent....when the detectives comments are placed in their proper context, they cannot be reasonably construed as an attempt to "wear down [defendant's resistance,' or even as an attempt to communicate to the defendant that the detectives would not honor his assertion of the privilege....Rather, [they just wanted to be sure whether the defendant wanted to talk to them.]...Thus it cannot be said that the detectives did not scrupulously honor defendant's assertion of this 'right to cut off questioning.'" *People v. Jackson*, 2007 WL 1864946 (Mich.) (per curiam). *But see* *Ramos v. State*, __S.W.3__(Tex. Crim App. 2008), 2008 WL 313900 (Tex. Crim App) (*Mosley* is not satisfied when police attempted to re-question a suspect only five minutes after he invoked his rights). One court permitted an eight minute gap between invocation and re-interrogation on the same topic under *Mosley*, but the court conflated the *Mosley* test with initiation: "While only a short period of time passed after Appellant invoked his right to remain silent, it was Appellant and not the officers who initiated the conversation."

¹²⁸ See *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). The precise definition of initiation is unclear. The plurality in *Bradshaw* stated that initiation occurs when the suspect makes statements or inquiries evincing a desire for a "more generalized discussion relating directly or indirectly to the investigation," as opposed to inquiries or statements relating to routine incidents of the custodial relationship. *Id.* at 1044-45. The plurality held that initiation in that case occurred when the suspect asked, "well, what's going to happen to me now," while being driven back to jail. Many criticize the Court's conclusion that this comment constituted initiation even under the Court's own test. See, e.g. 2 LaFave et al, S. 6.9 at 849. Although the four justice plurality test is the one employed by most lower courts, at least one court suggested that it was free to choose the test set forth by the four person dissent in *Bradshaw*. The dissent suggested a more stringent test: that initiation occurs when the suspect starts a dialogue specifically and directly focused on the investigation. See *State v. Hamby*, __ N.W. __ (Wis. 2008), 2008 WL 321511 *13 (Wis). The

initiation by the suspect, the police can approach a suspect to try to obtain a waiver of rights, albeit when the suspect has his lawyer present.

3. *Treating an ambiguous invocation as irrelevant has great cost to the individual's privilege against self incrimination.*

Against this diminished value of confessions and the recognition that re-interrogation can occur with a willing defendant must be weighed the harm to an individual's free choice that the *Davis* rule entails. While the *Davis* Court overestimated the cost to law enforcement if ambiguous invocations were treated as invocations (or required to be clarified), they underestimated (or ignored) the significant costs to the objectives of *Miranda*—ensuring a free and voluntary choice to submit to police interrogation. Ignoring an ambiguous request for counsel or to remain silent and permitting further interrogation almost certainly interferes with an individual's determination whether to ever invoke his or her rights.¹²⁹ Assume, for a minute, that an ambiguous request reflects a suspect's cultural background or intimidation in the circumstance or even fear of reprisal. Thus, the

Wisconsin Supreme Court held that under either test, the defendant initiated conversation when the suspect told the detective that he did not understand why he was under arrest. *Id.* at *14-15. *See also* Commonwealth v. LeClair, 770 N.E.2d 50, 56 (Mass. App. Ct. 2002) (discussing plurality and dissent) But see State v. Chew, 695 A.2d 1301, 1318 (N.J. 1997) (acknowledging that there are separate tests set forth by the plurality and the dissent and that it had not yet chosen between the two, but deciding that the court “perceived little difference between the tests...”). For various applications of the rule, *see, e.g.* U.S. v. Thongsopaporn, 503 F.2d 51, 56(1st Cir. 2007) (defendant's question of police agent who had been sitting silently for a bit over five minutes, “what was going on” constituted initiation); Vann v. Small, 1999 WL 439400 *1-2(9th Cir.) (Vann initiated further conversation with police in patrol car by asking, “what is going to happen to me, what do you think I should do?”); U.S. v. Debrew, 1994 WL 637245 *2 (4th Cir. 1994) (“look man, I’ll tell you about it” re-initiated conversation); Robbins v. Maas, 1992 WL 170952 *1-2 (9th Cir. 1992) (suspects comment, “exactly what is the charge here” initiated conversation); Henderson v. Commonwealth, __S.E.2d ___, 2006 WL 1459974 (Va. App) (suspect initiated by saying, after the detective started to leave, “maybe I’ll make the letter of apology”); Commonwealth v. LeClair, 770 N.E.2d 50, 56-57 (Mass. Ct. App)(defendant's statement that he was in a lot of trouble, and his inquiry whether he needed counsel “evinced a desire for more generalized conversation at least sufficient to permit further inquiry about whether the defendant continued to stand by his earlier invocation of his right to counsel.”); State v. Montejo, __So.2d ___, 2008 WL 398508 (La)*10(after invoking right to counsel, suspect initiated by saying, “no, come here, come here, even though that followed the police officer's comments: “Dude, you don’t want to talk to us no more, you want a lawyer, right? I trusted you and you let me down.”).

¹²⁹ *See* People v. Jones, 2007 WL 292532 *4(Mich. Ct. App)(seeing that his requests for a lawyer were futile because the police simply continued speaking to him, defendant elected to speak to the police without a lawyer and confessed to the crime).

suspect who says “well, I think I’d might like to stay silent,” is trying politely, albeit hesitantly, to invoke the right to remain silent. Or take the suspect who says, “I don’t want to talk now.” If the police ignore such a request and continue questioning, the suspect likely would never bother to invoke again, even if that remains either a continuing or ever- growing desire as the interrogation continues. After all, their initial attempts to invoke their right were met with disdain, reinforcing all their fears and concerns in the first place. The belief that such a person would then ever be capable of unequivocally and clearly invoking their rights at some point in the interrogation seems naïve at best.

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

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

3. Conclusion

Davis was wrongly decided and should be overturned. First, in too many cases, ambiguous comments about the right to remain silent or the right to counsel will represent an attempt to invoke the rights rather than true ambivalence or uncertainty. For these people, then, the goal of *Miranda*—giving individuals the

tool to counter inherent coercive pressure by asserting their right not to deal with the police alone or at all—is thwarted. Moreover, it is subverted for no good reason. Police investigation will not be unduly hampered. The importance of police interrogation may well be overstated and, most significantly, individuals who want to talk to the police can still do so by initiating conversation (and waiving their rights). Even if no initiation occurs, at least when the right to remain silent is invoked the police can simply attempt to re-question later. Further, even if the number of confessions is diminished, that price may not be so costly. Physical evidence may be available to convict the suspect, and the reliability of confessions, particularly in the absence of substantial physical evidence, should be of some concern. Finally, even if a suspect was truly uncertain when voicing a potential request for counsel or to remain silent, if the police simply ignore it, or use the opportunity to convince the suspect that invoking their rights would be detrimental, the likelihood of a suspect subsequently invoking their rights and curtailing the interrogation is drastically diminished. That suspect would likely feel they have no real choice at any stage in the interrogation process but to continue talking. For all these reasons, the conclusion that the right to counsel and the right to remain silent must be unambiguously asserted is in error.

B. *Davis* should not be applied to the Right to Remain Silent

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

1. As a Matter of law

In some ways, it is ironic that courts would, without explanation, import the *Davis* rule concerning the right to counsel to the right to remain silent because in virtually every other aspect of the rules, the courts go out of their way to develop distinct standards.¹³⁰ Most obvious, of course, is the divergent rules that govern re-interrogation after invocation of the respective rights. Police can re-question suspects after an invocation of the right to remain silent so long as the suspects' rights are scrupulously honored; re-questioning after the invocation of the right to counsel

¹³⁰ See *Arizona v. Roberson*, 486 U.S. 675 (1988) (questioning about different offense does not alter *Edwards* rule); *Minnick v. Mississippi*, 498 U.S. 146 (1990) (opportunity to consult with attorney doesn't change *Edwards*; emphasize, unlike *Mosley*, need for bright line clear rule). See generally, Wayne Holly, *Ambiguous Invocations of the Right to Remain Silent: A Post-Davis Analysis and Proposal*, 29 SETON HALL L. REV. 558 (1998).

requires that the suspects initiate the conversation and waive their rights.¹³¹ Given that in this most basic and fundamental way, the rights are not treated the same, it is not clear why courts, with no real explanation, determine that the *Davis* rule applies to invocations of the right to remain silent.

Moreover, the right to remain silent is the transcendent right protected by *Miranda*.¹³² The right to counsel exists only to protect the right to remain silent—the right to be free from compelled self-incrimination. After all, a suspect does not *really* have a right to an attorney under *Miranda*; *Miranda* is not violated if the suspect is never provided an attorney so long as no interrogation occurs in the absence of such an appointment.¹³³ Thus, even if the Court decides that a suspect must invoke the right to counsel in a particular manner, there is no inherent reason why the right to remain silent needs to be asserted in precisely the same way. To a large extent, the Court in *Davis* recognized this distinction between the transcendent constitutional right in *Miranda*-- the right to remain silent-- and the right to counsel, which is there to protect the right not to self-incriminate. As the Court in *Davis* held, “we are unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect might want a lawyer. Unless the suspect actually requests an attorney, questioning may continue.”¹³⁴

Finally, the *Miranda* decision itself suggests that an ambiguous invocation is sufficient to invoke the right to remain silent. When discussing the right to remain silent, the Court suggested that: “if an individual indicates *in any manner*, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.”¹³⁵ It is difficult to imagine the

¹³¹ See *supra* notes 22-34 and accompanying text.

¹³² See, e.g., *Miranda*, 436 U.S. at 439 (case concerns necessity for procedures to ensure individual is “accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.”). See Thomas, *supra* note 3 at 1094-95 (“reading *Miranda* now, 36 years after it was written, one is struck by the Court’s genuflection in the direction of suspect’s ‘free choice’—a locution that, in one variation or another, appears at least 9 times in the majority opinion.” But see *State v. Williams*, 535 N.W.2d 277, 285 (Minn. 1995), using *Edwards* and the greater procedural protections afforded when a suspect invokes the right to counsel, as proof that the right to counsel is of preeminent concern). *Accord*, *State v. Owens*, 696 So.2d 715, 717 n.6 (Fl. 1997) (“If anything, requests for counsel have been accorded greater judicial deference than requests to terminate interrogation.”) Interestingly, studies show that suspects are slightly more likely to invoke the right to counsel than the right to silence. Welsh S. White, *Deflecting a Suspect from Requesting an Attorney*, 68 U. PITT L. REV. 29, 36 (2006).

¹³³ See *supra* note 15.

¹³⁴ *Davis*, 512 U.S. at 462.

¹³⁵ *Miranda*, 436 U.S. at 473-74. There is no similar language in that paragraph about the right to counsel. Instead the Court stated simply, “If the individual

meaning of “in any manner” if not to include ambiguous invocations.¹³⁶ Thus, at a minimum, the *Miranda* decision itself suggests some leeway should be accorded a suspect who might want to stay silent in the face of police questioning.

2. *As A Matter of Policy*

Most of the policy justifications for not employing the *Davis* rule with respect to the right to remain silent were discussed above. Most significant, the fact that police questioning can easily resume after an invocation of silence is made, unlike a request for counsel, strongly suggests that a different rule for asserting the right to remain silent is in order. In other words, even if *Davis* was a viable decision with respect to the right to counsel because the ramification of such an invocation is so severe, that same concern does not exist with respect to the right to remain silent. Given the relative ease with which new questioning can occur, there is no corresponding need for a stringent rule governing assertion of the right to remain silent.¹³⁷

Indeed, given the rules governing the right to remain silent and re-questioning, there is a strong argument that a stringent rule is not only unnecessary, it is wholly inappropriate. In some ways, the combination of *Davis* and *Mosley* stacks the deck for the state. If a suspect ambiguously invokes the right to remain silent, the police can ignore such comments and continue questioning. In the remote chance that the suspect makes an unambiguous invocation, the police can re-question later under the fairly undemanding standards of *Mosley*. Hence, the application of *Davis*, in conjunction with other rules regarding the right to remain silent, has an undesirable synergistic effect.¹³⁸ The police are, in many

states that he wants an attorney, the interrogation must cease until an attorney is present.” Whether this divergence is intentional or inadvertent is not clear. Other places in the opinion, however, use similar language with respect to the right to counsel. *Id.* at 474.

¹³⁶ See, e.g. Matthew Bowman, *The Right to Counsel During Custodial Interrogation: Equivocal References to an Attorney—Determining What Statements or Conduct should Constitute An Accused’s Invocation of the Right to Counsel*, 39 VAND. L. REV. 1159, 1187 (1986).

¹³⁷ See Holly, *supra* note 130. (“The perceived obstacle to police interrogations imposed by *Edwards* simply does not exist in the same degree under *Mosley* and the right to silence context.”). See also *Pena v. State*, 98 P.3d 857, 868 (Wyo. 2004) (court acknowledges difference between *Edwards* and *Mosley* raised significant question of whether *Davis* should apply to right to remain silent, but doesn’t need to resolve issue since police here properly clarified ambiguous invocation).

¹³⁸ This argument, moreover, can be expanded to include Court decisions elaborating upon other aspects of the *Miranda* decision which many criticize as unfairly pro-police. For example, some contend that the definition of custody has come to favor the police. Note: *The Intrinsically Coercive Nature of Police Interrogation*, 3 RUTGERS RACE & L. REV. 297, 307 (2001); Craig Bradley & Joseph Hoffmann, *Be Careful What You Ask For: The 2000 Presidential*

ways, placed in a win-win situation. If *Davis* is justified at all, it has to be as the “price” of *Edwards*¹³⁹—that because invoking the right to counsel has such dire consequences for law enforcement, it should not be easy to invoke. That argument cannot be made with respect to the right to remain silent. *Davis* plus *Mosley* eviscerates the protections of *Miranda*.

C. *Davis* at best should be deemed a Limited Rule, applicable only to post-waiver invocations

Even if *Davis* is a viable decision, and even if it should be applicable to the right to remain silent, it is in reality limited in its application. *Davis* is a rule governing *post-waiver* initiations. That is, it applies only in the situation when the suspect already has waived his or her rights¹⁴⁰

That *Davis* is a post-waiver case is clear from the facts of the case and from the holding itself. *Davis* had previously waived his rights and agreed to talk without an attorney present. At some point in the interrogation, he indirectly and ambiguously requested an attorney. Justice O’Connor, in writing for the majority held that after a suspect knowingly and voluntarily waives their *Miranda* rights, law enforcement officers may continue questioning unless he or she clearly and unequivocally request counsel.¹⁴¹

Election, the U.S. Supreme Court, and the Law of Criminal Procedure, 76 IND. L. J. 889, 912 (2001). Others argue that the Court’s definition of “interrogation” is too narrow. See, e.g., Jennifer Diana, *Apples and Oranges and Olives? Oh my!*, 71 BROOK L. REV. 985, 996 (2005); Lisa Lewis, *Rethinking Miranda: Truth Lies and Videotape*, 43 GONZ. L. REV. 199, 211 (2007). Additionally, the police can ask questions—and the answers are admissible even without the provision of *Miranda* warnings-- if the questions were reasonably prompted by a concern for public safety. *New York v. Quarles*, 467 U.S. 649 (1984). See also George C. Thomas III, *Stories about Miranda*, 102 MICH. L. REV. 1959, 1996-97 (2004) (discussing how *Quarles* is used by the police to admit confessions obtained without the issuance of warnings). The police can question without providing *Miranda* warnings and any physical evidence derived from that interrogation is admissible. *U.S. v. Patane*, 542 U.S. 630 (2004). Finally, the Supreme Court has recently shown some leeway for “questioning outside *Miranda*.” *Missouri v. Siebert*, 542 U.S. 600 (2004).

¹³⁹ It is almost reminiscent of the “unintended consequences” argument in foreign policy. It is hard to imagine that the Justices, when handing down a decision that was protective of a suspect’s rights in *Edwards*, imagined that the decision would lead to the result in *Davis*, and as a result, it would be extremely difficult for a suspect to even invoke the right to counsel.

¹⁴⁰ See 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). See, e.g. *State v. Leyva*, 951 P.2d 738 (Utah 1997); *State v. Tuttle*, 650 N.W.2d 20, 28 (S.D. 2002) (“the *Davis* holding obviously applies to instances where the suspects attempt to invoke *Miranda* rights after a knowing and voluntary waiver of those rights *Davis*, in sum, applies to an equivocal post-waiver invocation of rights”).

¹⁴¹ *Davis*, 512 U.S. at 459–461.

Despite the fact that *Davis* involved a post-waiver attempt at invocation, the lower courts have not consistently limited its application to that setting. Several lower courts have recognized that *Davis* is limited to a post-waiver situation,¹⁴² while others have applied it more generally to any attempted invocation.¹⁴³ It is difficult to see, however, how the *Davis* rule can truly apply pre-waiver. Take, for example, this soliloquy:

Police: (provides standard *Miranda* warning; suspect agrees to waive rights; police engage in questioning and at some point, suspect responds as follows:

Suspect: Gee, I think I shouldn't say anything...you know,...my lawyer, he wouldn't want me to talk to you...."

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

But pre-waiver, the scenario is entirely different.

Police officer: (provides standard *Miranda* warning)

Suspect: "Gee, I think I shouldn't say anything....you know, my lawyer, he wouldn't want me to talk to you."

Even if ambiguous, the police officer at this junction cannot simply "continue questioning." There has been no waiver of rights. In other words, even if the equivocal statement is not deemed an invocation, it cannot be construed to constitute a waiver. And a waiver of rights does not occur "simply" by the fact that the suspect proceeded to answer questions.¹⁴⁴ Thus, it is virtually inevitable that at least some clarification of rights must occur in this context, if only to obtain a valid waiver.

¹⁴² See *Dooley v. State*, 743 So.2d 65 (Fl. Ct. App. 1999) ("the holding in *Owen* [and *Davis*] applies only where the suspect has waived the right earlier during the session.).

¹⁴³ See, e.g. *Commonwealth v. Sicari*, 752 N.E.2d 684 (Mass. 2001) (courts have held that unless a suspect "clearly and unambiguously invokes his right to remain silent, *either before or after a waiver of that right*, the police are not required to cease questioning.). *State v. Moss*, 2007 WL 91649 (Neb. App) *5 (applying *Davis* pre waiver), *Bui v. Dipaolo*, 170 F.3d 232 (1st Cir. 1999) (applying *Davis* to a purported assertion immediately after being read rights; *State v. Law*, 39 P.3d 661 (Id. Ct. App. 2002) (using *Davis* rule to pre-waiver possible invocation). Cf. *In Re. Christopher*, 841 N.E.2d 945, 964-65 (Ill. 2005) ("Respondent correctly points out that the holding in *Davis* is limited to the situation where the alleged invocation of the right to counsel comes after a knowing and voluntary waiver....By implication, this suggests that the [Supreme Court] left open the issue of whether the objective test applies in a pre-waiver setting. We believe the objective test set forth in *Davis* can be applied [pre-waiver.]").

¹⁴⁴ See *Smith v. Illinois*, 469 U.S. 91, 98, 105 (1984) (*per curiam*) (The issues of "invocation and wavier are entirely distinct inquiries and the two much not be blurred.").

My point is this: even if *Davis* renders an ambiguous statement insufficient to invoke a suspect's rights, that statement should influence whether there occurred a valid waiver. Pre-waiver, the statement should not be deemed the equivalent to "Gee, I think the Yankees might win the World Series." Even if not deemed an invocation per se, the statement can and should be considered in deciding the validity of any waiver. Pre-waiver, ignoring such a statement (or making a derogatory statement about how not talking would hurt the defendant's cause) should render any subsequent waiver invalid.¹⁴⁵ At a minimum, the officers need to clarify the suspect's desire in order to satisfy the waiver requirements.

Thus, even if a court were inclined to adapt the *Davis* rule to the right to remain silent, it should apply that rule at most to the post-waiver scenario. That was the approach adopted by the Maryland Court of Appeals in 2004: "a careful reading of *Davis* reveals that the Supreme Court's bright line rule, requiring an unequivocal assertion of the right to counsel, pertains to a situation in which the defendant had previously waived his right and then, during the interrogation, arguably sought to exercise his rights. Based on the foregoing, we decline to apply the rationale of *Davis* to our analysis of appellant's silence, because the silence occurred in a pre-waiver context."¹⁴⁶

IV. Conclusion: Some Possible Solution

In recent years, a plethora of suggestions for improving *Miranda*, including limiting the length of an interrogation,¹⁴⁷ curtailing the "trickery" police officers can employ,¹⁴⁸ and, perhaps most significantly requiring videotaping of confessions,¹⁴⁹ have been suggested. While these are certainly laudable, this paper urges a re-examination and re-invigoration of *Miranda's* central premise: that suspects have a basic right not to answer questions by the police. To preserve that core value of *Miranda*, suspects who, after waiving their rights, should not be required to assert their rights unambiguously before police need honor those rights.

¹⁴⁵ See *State v. Collins*, 937 So.2d 86, 89, 93 (Ala. Crim. App. 2005).

¹⁴⁶ *Freeman v. State of Maryland*, 857 A.2d. 557, 573 (Md. Ct. App. 2004). *Accord*, *State v. Hill*, 2006 WL 3056408 *2 (Wash. App.)

¹⁴⁷ Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV 105 (1997).

¹⁴⁸ Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV 581 (1979). But see Laurie Magid, *Deceptive Police Interrogation Practices: How far is Too Far*, 99 MICH. L. REV 1168 (2001).

¹⁴⁹ See Slobogin, *supra* note 3, Erik Lilliquist, *Improving Accuracy in Criminal Cases*, 41 U. RICH. L. REV 897, 923-926 (May 2007) (advocating taping despite recognizing some problems with it).

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

Thus, perhaps the strongest evidence for the need for change comes not from the cases directly but from some remarkable statistics. Of all suspects subjected to custodial interrogation, only one in five refuse to talk initially.¹⁵⁰ That is, only 20% refuse to waive their rights. As I noted before, a good proportion of these 20% who refuse to talk are persons with prior felonies.¹⁵¹ Whether they have learned that talking to the police is not helpful, or learned how to effectively invoke their rights (unlike novices to the criminal justice system) is unknowable—and probably a combination of both! But the more troubling statistic is this: out of those 80% who do agree to talk, *virtually none* assert their rights during the interrogation.¹⁵² In other words, studies show that almost no suspect who waives their rights initially and is subjected to police questioning later effectively invokes their rights. Almost none of the suspects do what *Miranda* so carefully guaranteed them—control whether and when they speak to the police.

¹⁵⁰ Saul M. Kassin et al, Police Interviewing and Interrogation: A Self Report Survey of Police Practices and Belief, 31 LAW & HUM BEHAV. 381 (August, 2007) (“Consistently, research has revealed that custodial suspects waive their rights approximately 80% of the time). “Next to the warning label on cigarette packs, *Miranda*’s the most widely ignored piece of official advice in our society.” Patrick A. Malone, *You have the Right to Remain Silent: Miranda after 20 years*, AMERICAN SCHOLAR, Summer 1986 at 368. One scholar wrote that the *Miranda* Court “would have been stunned” had they seen the data on how few people resist police interrogation. George C. Thomas, *Stories about Miranda*, 102 MICH. L. REV. 1959, 1977 (2004).

¹⁵¹ See Duke, *supra* note 1.

¹⁵² William Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975, 977 (2001) (“Once suspects agree to talk to the police, they almost never call a halt to questioning or invoke their right to have assistance of counsel.”) See also *Project, Interrogations in New Haven: The Impact of Miranda*, 76 YALE L. J. 1519, 1554-55 (1967); Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM L. & CRIMINOLOGY, 621, 653 tb1 (1996) (of 182 *Miranda* suspects, 38 invoked their *Miranda* rights but only 2 did so after an initial waiver).

Why do I call this remarkable? Of course, it is possible that all those who decide to speak to the police find the experience so helpful, cathartic and enjoyable, that they never want it to end. Frankly, I find this possibility preposterous. Rather, I believe that the only logical interpretation of this statistic is that the rules for asserting either the right to counsel or the right to remain silent have become so difficult that almost no one is able to do it. Empirically, this seems evident by the fact that the number who manage to assert their rights post-waiver is infinitesimal. Descriptively, I hope I showed through my examination of the specific cases how the courts have set the bar for an unambiguous invocation incredibly and unrealistically high.¹⁵³

So what should be done? Many others have discussed possible solutions in great detail,¹⁵⁴ and thus, I will only sketch out three proposals here. First, ideally, all ambiguous invocations of the right to remain silent should end the interrogation and further interrogation should proceed under the rules of *Mosley*. Such an approach would best protect the suspect's free will, given my arguments that many (if not most) ambiguous invocations likely represent attempts to remain silent. And, given the ease with which re-interrogation can occur under *Mosley*, this approach would pose no real impediment to law enforcement interests. This solution, however, is unlikely to be embraced. It was clearly rejected by the Supreme Court in *Davis*, and had been a minority position in the court pre-*Davis*, at least with respect to the right to counsel.

Alternatively, the courts should adopt a stringent "stop and clarify" method. By stringent, I mean that the method would have to follow specific and rigid rules similar to *Miranda* warnings so as to ensure that the suspect's will is not worn down. For example, a police officer should be required to have a set script and would not be able to use the opportunity to editorialize on the benefits of talking to the police. Such a script might go like this: "It sounds like you don't want to speak to us about any topic, but it wasn't clear. I am going to stop questioning you now because I am not sure if you want to proceed. You have the right not to speak to us, and we are prepared to honor that right. And if you don't want to speak to us, there will be no adverse consequence to you. So, do you want to speak to us at this time?"

¹⁵³ In a study of 211 cases in which the suspects were provided their *Miranda* rights, suspects invoked their right to counsel in 20 cases and invoked the right to remain silent in 6. In 11 of the 20 cases where the suspect invoked the right to counsel, statements were suppressed or no questioning occurred at all. In all of the 6 cases where the suspects claimed to have invoked the right to remain silent, the claim was rejected and the incriminating statement was admissible. George Thomas, *Stories about Miranda*, 102 MICH. L. REV. 1959 (2004), discussed in Welsh, *supra* note 132 at 37.

¹⁵⁴ See Holly, *supra* note 130, at 581.

Let me add one other suggestion that would, along with either of the above proposals, help ensure that the ideals of *Miranda* with respect to the right to remain silent be realized. The initial warnings should include the following two additions: First, the police must say: You have the right to remain silent and you may state *at any time* that you don't wish to talk to us during the interrogation and we will stop asking you questions. In other words, if you decide to talk now, you can stop at any time." Second, the suspect must be told: "If you decide to ask for an attorney or to stay quiet, that choice will not be used against you. We cannot comment on the fact that you chose not to talk to us in court."¹⁵⁵ The first statement would explicitly inform the suspect that they can assert the right at any time—a right only implicitly conveyed currently. The second statement would hopefully dispel the fear of a suspect that the invocation of silence would "make them look bad," and could be used against them.

After 40 odd years, *Miranda* has been probed and prodded, attacked from all sides and, most recently, reaffirmed by the Court.¹⁵⁶ At its heart lies the right of each individual to decide freely whether to cooperate with the police in the investigation by submitting to questioning. The *Miranda* decision represents the viewpoint that the suspect's choice to remain silent, or to speak only with the help of counsel, is not an evil to be avoided but an acceptable option. Somehow, *Miranda's* guarantees, and its perspective have become thwarted by subsequent Courts intent on promoting police interrogations at almost any cost. It's time to restore the promise of *Miranda* at its most basic level—to truly protect the right to remain silent. That right should not only be the province of those fortunate enough or educated enough to say the right words. The promise belongs to all.

¹⁵⁵ This suggestion is explored in an excellent law review article, Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understanding*, 90 MINN. L. REV 781 (2006).

¹⁵⁶ *Dickerson v. United States*, 530 U.S. 428 (2000).

**APPENDIX OF STATE CASES CONSIDERING WHETHER
DAVIS APPLIED TO RIGHT TO REMAIN SILENT (as of
2/2008)**

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

Alaska--did not yet decide whether if invocation need be unambiguous: *Munson v. Alaska*, 123 P.3d 1042 (Al. 2005).

Arizona-- uses clarification approach; says will follow that approach until the Supreme Court of state tells the lower courts to follow Davis for purposes of determining whether the suspect invoked the right to remain silent. *State v. Strayhard*, 911 P.2d 577 (Ariz.App. Div. 1995).

Arkansas--adopts Davis for right to remain silent. *Bower v. State*, 911 S.W.2d 555, 565 (1995) (no distinction between the right to counsel and the right to remain silent with respect to the manner in which it must be effected); *Standridge v. State*, 951 S.W.2d 299 (Ark. 1999).

California--appears to have adopted Davis for right to remain silent. *People v. Stitely*, 108 P.3d 182 (Cal. 2005)(in order to invoke Fifth Amendment privilege, suspect must unambiguously assert his right to silence or counsel, citing Davis); *People v. Furness*, 2006 Lexis 62498 *8 (Ca. App.). But see *In Re John W.*, 2005 Lexis 7782 (Ca. App.) (must ask clarifying questions if ambiguous); *People v. Bates*, 2005 Lexis 11604 (Ca. App) (same).

Colorado--adopts Davis for right to remain silent. *People v. Arroyo*, 988 P.2d 1124, 1130 (Colo 1999) (following majority of other states and federal jurisdictions in applying Davis).

Connecticut--no case

Delaware--uses clarification rule under state constitution: *Garvey v. State*, 873 A.2d 291, 296 (Dela. 2005) (Under Delaware constitution, if suspect attempts to invoke rights equivocally, police must clarify).

Florida--- adopts Davis for right to remain silent.: *Owen v. State*, 862 So.2d 687, 696-97 (Fl. 2003).

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

Hawaii--no case (but does not use Davis even for the right to counsel, see *State v. Huey*, 881 P.2d 504, 522 (Haw. 1994).

Idaho--adopts Davis for right to remain silent. *State v. Whipple*, 5 P.3d 478, 482-84 (Ct. App. Ind.2000) (implicitly adopting Davis); *State v. Law*, 39 P.3d 661, 665 (Ct. App. Ind. 2002) (explicitly adopts Davis).

Illinois--no case

Indiana--no case
has made an ambiguous or equivocal statement S.W.2d 299 (Ark. 1999).

Iowa--no case

Kansas--requires that invocation of right to remain silent be unambiguous without citing Davis: *State v. Holmes*, 102 P.3d 406, 418 (Ks. 2004). *State v. Biecker*, 132 P.3d 478, 481-82 (Ks. App. 2006);

Kentucky--requires that invocation of right to remain silent be unambiguous without citing Davis. *Soto v. Commonwealth*, 139 S.W.3d 827, 846 (Ky. 2004).

Louisiana--adopts Davis for right to remain silent. *State v. Robertson*, 712 So.2d 8, 28 (state can continue questioning if the right to remain silent or the right to counsel is not specifically invoked: *State v. Gerpard*, 709 So.2d 213, 220 () (if invocation of right to counsel must be unambiguous, then certainly the invocation of the right to remain silent must also be unambiguous).

Maine--requires that invocation of right to remain silent be unambiguous without citing Davis. *State v. Grant*, 2006 WL 21804 (Me. Super). But has held Davis does not apply pre waiver, *State v. Holloway*, 760 A.2d 223, 228 () (declining to extend Davis to ambiguous invocation of right to remain silent in the absence of a prior waiver).

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

Massachusetts--has not decided. *Commonwealth v. Sicari*, 752 N.E.2d 684 (Mass. 2001) (“we need not decide whether to adopt the clear articulation rule”).

Michigan--adopts Davis for right to remain silent. *People v. Grandson*, 538 N.W.2d 471 (1995) and *People V. Harris*, 2001 WL 668957 *2 (Mich. App). But see *People v. Draper*, 1997 WL 33354344 *1 (if equivocal invocation of right to remain silent, police can continue questioning to seek clarification).

Minnesota--no case

Mississippi--clarification approach adopted; did not discuss Davis: *Holland v. State*, 587 So.2d 848 (Miss. 1991).

Missouri--no case.

Montana--no case

Nebraska--adopts Davis for right to remain silent. *State v. Moss*, 2007 WL 91649 *5(Neb. App)(“following the majority of jurisdictions, we hold the Davis clear articulation rules applicable to the invocation of the right to remain silent);

New Hampshire--no case

New Jersey--no post Davis case, pre Davis supported clarification approach: *State v. Bey*, 548 A.2d 887, 893 (N.J. 1988) (where suspect ambiguously asserts Miranda rights, police should stop and clarify).

New Mexico--no case

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

Nevada--no case

North Carolina--adopts Davis for right to remain silent (though calling it a 6th Amendment right). *State v. Golphin*, 533 S.E.2d 168, 225 (N.C. 2000).

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

Ohio--adopts Davis for right to remain silent. *State v. Murphy*, 747 N.E.2d 765, 779 (Oh. 2001)(“although Davis deals with invocation of right to counsel, we think it also applies to the right to remain silent.”).

Oklahoma--no case

Oregon--no case

Pennsylvania--no clear decision. Closest was a confusing opinion which said that Davis related to the 6th Amendment right to

counsel and therefore was not applicable to 5th Amendment right to remain silent. Commonwealth v. Chmiel, 2003 WL 2528728 (Pa. Crim).

Rhode Island--no case

South Carolina--adopts Davis for the right to remain silent. State v. Reed, 503 S.E.2d 747 (S.Caro. 1998).

South Dakota----no case

Tennessee--adopts Davis for the right to remain silent. State v. Mason, 1996 WL 111200 (Tenn. Crim App).

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

Utah--somewhat unclear. Generally adopts Davis, but says if invocation is something like: "I don't want to talk about *it*," court describes that as ambiguous with regard to scope and otherwise unambiguous and says that kind of statement requires clarification.

Vermont--adopts Davis for right to remain silent. State v. Bacon, 658 A.2d 54, 65-66 ("Without doubt [Davis] applies equally to situations in which a defendant who has waived his Miranda rights ambiguously invokes the right to remain silent during the subsequent interrogation.").

Virginia--adopts notion suspect must clearly invoke rights without mentioning Davis—Midkill v. Commonwealth, 462 S.E.2d 112 (Va. 1995); Green v. Commonwealth, 500 S.E.2d 835 (Va. App. 1998).

Washington--adopts Davis for right to remain silent. State v. Fitzgerald, 2007 WL 1241518 (Wash. App) (suspect must unequivocally assert right to remain silent); State v. Hill, 2006 WL 3056408 (Wash. App) (Davis only applies post-waiver).

West Virginia--adopted Davis as "an analytical starting point," but suggesting that it was "not adopting Davis as part of West

Virginia's jurisprudence." State v. Farley, 452 S.E.2d 50, 59-60 (W.V. 1994); State v. Bradshaw, 457 S.E.2d 456 (W.Va. 1995) ((suspect must clearly and unambiguously indicate he wants to cease all questions and not simply refusing to answer certain questions before police must stop).

Wisconsin--adopts Davis for right to remain silent. State v. Markawadt, 742 N.W.2d 546 (Wi Ct. App.2007).

Wyoming--expressly did not decide if Davis applies to right to remain silent. Pene v. State, 98 P.3d 857 (Wyo. 2004) (positing reasons why Davis might not apply to right to remain silent, but saying didn't need to decide because police officers here clarified an ambiguous request).