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I. INTRODUCTION

In Davis v. United States, the United States Supreme Court considered the appropriate response by law enforcement officers when a suspect makes an ambiguous or equivocal reference to an attorney or the need for representation during a custodial interrogation. The officers' response to such a reference is important because if the suspect were to request that counsel be present during a custodial interrogation, invoking the Fifth Amendment right to counsel, then the police officers would be required to end the interrogation immediately. During Davis's interrogation, he said, "Maybe I should talk to a lawyer." The Supreme Court held that after a suspect has knowingly and voluntarily waived his Miranda rights, the interrogating officers may disregard the subsequent ambiguous reference to an attorney until and unless the suspect makes a clear request for the assistance of counsel. The Court declined to adopt a rule requiring officers to cease interrogation and ask clarifying questions in order to ascertain whether the suspect intended to invoke the right to counsel.

This note examines the development of the Fifth Amendment right against self-incrimination and the judicially created Miranda rules protecting that right. Further, this note examines the practical application of the rule from Davis as well as the potential consequences to follow.

II. FACTS

Petitioner, Robert L. Davis, was convicted of the unpremeditated murder of Seaman Apprentice Keith Shackleton and was sentenced

2. "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.
3. Edwards v. Arizona, 452 U.S. 973 (1981) (holding that once a suspect requests counsel, the suspect is not subject to any further questions until either counsel is available or the suspect initiates further communication with the police).
4. Davis, 114 S. Ct. at 2353.
5. See Miranda v. Arizona, 384 U.S. 436, 478-79 (1966). The Miranda Court held when an individual is taken into custody or significantly deprived of his freedom by authorities and is subject to questioning, he must be advised of his Miranda rights; these right include the right to remain silent and a court-appointed attorney if the suspect is unable to afford counsel. Id. at 479.
6. Davis, 114 S. Ct. at 2356.
7. Id.
to life imprisonment. The victim was last seen alive playing pool in the Enlisted Men’s Club located on the base the evening before his body was found. During the ensuing investigation, the Naval Investigation Service (NIS) focused on which patrons of the club owned pool cues because the club did not allow its cues to be removed from the premises.

As a result of routine interviewing, NIS Special Agent (SA) Sentell learned that Davis was at the club the night of the murder. The next day, October 19th, NIS agents went aboard Davis’s ship to interview him, but he was absent from his post without authority. When Davis returned to duty on October 20th, the NIS agents returned to conduct the interview, explaining to Davis’s command that he was a potential witness. Before the interview was conducted, the ship’s executive officer informed the agents that Davis was being referred for a mental status evaluation for making violent statements concerning his desire to shoot someone, in particular a police officer.

During the October 20th interview, Davis was not advised of his rights because he was not considered a suspect at that time. Davis confirmed that he was at the club on the night of October 2nd and identified a picture of the victim, stating that he had played pool with him before. His interview lasted approximately thirty minutes. Davis also provided the agents with his pool cues and

9. Id. at 338. The pathologist reported that the injuries appeared to be inflicted with a “long tubular shock-absorbing object” and that the butt end of a pool cue could have been the weapon used in the attack. Id.
10. Id. Later, the Naval Investigative Service learned that Davis and Shackleton were playing pool in the club and that Shackleton had lost $30 to Davis and refused to pay. Davis, 114 S. Ct. at 2352-53.
11. Id. at 2353. NIS interviewed between 100 to 250 people during the investigation. Davis, 36 M.J. at 338.
12. Davis, 36 M.J. at 338. Two sailors interviewed told SA Sentell that Davis was at the club until almost closing time. Id.
13. Id.
14. Id.
15. Id.
16. Id. at 339. He was not considered a suspect because Shackleton was beaten, not shot. Id. at 338. See Miranda v. Arizona, 384 U.S. 436, 478 (1966) (holding that when an individual is taken into custody or significantly deprived of his freedom by authorities and is subject to questioning, he must be advised of his Miranda rights).
17. Davis, 36 M.J. at 339.
18. Id. His attitude throughout the interview was described by SA Sentell as “[v]ery cooperative.” Id.
pointed out a red stain on the cue case, saying at first that it was ketchup, then later that it could be his own blood.\textasciitilde{19}

On November 1st, NIS was informed that Davis had admitted to killing Shackleton, and from that time, Davis was regarded as a suspect.\textasciitilde{20} Three days later, on November 4th, Davis was again interviewed by NIS agents; this time he was advised of his Article 31(b) rights\textasciitilde{21} as well as his Fifth Amendment right to counsel.\textasciitilde{22} Davis signed a written waiver of rights and agreed to answer questions.\textasciitilde{23}

During the interview, Davis said, “Maybe I should talk to a lawyer.”\textasciitilde{24} SA Sentell immediately stopped the interrogation and asked Davis to clarify whether he was asking for a lawyer or just making a comment about a lawyer.\textasciitilde{25} SA Sentell testified that Davis said, “No, I’m not asking for a lawyer,” and then said, “No, I don’t want a lawyer.”\textasciitilde{26}

After clarifying Davis’s statement concerning a lawyer, the agents took a break before resuming the interview.\textasciitilde{27} When they returned, the agents reminded Davis of his rights but did not repeat his rights in full or ask him to sign another waiver.\textasciitilde{28} Shortly after the interview resumed, Davis told SA Sentell, “I think I want a lawyer before I say anything else.”\textasciitilde{29} The interview ended at that point.\textasciitilde{30}

\ \ \textit{Id.} Pool cues were also collected from three other people. \textit{Id.}

\ \ \textit{Id.} This information was provided by Petty Officer Mull, to whom Davis had admitted the crime. \textit{Id.}

\ \ \textit{Id.} Article 31, Uniform Code of Military Justice, 10 U.S.C. § 831, provides as follows:

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

\textit{Id.}

\ \ \textit{Davis}, 36 M.J. at 339. “No person ... shall be compelled in any criminal case to be a witness against himself.” \textit{U.S. Const.} amend. V.

\ \ \textit{Davis}, 36 M.J. at 339. Davis’s stated reason for agreeing to be questioned was “because he didn’t kill anyone.” \textit{Id.}

\ \ \textit{Id.} at 339-40.

\ \ \textit{Id.} at 340. SA Sentell testified that “[We] made it very clear that we’re not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren’t going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, ‘No, I don’t want a lawyer.’” \textit{Id.}

\ \ \textit{Id.}

\ \ \textit{Id.}

\ \ \textit{Id.}

\ \ \textit{Id.}

\ \ \textit{Id.}
During his court-martial, Davis sought to have the statement he made during the interview on November 4th suppressed, arguing that the fruits of that interview were obtained after he made a request for counsel. The military judge denied his motion to suppress. Davis was convicted of unpremeditated murder and sentenced to life imprisonment.

On appeal, the United States Court of Military Appeals affirmed the military trial judge's decision to deny the motion to suppress Davis's statement made during the interview. The appellate court agreed with the military judge that Davis's comment, "Maybe I should talk to a lawyer," did not invoke his right to counsel at that point. The court of appeals also found that the information received during the November 4th interview was properly admitted into evidence.

The United States Supreme Court granted certiorari to resolve the issue of ambiguous references to counsel made by suspects during custodial questioning by the police. The Supreme Court's acceptance of this case was based on the lack of uniformity in decisions among the lower courts. The Court held that when Davis made the ambiguous statement concerning a lawyer, the NIS agents were not required to stop the interview. The Court further held that it was proper, although not required, for the agents to clarify whether Davis did or did not wish to speak to a lawyer. The Court affirmed the judgment of the Court of Military Appeals, finding no grounds for the suppression of Davis's statement.

III. HISTORICAL DEVELOPMENT

The roots of the Fifth Amendment-based right to counsel are embedded in English common law. The privilege against self-in-
Criminal procedure initially began as a judicial reaction to the brutal methods used in England during interrogation to force the suspect to confess.\textsuperscript{42} This belief in suspects' rights was transplanted in the United States by the English settlers in colonial America and was considered of such vital importance that it was included among the fundamental principles of the United States.\textsuperscript{43}

Nevertheless, while a suspect has traditionally been entitled to the privilege not to incriminate himself, the Fifth Amendment has not always been interpreted to extend a right to counsel during a custodial interrogation by the police. Originally, the right to counsel was seen only as a Sixth Amendment right, which only arose when formal criminal proceedings were initiated.\textsuperscript{44}

Slowly, case law developed to ensure that a suspect's Fifth Amendment right against self-incrimination was protected. In 1897, the Court established a rule based on the Fifth Amendment Due Process Clause, which required that whenever the question arose as to whether the confession was voluntary, it would be determined in favor of the accused.\textsuperscript{45} Over eighty years later, in 1963, the Court held that if the suspect had requested and been denied the opportunity to confer with counsel while in custody and had not been effectively warned of his constitutional right to remain silent, his constitutional rights under the Sixth Amendment\textsuperscript{46} were violated.\textsuperscript{47} Thereafter, any statement elicited by the officers during interrogation could not be introduced at trial.\textsuperscript{48}

\begin{footnotes}
\item[42.] Id. at 443.
\item[43.] Id.
\item[44.] See, e.g., United States v. Gouveia, 467 U.S. 180, 187-88 (1984) (explaining that the Sixth Amendment is invoked only after formal criminal proceedings are initiated, such as a formal charge, information, preliminary hearing, arraignment, or indictment).
\item[45.] Bram v. United States, 168 U.S. 532, 565 (1897) (basing its decision on the Fifth Amendment Due Process Clause, this Court held that the trial court erred in admitting the defendant's confession because he had been unduly influenced).
\item[46.] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. U.S. Const. amend. VI.
\item[47.] Escobedo v. Illinois, 378 U.S. 478, 491 (1963). See also Kirby v. Illinois, 406 U.S. 682, 689 (1972) (noting that in retrospect, the Court perceives that the purpose of \textit{Escobedo} was not to uphold the Sixth Amendment right to counsel but to guarantee the Fifth Amendment privilege against self-incrimination).
\item[48.] \textit{Escobedo}, 378 U.S. at 490.
\end{footnotes}
In 1964, an issue came before the United States Supreme Court in *Malloy v. Hogan*\(^4\) that directly affected the later development of the Fifth Amendment right to counsel. The Court considered whether the Fifth Amendment right against self-incrimination applied to state court proceedings as in the federal system.\(^5\) During the Warren Court Era, the Court was struggling with whether states were required to extend the protections of the Bill of Rights to its citizens or whether those rights only pertained to federal government action.\(^6\) In a controversial opinion, the Court held that Malloy enjoyed the Fifth Amendment privilege against self-incrimination in his state court proceedings through the application of the Fourteenth Amendment,\(^7\) which guarantees a defendant the right to due process of law.\(^8\) The Court rejected the view that the Fourteenth Amendment applies to the states in a "watered-down, subjective version of the individual guarantees of the Bill of Rights."\(^9\) Instead, the Court decided that no justification exists for maintaining different standards to determine the validity of an invocation of constitutional privilege based merely on whether the defendant is tried in a state or federal court.\(^10\) Thus, the same standards must be applied to determine whether the defendant properly invoked his rights regardless of whether he is in federal or state court.\(^11\) It is through the Fourteenth Amendment that the Fifth Amendment privilege against self-incrimination becomes applicable to the states.\(^12\)

Two years later in *Miranda v. Arizona*, the Supreme Court recognized the need for a protective rule to establish a safeguard for the suspect's Fifth Amendment right against compulsory self-incrimination.\(^13\) In *Miranda*, the Court held that a suspect must be

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50. *Id.* at 3. Malloy refused to answer any questions in regard to alleged gambling and other criminal activities "on the grounds it may tend to incriminate me." *Id.*
51. *Id.* at 4-5.
52. *Id.* at 6. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.
54. *Id.* at 10-11 (quoting Ohio ex rel. Eaton v. Price, 364 U.S. 263, 275 (1960) (dissenting opinion)).
55. *Id.* at 11.
56. *Id.*
57. *Id.* at 6. "We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States." *Id.*
58. 384 U.S. 436 (1966) (noting that widespread abuse by police officers, such
clearly advised of his right to remain silent, and that anything he says can be used against him in court proceedings. The suspect must also be informed of his right to counsel and advised that if he is unable to afford counsel, one will be appointed for him. The Court went on to hold that, after being advised of these rights, the suspect can choose to waive the rights and answer questions. Nevertheless, if during questioning, the suspect indicates in any manner that he has decided to reinvokes the right to counsel or silence, the officers must immediately end the interrogation.

The *Miranda* rule has a two-fold purpose; it protects the suspect’s constitutional rights and insures that the confession made will not be rendered inadmissible. In *Miranda*, the Court noted that because interrogations of in-custody suspects are by their nature coercive,
the suspect must be completely apprised of his Fifth Amendment rights. If he chooses to exercise these rights, his wishes must be honored.

*Miranda v. Arizona* is the foundation of the evolving case law concerning the Fifth Amendment right to counsel. Two major categories of Fifth Amendment cases since *Miranda* present two questions: 1) what constitutes a valid waiver of the *Miranda* rights, and 2) how must a suspect properly invoke his *Miranda* rights.

A. Valid Waiver

In 1979, the issue of what constitutes a valid waiver of the Fifth Amendment right to counsel came before the United States Supreme Court in *North Carolina v. Butler*. The Court held that an express written or oral statement is not required to show that the suspect knowingly and voluntarily waived his rights. While silence alone is not enough, the Court refused to hold that silence, coupled with an understanding of the right to counsel and with conduct indicating a waiver of that right, could never support a finding that a suspect had waived his right to counsel, as the North Carolina Supreme Court had held. The Court based this decision on prior case law which held that whether the suspect has knowingly and voluntarily made an effective waiver depends on the facts and

65. *Id. But see G. Edward White, Earl Warren: A Public Life* 271 (1982) (stating that the problem with the view that interrogating officers and suspects should be on equal footing is that “[a]lthough interrogated persons are technically presumed to be innocent of potential charges, as a practical matter a system of law enforcement has to presume potential guilt in detained suspects to justify their detention” and that the fairness principle of *Miranda* ignores the necessity of giving officers certain advantages in order to do their jobs).

66. *Miranda*, 384 U.S. at 467. *See also Michigan v. Mosley*, 423 U.S. 96 (1975) (concluding that whether a statement obtained after the suspect has invoked his Fifth Amendment right to remain silent is admissible will depend on whether the assertion of those rights was completely honored).


68. *Id.* at 369.

A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

69. *Butler*, 441 U.S. at 373.
circumstances in that particular case, including the suspect's background, experience, and conduct.\textsuperscript{70}

Two years later, the waiver issue came before the Court again in \textit{Edwards v. Arizona}.\textsuperscript{71} The defendant, Robert Edwards, invoked his right to counsel during interrogation.\textsuperscript{72} Nevertheless, the next day Edwards was forced to speak with police again and subsequently made incriminating statements.\textsuperscript{73} As to whether Edwards had subsequently waived his invoked right to counsel, the Court reiterated that in order to waive that right, the waiver must be voluntary and constitute a knowing and intelligent relinquishment of a known right.\textsuperscript{74} To effectively waive this right, there must be more than the suspect's response to further questioning by police.\textsuperscript{75} The Court established a second layer of protection for suspects held in police custody by ruling that after a suspect requests counsel, the suspect is not subject to further interrogation until either counsel is available or the suspect initiates further communication with the police.\textsuperscript{76}

In 1990, the Court clarified the holding in \textit{Edwards} when it decided \textit{Minnick v. Mississippi}.\textsuperscript{77} Reasoning that a single meeting with a lawyer will not protect a suspect from the coercive nature of custodial interrogation, the Court held that once counsel has been requested, all interrogation must end and cannot be re-initiated without an attorney present, regardless of whether the suspect has consulted with counsel.\textsuperscript{78}

\textbf{B. Proper Invocation of Fifth Amendment Rights}

In 1984, a question arose in \textit{Smith v. Illinois}\textsuperscript{79} concerning how a suspect properly invokes the Fifth Amendment right to counsel.

\textsuperscript{70} Id. at 374-75 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1937)).
\textsuperscript{71} 451 U.S. 477 (1981).
\textsuperscript{72} Id. at 477, 479.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 482. See also Johnson v. Zerbst, 304 U.S. 458, 464 (1937).
\textsuperscript{75} Edwards, 451 U.S. at 484. \textit{Edwards} is "designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights." Michigan v. Harvey, 494 U.S. 344, 346 (1990). In \textit{Harvey}, the Court ruled that the defendant's statement was inadmissible because it was given after he was discouraged from speaking with a lawyer because "his lawyer was going to get a copy of the statement anyway." Id.
\textsuperscript{76} Edwards, 451 U.S. at 484-85.
\textsuperscript{77} 498 U.S. 146 (1990).
\textsuperscript{78} Id. at 146.
\textsuperscript{79} 469 U.S. 91 (1984). In a case related to the same issue of waiver, the Court decided Arizona v. Roberson, 486 U.S. 675 (1988). In \textit{Roberson}, three days after
In *Smith*, the defendant was advised of his *Miranda* rights.\(^{80}\) In reference to the right to counsel, he said, "'Uh, yeah. I'd like to do that.'"\(^{81}\) The police continued asking questions about the request for counsel and the suspect ambiguously agreed to be interrogated.\(^{82}\) His motion to suppress the statement given was denied and he was convicted.\(^{83}\) The Supreme Court reversed and remanded, holding that the trial court must first determine whether the suspect actually invoked the right to counsel.\(^{84}\) If the trial court determines such an invocation was made, it must then apply the "bright-line rule" from *Edwards*, requiring that the suspect both initiate further communication with the police and knowingly and intelligently waive the right he had invoked in order for his responses to be admitted into evidence.\(^{85}\)

However, the Court did not specify what should be construed as a proper invocation and declined to address the issue of ambiguous statements, finding instead that the defendant's statement in *Smith* was neither ambiguous nor unclear.\(^{86}\) The Court did state that all questioning must cease when neither the request nor the events leading up to the request indicate ambiguity.\(^{87}\) Thereafter, any subsequent statements made by the suspect are relevant only as to whether the right he had invoked has now been waived.\(^{88}\) The Court held that the defendant invoked his Fifth Amendment right, an officer, unaware of the invocation, questioned the defendant about another crime and elicited an incriminating statement that was later suppressed at trial. *Id.* at 678. Affirming the trial court's decision, the Supreme Court held that once the request has been made, all interrogation is barred, regardless of how many crimes the defendant is accused of. *Id.* at 682-88.

81. *Id.* at 93.
82. *Id.*
83. *Id.* at 94.
84. *Id.* at 95, 98.
85. *Id.* at 95. *But see* Connecticut v. Barrett, 479 U.S. 523 (1987) (rejecting the argument that because the defendant distinguished between written and oral statements, this indicated that he did not understand the consequences of his statement to waive his Fifth Amendment rights effectively); *cf.* Charles J. Williams, Comment, *Connecticut v. Barrett And The Limited Invocation Of The Right To Counsel: A New Limitation On Fifth Amendment Miranda Protections*, 73 Iowa L. Rev. 743 (1988). The author advocates that "the test should be whether a reasonable person who fully understood the right to have counsel present during an interrogation would act as the suspect did." *Id.* at 763.
86. *Smith*, 469 U.S. at 99-100.
87. *Id.* at 98.
88. *Id.*
any answers to further questioning after the suspect requests counsel may not be used to cast doubt on the clarity of the initial request itself.\textsuperscript{89}

Among the lower courts, three distinct positions had developed prior to \textit{Davis v. United States}\textsuperscript{80} in order to deal with the problem of ambiguity. Each approach placed different burdens of clarity upon the suspect and provided vastly different degrees of protection for the suspect's Fifth Amendment right to counsel.

First, some courts took the position that an equivocal request for counsel by the suspect is sufficient in order to invoke the Fifth Amendment privilege.\textsuperscript{91} This approach provided the greatest amount of protection against any rights violation by presuming the suspect has invoked the right to counsel by the equivocal request.\textsuperscript{92} An example of this view is found in \textit{Maglio v. Jago},\textsuperscript{93} a Sixth Circuit decision remanding a conviction based on a confession given after the defendant had attempted to assert his Fifth Amendment right to counsel.\textsuperscript{94} When the interrogating officer asked Daniel Maglio if he would waive his rights and answer questions, Maglio replied, “Maybe I should have an attorney.”\textsuperscript{95} The officer told him he would have to wait until the following day to have an appointed lawyer.\textsuperscript{96} The officer then continued asking questions until Maglio confessed to murder.\textsuperscript{97} Over Maglio's objections, the confessions were admitted

\textsuperscript{89} \textit{Id.} at 98-99.
\textsuperscript{90} 114 S. Ct. 2350 (1994).
\textsuperscript{93} 580 F.2d 202 (6th Cir. 1978).
\textsuperscript{94} \textit{Id.} at 207-08. The Court held that a new trial was necessary because Maglio's confessions were obtained in violation of his constitutional right to assistance of counsel. \textit{Id.} at 207.
\textsuperscript{95} \textit{Id.} at 203. Daniel Maglio was a 16-year-old runaway and had been arrested when found driving a car belonging to a man who had been found dead earlier in the day. \textit{Id.} at 202-03. During the interrogation, the officer told Maglio that he was not required to speak without counsel. \textit{Id.} at 203. Nevertheless, the officer continued asking questions regarding how Maglio got the car. \textit{Id.} Forty-five minutes after confessing to the officers, the prosecutor arrived to tape the confession. \textit{Id.} The prosecutor re-explained to Maglio his rights. \textit{Id.} When asked whether he understood that an attorney would be appointed if he could not afford one, he replied, “I understand it now. It's not the way it seemed before, but it doesn't matter.” \textit{Id.}
\textsuperscript{96} \textit{Id.}
\textsuperscript{97} \textit{Id.} at 203.
into evidence and he was convicted of murder. The Sixth Circuit found that Maglio was attempting to assert his right to counsel by his ambiguous statement. The court based this finding on the language in *Miranda*, interpreting it to mandate that questioning must stop if the defendant "indicates [in] any manner and at any stage of the process that he wishes to consult with an attorney before speaking." The Court of Appeals held that Maglio was denied his Fifth Amendment right to counsel and remanded the case for a new trial.

The second approach required the interrogating officers to ask clarifying questions to determine whether the suspect has requested counsel by his ambiguous reference. This position shifted the burden to the interrogating officers to ensure that the suspect's rights are adequately protected. An example of this approach is *Thompson v. Wainwright*, a Fifth Circuit decision. During a custodial interrogation, Larry Thompson was advised of his *Miranda* rights and signed a waiver card. He then told the officers he was willing to make a statement but that he wanted to tell his story to an attorney first. An officer responded by explaining to Thompson that the attorney could not tell his story to the police and that the attorney would probably advise him to not give a statement. Thompson subsequently gave the officer his statement, which was used against him at his trial. The court of appeals held that

98. *Id.* at 204. In a pretrial hearing, the trial judge ruled that the confessions were voluntary and that Maglio had intelligently and knowingly waived his right to an attorney. *Id.*

99. *Id.* The court of appeals reiterated that courts indulge in every reasonable presumption against a waiver of the Fifth Amendment right to counsel and that the burden to prove a waiver is on the State. *Id.* at 204-05.

100. *Id.* at 205 (quoting *Miranda v. Arizona*, 384 U.S. 436, 445 (1966)).


104. 601 F.2d 768 (5th Cir. 1979).

105. *Id.* at 769. Thompson was arrested for stabbing the night manager of a restaurant after Thompson attempted to steal cash from the register. *Id.*

106. *Id.*

107. *Id.* One of the interrogating officers testified that "[t]he only thing he said was he would like to tell his attorney first and we told him he could tell us just as well and that his attorney would not be able to tell us what he said so he wanted to tell us himself." *Id.* at n.2.

108. *Id.* at 769-70. The statement was used to corroborate the testimony of an eyewitness and to impeach Thompson's own testimony. *Id.* at 770.
Thompson’s conviction must be reversed and remanded.109 The court established its approach to the ambiguous reference to counsel dilemma by stating that whenever a suspect makes even an ambiguous request for counsel during a custodial interrogation, the officers must immediately clarify the request until its meaning is clearly understood.110

The third approach, called either the “Threshold Standard of Clarity” or the “Totality of Circumstances” test, required the suspect’s request to be sufficiently clear in order for a court to find the right to counsel had been invoked.111 This approach shifted the burden to the suspect to establish clarity by presuming that the suspect did not invoke the right to counsel whenever an ambiguous statement is made.112 This view is exemplified by the Illinois case, People v. Krueger.113 The case concerned a defendant who said, “Maybe I ought to have an attorney,” during a custodial interrogation.114 Subsequently, the defendant made incriminating statements that were introduced as evidence at his trial.115 In determining whether this statement properly invoked his right to counsel, the court acknowledged that his reference to counsel technically was covered by Miranda’s “in any manner” language.116 Nevertheless, the Illinois court reasoned that the United States Supreme Court did not intend for any and every reference, regardless of its vagueness or ambiguity, to be interpreted as an invocation to the right to counsel.117 The Illinois Supreme Court upheld the trial court’s decision to admit the evidence and affirmed the defendant’s conviction.118

109. Id. at 772. “Thompson’s incriminating statement, taken under [these] circumstances . . . and after he was misled into abandoning his equivocal request for counsel, was gotten in violation of Miranda.” Id.

110. Id. at 771. “Further questioning thereafter must be limited to clarifying that request until it is clarified.” Id.

111. Shreffler, supra note 91, at 469. See, e.g., People v. Krueger, 412 N.E.2d 537 (1980) (supporting the view that a suspect must meet the minimum threshold of clarity to have effectively invoked the Fifth Amendment right to counsel).

112. Shreffler, supra note 91, at 468.

113. 412 N.E.2d 537 (Ill. 1980).

114. Id. at 540. Three officers testified that during the custodial interrogation, Krueger said either, “Maybe I ought to have a lawyer,” ”Maybe I need a lawyer,” or “Maybe I ought to talk to an attorney.” Id.

115. Id. at 539. Krueger was tried and convicted of murder, although maintaining a defense of self-defense. Id.

116. Id. at 540 (citing Miranda, 384 U.S. at 444-45). The Miranda Court stated that if a suspect “indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.” Miranda, 384 U.S. at 444-45.


118. Id. at 540-41. “[W]hile we are sensitive to the requirement that authorities refrain from interrogation whenever a suspect invokes his right to counsel, we find
Noting that the issue concerning ambiguous or equivocal references to counsel during an in-custody interrogation had not been specifically addressed, the Supreme Court granted certiorari in *Davis v. United States* to resolve the conflicts between the three differing approaches in the lower courts.

IV. REASONING OF THE COURT IN *DAVIS*

The Supreme Court chose to adopt the "Threshold Standard of Clarity" approach, concluding that when a suspect makes an ambiguous statement concerning a desire for counsel during interrogation, law enforcement officers may continue asking questions until the suspect clearly requests counsel. The Court reiterated that the right to counsel is not a constitutional right but rather a judicially created measure to ensure protection of the Fifth Amendment right against compulsory self-incrimination, which was established by *Miranda v. Arizona* and *Edwards v. Arizona*. The Court refused to accept the petitioner's argument that law enforcement officers must cease interrogation immediately if the suspect makes any reference to an attorney. After *Davis*, law enforcement officers continue to be free to interrogate the suspect provided that, after he receives *Miranda* warnings, he effectively waives his right that defendant's remarks here did not constitute an invocation of such right." *Id.* at 540.

120. *Id.*
121. *Id.* at 2356. The Court noted that, even though this case arose in the military court system, the Court of Military Appeals had previously held that United States Supreme Court cases concerning the Fifth Amendment right to counsel applied within the military judicial system. *Id.* at 2354 n.1. See, e.g., United States v. McLaren, 38 M.J. 112, 115 (1993) (employing the holdings from *Edwards v. Arizona*, 451 U.S. 477 (1981) and *Minnick v. Mississippi*, 498 U.S. 146 (1990) to determine whether the defendant's request was equivocal in a military court proceeding).

122. *Davis*, 114 S. Ct. at 2354. The pronouncement that the right to counsel stemming from the Fifth Amendment is not a constitutional right is potentially problematic. Unless the right to counsel based on the Fifth Amendment is a fundamental right required by the Constitution, the Supreme Court cannot mandate that state courts recognize it because judicially created measures do not bind state courts. *See generally WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE §§ 2.2 to 2.6* (2d ed. 1992) (giving a thorough explanation of the Selective Incorporation Doctrine).

123. *Davis*, 114 S. Ct. at 2354. "No person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. 5.
124. 384 U.S. 436 (1966) (holding that suspects subject to custodial questioning have the right to both consultation with an attorney and to have an attorney present during questioning).
125. 451 U.S. 477 (1981) (holding that the custodial interrogation must end once the suspect has invoked the right to counsel).
126. *Davis*, 114 S. Ct. at 2355.
to counsel. Nevertheless, as in *Edwards*, if at any time during the questioning, the suspect decides to request an attorney, the interrogation must be discontinued until counsel has been made available or until the suspect, on his own, re-initiates the conversation.

In rejecting the petitioner’s argument that law enforcement officers should be required to cease interrogation immediately when any reference to an attorney is made, the Court reasoned that this policy would prevent law enforcement officers from interrogating in the absence of an attorney, even if the suspect does not desire to have counsel present. Calling the *Edwards* provision a “second layer of prophylaxis for the *Miranda* right to counsel,” the Court stated that its purpose is to prevent law enforcement officers from coercing the suspect into waiving his *Miranda* rights, which had been previously asserted, not to halt the interrogation needlessly because of non-specific references to counsel.

The Court recognized that in applying the *Edwards* rule, lower courts will be required to determine whether the suspect did or did not assert his right to counsel. The test is objective in order to avoid problems of proof and to give guidance to the officers who conduct the interrogations. While the Court does not require the suspect to “speak with the discrimination of an Oxford don,” he must communicate his wish to assert his right clearly enough for reasonable law enforcement officers to understand that he is requesting counsel. When the suspect makes a statement that does not clearly indicate this wish, the *Davis* majority held that the officers are not required by *Edwards* to end the interrogation.

The Court noted that the requirement of a clear assertion of the right to counsel may put some to a disadvantage, namely those who will not be able to express their wish clearly, whether due to
fear, intimidation, lack of linguistic skill, or any other reason. Nevertheless, the Court asserted that when the suspect fully comprehends the rights to remain silent and to request counsel, this understanding is adequate to dispel any coercion that may exist in the interrogation process.

The Court then considered the law enforcement dilemma that results from the Miranda rule, noting that ultimately it is the officers who must determine whether the suspect can be questioned. The Court found that the Edwards rule, which stops the interrogation once the right to counsel has been asserted, provides a clear guideline to officers, thus making the decision less of a judgment call. This need for an easily applied rule is one of the major factors contributing to the Court's holding that officers may continue with interrogation until the suspect clearly requests counsel.

The Court declined to hold that when a criminal suspect makes an ambiguous statement concerning counsel, the officers must attempt to clarify whether the statement is truly a request for an attorney. Although the Court suggested that this procedure would help ensure that the suspect's rights are protected and minimize the possibility of the confession being judicially suppressed, the Court clearly rejected the position that the officers are under a legal obligation to ask the necessary questions to make the suspect's wishes clear.

Justice Souter, joined by Justices Blackmun, Stevens, and Ginsberg, concurred with the judgment of the majority but disagreed in the conclusion that law enforcement officers have no legal obligation to ask the necessary questions in order to clarify any ambiguous statements concerning an attorney made by a suspect. Justice Souter considered the legal analysis of the admissibility of hearsay without consulting the Rules of Evidence; it is an unreal exercise.

Id. at 2358-64 (Souter, J., joined by Blackmun, J., Stevens, J., and Ginsberg, J., concurring). Justice Scalia also wrote a concurring opinion, taking issue with the omission of 18 U.S.C. § 3501 in the legal analysis of this case. Id. at 2357 (Scalia, J., concurring). Justice Scalia wrote that "[i]legal analysis of the admissibility of a confession without reference to these provisions is equivalent to legal analysis of the admissibility of hearsay without consulting the Rules of Evidence; it is an unreal exercise." Id.; see 18 U.S.C. § 3501 (1988).
asserted that this holding is contrary to the precedent and judgments of the many Courts before them which have addressed this issue.\textsuperscript{143} His concurring opinion was strongly in favor of supporting the \textit{Miranda} case law, which is based on fairness and practicality.\textsuperscript{144} He advocated adopting the rule that once law enforcement officers are reasonably unable to discern whether or not the suspect is asking for counsel, the interrogation should stop until the suspect’s wishes are made clear.\textsuperscript{145} Justice Souter argued that the majority’s decision, tested against three decades of case law, fails to uphold two major precepts concerning the relationship between officers and suspects during custodial interrogations: the protection of the suspect’s right to either speech or silence throughout the questioning process and the need for practical application in a real world situation.\textsuperscript{146} Justice Souter asserted that requiring officers to stop interrogation until they determine whether the suspect is asking for legal representation would fulfill both goals of the broad \textit{Miranda} principles.\textsuperscript{147} It would protect the suspect from an infringement of the right to counsel and provide a practical approach that can help avoid misunderstandings leading to inadmissibility.\textsuperscript{148}

Justice Souter’s concurring opinion took issue with the requirement that the suspect clearly indicate to the officers his wish for counsel, pointing out that a substantial number of suspects lack a firm grasp of the English language,\textsuperscript{149} are ignorant,\textsuperscript{150} or become so overwhelmed by the circumstances that they are unable to speak assertively.\textsuperscript{151} Justice Souter believed that this requirement of clear

\begin{itemize}
  \item \textsuperscript{143} \textit{Davis}, 114 S. Ct. at 2359 (Souter, J., concurring).
  \item \textsuperscript{144} \textit{Id.} (Souter, J. concurring).
  \item \textsuperscript{145} \textit{Id.} (Souter, J. concurring).
  \item \textsuperscript{146} \textit{Id.} at 2359-60 (Souter, J., concurring). \textit{See} Connecticut v. Barrett, 479 U.S. 523, 528 (1987) (stating that ‘‘the fundamental purpose of the Court’s decision in \textit{Miranda} was ‘to assure that the individual’s right to choose between speech and silence remains unfettered throughout the interrogation process’’’).
  \item \textsuperscript{147} \textit{Davis}, 114 S. Ct. at 2360 (Souter, J., concurring).
  \item \textsuperscript{148} \textit{Id.} \textit{See} Michigan v. Mosley, 423 U.S. 96, 110 n.2 (1975) (White, J., concurring) (noting that once the suspect has ‘‘expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities’ insistence to make a statement may properly be viewed with skepticism’’).
  \item \textsuperscript{149} \textit{See} United States v. De la Jara, 973 F.2d 746, 750 (9th Cir. 1992) (involving a Peruvian defendant who requested an attorney in Spanish, which depending on the inflection could be either an assertion or merely a question).
  \item \textsuperscript{150} \textit{See} Davis v. North Carolina, 384 U.S. 737, 742 (1966) (involving an impoverished defendant of low mentality with a third or fourth grade education).
  \item \textsuperscript{151} \textit{Davis}, 114 S. Ct. at 2361 n.4 (Souter, J., concurring). Social science confirms that ‘‘individuals who feel intimidated or powerless are more likely to speak in equivocal or nonstandard terms when no ambiguity or equivocation is meant.’’ \textit{Id.}
and unambiguous requests places too great a burden on those who may not be capable of carrying such a burden, which is the underlying basis for adopting the *Miranda* protection rules.\(^{152}\)

Concerning the need for practical application, Justice Souter acknowledged that every approach will involve a certain amount of individual judgment.\(^{153}\) Nevertheless, the approach he advocated would allow the judgment call to be made, not by the officers in charge, but by the suspect himself, the one whom Justice Souter asserted that prior case law has assumed should make that decision.\(^{154}\)

V. SIGNIFICANCE

This opinion, which holds that officers do not have to discontinue questioning or ask clarifying questions when an ambiguous reference to counsel is made by a suspect, is significant because it gives the lower courts and law enforcement officers a standard to apply, ending the dispute between the differing approaches taken by the lower courts. This opinion is also significant because it cannot be easily reconciled with the line of precedent concerning the Fifth Amendment right to counsel.\(^{155}\) First, *Davis* violates the policy behind *Miranda*, which is concerned with both the individual's constitutional rights and the need for objective guidelines for interrogating officers. Second, *Davis* does not fit within the *Johnson v. Zerbst*\(^{156}\) standard for effective waivers, which requires that the waiver be knowing and voluntary.\(^{157}\) Finally, the *Davis* opinion opens the door to discrimination against certain classes of individuals.\(^{158}\)

A. *Miranda* Policy Concerns

The double purpose of *Miranda*, to protect the suspect's constitutional rights and to prevent the inadmissibility of confessions, has been circumvented by the holding in *Davis*, rendering both to uncertainty and confusion. First, *Miranda* states that if a suspect indicates "in any manner" that he wants to speak with an attorney before engaging in any interrogation, then there can be no more

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152. *Id.* at 2360. See Michigan v. Jackson, 475 U.S. 625, 633 (1986) (noting that the State has the burden of establishing that the suspect made a valid waiver).
153. *Davis*, 114 S. Ct. at 2363 (Souter, J., concurring).
154. *Id.* (Souter, J. concurring).
155. *Id.* at 2359.
156. 304 U.S. 458 (1937).
157. *Id.* at 464.
questioning. This "in any manner" standard has been disregarded, if not completely overruled, by the holding in *Davis*. An ambiguous reference potentially can be a request that should fall within the "in any manner" spectrum. By disregarding the ambiguous reference and continuing the interrogation, the suspect's rights are being violated if the reference was intended to invoke the suspect's rights. After *Davis*, the suspect must now assume the burden for asserting his rights by making certain that the interrogating officers clearly understand what his wishes are. Additionally, it is not clear what the threshold for clarity really is; different jurisdictions are free to develop their own standard for clarity and contribute more uncertainty than before *Davis*.

Second, from the perspective of law enforcement, this opinion gives the interrogating officers wide latitude by allowing them to determine if the suspect has unambiguously requested counsel. It allows room for abuse by trained officers to decide that a request is ambiguous enough to continue questioning although realizing the true intent of the reference, thus raising the standard of clarity in order to continue the interrogation. Officers are essentially able to manipulate the suspect who makes an ambiguous request into further interrogation. Also, the officers who do attempt to preserve the suspect's rights are not given guidance as to when a reference to counsel has reached the threshold of clarity.

**B. Johnson v. Zerbst Standard For Waiver Disregarded**

The *Johnson v. Zerbst* standard that requires a knowing, intentional, and voluntary waiver has been disregarded by the Court's

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161. Id.
162. Interview with Thomas Sullivan, Professor of Law, University of Arkansas at Little Rock School of Law in Little Rock, Arkansas, October 19, 1994.
164. Bowman, *supra* note 160, at 1190. For a contrary view, see Fred Schlosser, Note, *The Fifth Amendment Right Against Self-Incrimination: An Individual's Right Versus The Government's Need For Effective Law Enforcement* 16 S. ILL. U. L.J. 197 (1991) (stating that "the importance of confessions and the use of 'ordinary unethical' practices are necessary for effective law enforcement" and that "the Fourteenth Amendment is adequate to protect an individual from police excess").
165. Sullivan, *supra* note 162. See *supra* note 107 for an example of this potential manipulation problem.
refusal to require law enforcement officers to ask clarifying questions to determine what the suspect meant by the ambiguous reference to an attorney.\textsuperscript{168} By disregarding the ambiguous reference, the officers are, in effect, assuming that the suspect continues to waive his rights to an attorney.\textsuperscript{169} This assumption does not fit the requirements of a valid waiver as set forth in \textit{Johnson v. Zerbst}.\textsuperscript{170} Once the suspect makes an ambiguous reference to counsel, it is no longer clear whether the suspect's waiver continues to be knowing, voluntary or intentional. No one but the suspect knows whether the continuation of the interrogation is truly voluntary.\textsuperscript{171} In addition, the \textit{Davis} holding does not adhere to the related rule also from \textit{Johnson v. Zerbst} that courts are to indulge in every reasonable presumption against the waiver of a fundamental constitutional right and are not to presume acquiescence in the loss of a fundamental right.\textsuperscript{172} Instead, the \textit{Davis} approach presumes that the suspect has not invoked his rights and presumes a continuing waiver.\textsuperscript{173} "The officers should be under a duty to determine whether the suspect intends to continue waiving his Fifth Amendment right to counsel or whether, in fact, the suspect intends to invoke that right.

C. Potential Discriminatory Effects

Finally, the \textit{Davis} majority opinion opens up the door to potential discrimination of several classes of suspects, namely women,\textsuperscript{174} ethnic

\textsuperscript{168} Sullivan, \textit{supra} note 162.
\textsuperscript{169} Sullivan, \textit{supra} note 162.
\textsuperscript{170} See Anne Elizabeth Link, \textit{Fifth Amendment—The Constitutionality of Custodial Confessions}, 82 J. CRIM. L. & CRIMINOLOGY 878, 898 (1992) (noting that "[t]he Zerbst standard that waivers must be knowingly and intelligently waived is easily manipulated depending on the practical and theoretical viewpoints of the members of the majority in any given case").
\textsuperscript{171} See Rhonda Y. Cline, Comment, \textit{Equivocal Requests For Counsel: A Balance Of Competing Policy Considerations}, 55 U. CIN. L. REV. 767, 779 (1987). The author notes that "it is reasonable to infer that if a waiver of the right to counsel need not be explicit, then neither should an invocation of that right be required to be explicit. If courts require a clear statement, they are placing form above the fact that the accused is expressing a need for legal representation." \textit{Id}.
\textsuperscript{172} Johnson v. Zerbst, 304 U.S. 458, 464 (1937). The \textit{Davis} Court dodges this rule by characterizing the Fifth Amendment right to counsel as a judicially created measure rather than a constitutional right. \textit{Davis}, 114 S. Ct. at 2354. However, this view has a potential pitfall, the doctrine of Selective Incorporation. Unless the Fifth Amendment right to counsel is required by the Constitution, it cannot be imposed on state courts as \textit{Miranda} is. See generally \textit{Wayne R. LaFave & Jerold H. Israel, Criminal Procedure §§ 2.2 to 2.6} (2d. ed. 1992) (giving a thorough explanation of the doctrine of Selective Incorporation).
\textsuperscript{173} Shreffler, \textit{supra} note 91, at 468.
\textsuperscript{174} Ainsworth, \textit{supra} note 158, at 261.
minorities, those with lower intelligence, and those with less experience in the criminal justice system. This discrimination becomes possible by requiring suspects to make the request for counsel in the imperative or direct form of speech rather than by question form. Research in the area of sociolinguistics has shown that large portions of the population use indirect speech patterns. This has been shown to be particularly true of women and ethnic minorities, two groups who have historically been much less powerful in society. Additionally, during a custodial interrogation, a suspect may feel as though he is powerless. Often, those suspects will use indirect speech patterns when attempting to invoke their rights. The irony of the rule in Davis is that although these protective rules were established to protect suspects from police abuse of power, the reality is that the least powerful suspects are the ones provided with the least amount of protection.

Although the majority opinion is significant because it sets forth a uniform rule for the lower courts to follow when determining whether a custodial statement should be admitted into evidence, it represents a clear departure from the line of precedent involving the administration of a suspect’s Miranda rights and the standards by which a waiver of those rights is valid. This decision provides for less constitutional protection for suspects and gives the interrogating officers more freedom when deciding whether the interrogation should continue. Essentially, Davis denies protection to those least able to

175. Ainsworth, supra note 158, at 261. See also United States v. De La Jara, 973 F.2d 746 (9th Cir. 1992) (involving a suspect who requested an attorney in Spanish with a phrase that could be interpreted as either a question or an assertion).
176. See, e.g., Davis v. North Carolina, 384 U.S. 737 (1966) (involving a defendant with a third or fourth grade education and such a low level of intelligence that the lower court considered whether a person of such low mentality should be executed).
177. Sullivan, supra note 162. Professor Sullivan commented that those suspects who have been through the criminal system before are much more likely to know and understand their rights and how to exercise them properly. In effect, the Davis rule rewards the repeat offenders. Sullivan, supra note 162.
178. Ainsworth, supra note 158, at 304.
179. Ainsworth, supra note 158, at 261. See, e.g., People v. Santiago, 519 N.Y.S.2d 413 (N.Y. App. Div. 1987)(involving a suspect who said, “Will you supply a lawyer now so that I may ask him should I continue with this interview at this moment?” which was held to be an invalid invocation of the right to counsel), aff’d, 530 N.Y.S.2d 546 (1988).
180. Ainsworth, supra note 158, at 261.
181. Ainsworth, supra note 158, at 261.
182. Ainsworth, supra note 158, at 261.
183. Ainsworth, supra note 158, at 261.
The experienced criminal, who understands his rights and how to exercise them properly, benefits much more from this approach as compared to the young, intellectually challenged, weak, culturally oppressed, and perhaps, the innocent.¹⁸⁵

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¹⁸⁴ Sullivan, supra note 162.
¹⁸⁵ Sullivan, supra notes 162 and 177.