
ARE YOU SURE YOU NEED AN ATTORNEY?: INVOCATION OF THE FIFTH AMENDMENT RIGHT TO COUNSEL BY SUSPECTS DURING CUSTODIAL INTERROGATIONS

ABSTRACT

While a person has the right under the Fifth Amendment to the U.S. Constitution to have an attorney present during questioning, courts have differed as to when this right has been invoked. Under the current federal interpretation, the right to have counsel present has not been invoked until a clear and unequivocal statement has been made by a suspect requesting counsel. Some states, however, have held that when a suspect makes an ambiguous statement that a reasonable officer could interpret as an invocation of the right to counsel, the officer must ask clarifying questions to determine whether the right has been successfully invoked. This Note will discuss the varied interpretations regarding effective invocation and argue for a liberal test in favor of finding the right has been invoked by a suspect when an ambiguous statement or action would indicate to a reasonable police officer that is the intent of the suspect and clarifying questions affirm that intent.

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I. A SUSPECT'S FIFTH AMENDMENT RIGHT TO COUNSEL UNDER THE FEDERAL CONSTITUTION AND CONTROLLING SUPREME COURT PRECEDENT

Under the U.S. system of criminal jurisprudence, the Constitution affords the individual a multitude of protections when faced with some form

of governmental interaction.¹ The Fifth Amendment to the U.S. Constitution—in establishing the individual’s privilege against self-incrimination—states, “No person . . . shall be compelled in any criminal case to be a witness against himself.”² While the plain language of the Fifth Amendment does not mandate a suspect in a criminal investigation be informed of a right to have counsel present during questioning, the Supreme Court has held there is such a Fifth Amendment right during custodial interrogations and the suspect must be informed of this right prior to questioning.³ While the Fifth Amendment and Supreme Court precedent make clear the right to have counsel present does exist as a constitutional mandate, the question of when this protection has been effectively invoked is another matter altogether. Part I of this Note discusses the invocation of the right to counsel under the federal Constitution and applicable Court precedent, raising the potential issues faced by criminal defendants seeking the aid of counsel during police interrogation. Part II delves into the treatment of the invocation of the right to counsel under various state constitutions in an effort to address the problems created under federal constitutional jurisprudence. Part III is a proposal to the Iowa Supreme Court for the creation of a constitutional mandate establishing a layer of protection necessary to ensure the invocation of the right to counsel is honored under the Constitution of the State of Iowa.

*A. Invocation of the Right to Counsel Under the Fifth Amendment Before
Davis v. United States*

1. The Miranda Warnings

In 1966, the Supreme Court articulated necessary procedures under the Constitution—more specifically the Fifth Amendment—for law enforcement during custodial interrogations in its landmark holding in *Miranda v. Arizona*.⁴ In *Miranda*, the Court sought to provide “concrete constitutional guidelines for law enforcement agencies and courts to follow.”⁵ The primary purpose of establishing these constitutional procedural safeguards was to ensure that an individual’s privilege against

1. See e.g., U.S. CONST. amend. IV (providing the individual with the right to be free from unreasonable governmental searches and seizures).

2. *Id.* amend. V.

3. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

4. *Id.*

5. *Id.* at 442.

self-incrimination would be secure from arbitrary governmental infringement.⁶ The Court feared that, without the establishment of some procedural safeguards, the privilege against self-incrimination would become a “‘form of words’ in the hands of government officials.”⁷

The safeguards set forth by the Court required, “[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.”⁸ The Court further held a “defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.”⁹ In addressing the invocation of these rights, the Court explained, “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.”¹⁰ Moreover, the Court noted, “The mere fact that [a suspect] may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.”¹¹ The Court framed these safeguards as applying to “custodial interrogation[s],” which were defined as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”¹²

In the Court’s discussion of the rationale behind establishing procedures to safeguard the individual’s privilege against self-incrimination, the Court cited “the nature and setting of . . . in-custody interrogation[s]” as being “essential to [its] decision.”¹³ In fact, the Court spent a significant portion of the opinion reviewing the various methods and tactics employed by law enforcement during custodial interrogations, emphasizing these tactics as a means of eliciting statements from individuals.¹⁴ The Court was

6. *See id.* at 444.

7. *See id.* (quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)).

8. *Id.*

9. *Id.*

10. *Id.* at 444–45.

11. *Id.* at 445.

12. *Id.* at 444.

13. *Id.* at 445.

14. *See id.* at 445–56.

concerned with “this interrogation atmosphere and the evils it can bring.”¹⁵ The Court stated, “It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.”¹⁶ The Court, concerned with the inherently coercive environment produced by custodial interrogations, emphasized, “Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.”¹⁷

The Court contended the presence of an attorney during a custodial interrogation would “insure that statements made in the government-established atmosphere are not the product of compulsion.”¹⁸ The Court further stressed that having an attorney present when statements are given by an individual during custodial interrogation “enhances the integrity of the fact-finding processes in court. The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process.”¹⁹

In addressing the need for the presence of counsel in custodial interrogations, the Court reasoned, “The presence of counsel at the interrogation may serve several significant subsidiary functions as well.”²⁰ First, “If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness.”²¹ Second, “With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court.”²² Finally, “The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.”²³

15. *Id.* at 456.

16. *Id.* at 457.

17. *Id.* at 458.

18. *Id.* at 466.

19. *Id.*

20. *Id.* at 470.

21. *Id.*

22. *Id.*

23. *Id.* (citing *Crooker v. California*, 357 U.S. 433, 443–48 (1958) (Douglas, J., dissenting)).

Based on the dangers inherent in custodial interrogation, the Court sought to ensure the individual's privilege against self-incrimination would be sufficiently protected through the safeguards the Court had established.²⁴ In establishing these protections, the Court stated it in no way was creating a "constitutional straitjacket," which would serve only to hinder reform efforts.²⁵ In fact, Congress would be free to search for alternatives to the provisions set forth in *Miranda*, as long as those alternatives are "at least as effective" as *Miranda*.²⁶ However, the Court viewed the right to have an attorney present during custodial interrogation as indispensable in safeguarding the individual's privilege against self-incrimination.²⁷ The Court stated that a "mere warning" would not by itself ensure the Fifth Amendment would be protected.²⁸ Moreover, the individual need not have made a request for the presence of counsel prior to questioning.²⁹ The right to have an attorney present can be invoked at any time, and a failure to request counsel prior to the interrogation does not waive this right.³⁰

The coercive nature and psychological pressures which arise in the custodial interrogation setting were the Court's primary justifications for creating the layer of prophylaxis known today as the *Miranda* warnings.³¹ While law enforcement has come a long way in the 50 years since the *Miranda* decision, the practical concerns inherent in custodial interrogation are as real as ever.³²

2. A Clear Invocation of the Right to Counsel During Custodial Interrogation

In 1981, the Court reaffirmed the holding and rationale of *Miranda* and its progeny in *Edwards v. Arizona*.³³ The Court in *Edwards* discussed the effect of a clear invocation by a suspect of the right to have counsel present during custodial interrogation on the admissibility of a subsequent

24. *Id.* at 478–79.

25. *Id.* at 467.

26. *Id.*

27. *See id.* at 470.

28. *Id.* at 469–70.

29. *Id.* at 470.

30. *Id.*

31. *See supra* notes 14–17 and accompanying text.

32. *See infra* Part II.

33. *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981).

confession.³⁴

In *Edwards*, the petitioner had been arrested pursuant to an arrest warrant, and when he arrived at the police station, he was informed of his rights as required under *Miranda*.³⁵ The petitioner then “stated that he understood his rights, and was willing to submit to questioning.”³⁶ During the petitioner’s interaction with the police, he stated, “‘I want an attorney before making a deal.’ At that point, questioning ceased and [the petitioner] was taken to county jail.”³⁷ The next day, and without the presence of counsel, police questioned the petitioner again at the jail after providing him with another set of *Miranda* warnings.³⁸ The petitioner, at this time, made incriminating statements to the police.³⁹

The Court in *Edwards* held, “[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.”⁴⁰ In addition, the Court held that, when an individual has “expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused . . . initiates further communication, exchanges, or conversations with the police.”⁴¹ The Court emphasized, “*Miranda* itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, ‘the interrogation must cease until an attorney is present.’”⁴² The Court further stated the significance of the invocation of the right to have counsel present had been

34. *Id.* at 478–79, 485–87.

35. *Id.* at 478.

36. *Id.*

37. *Id.* at 479.

38. *Id.* (“When the detention officer informed Edwards that the detectives wished to speak with him, he replied that he did not want to talk to anyone. The guard told him that ‘he had’ to talk and then took him to meet with the detectives.”).

39. *Id.* Prior to making implicating statements, petitioner was played a tape-recorded statement of an alleged accomplice which implicated him in the crime. *Id.* “After listening to the tape for several minutes, petitioner said that he would make a statement so long as it was not tape-recorded. The detectives informed him that the recording was irrelevant since they could testify in court concerning whatever he said.” *Id.*

40. *Id.* at 484.

41. *Id.* at 484–85.

42. *Id.* at 485 (quoting *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)).

reaffirmed in the Court's holdings after *Miranda*.⁴³

The Court concluded that the use of the incriminating statements made by the petitioner during the second interrogation, after there was a clear invocation of the right to counsel, violated the Fifth Amendment as construed by *Miranda*.⁴⁴ It is important to note that in *Edwards*, the Court considered a *clear* invocation by an individual.⁴⁵ The Court would not address the possibility of extending the *Edwards*' rationale to ambiguous invocations of the right to counsel under *Miranda* until years later.⁴⁶

B. *The Invocation of the Right to Counsel Under the Fifth Amendment After Davis v. United States*

1. *The Invocation Must Be Clear and Unequivocal*

a. *The Davis decision.* In 1994, the Court "decide[d] how law enforcement officers should respond when a suspect makes a reference to counsel that is insufficiently clear to invoke the *Edwards* prohibition on further questioning."⁴⁷ In *Davis v. United States*, the Court recognized that lower courts had developed differing approaches to ambiguous or equivocal

43. *Id.* (stating later cases had not abandoned the view that the invocation of the right to counsel is a significant event mandating the cessation of questioning of an individual by the government). The Court in *Edwards* discussed *Miranda*'s progeny as supporting this view, stating:

In *Michigan v. Mosley*, the Court noted that *Miranda* had distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogation cease until an attorney was present only if the individual stated that he wanted counsel. In *Fare v. Michael C.*, the Court referred to *Miranda*'s "rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." And just last Term, in a case where a suspect in custody had invoked his *Miranda* right to counsel, the Court again referred to the "undisputed right" under *Miranda* to remain silent and to be free of interrogation "until he had consulted with a lawyer."

Id. (citations omitted) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 298 (1980)).

44. *Id.* at 487.

45. *See id.* at 485 ("[I]t is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.").

46. *See generally* *Davis v. United States*, 512 U.S. 452 (1994).

47. *Id.* at 454.

requests for counsel; however, the Court itself had never addressed the issue on the merits.⁴⁸

In *Davis*, the petitioner was suspected in a killing that occurred over a game of pool.⁴⁹ The petitioner was interviewed by Naval Intelligence Service (NIS) agents at the NIS office and informed “he was entitled to speak with an attorney and have an attorney present during questioning.”⁵⁰ During the interview the petitioner said, “Maybe I should talk to a lawyer.”⁵¹ At that point the NIS agents attempted to clarify with the Petitioner whether he was invoking his right to have counsel present during the questioning.⁵² The petitioner replied as follows: “No, I don’t want a lawyer.”⁵³ The interview continued on until, at a later point, the Petitioner said, “I think I want a lawyer before I say anything else.”⁵⁴

The Court began its discussion of the right to counsel under the Fifth Amendment with the *Miranda* holding stating, “[A] suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that the police must explain this right to him before questioning begins.”⁵⁵ The Court qualified the right to counsel under *Miranda* as a recommended procedural safeguard and not an independently guaranteed right under the Constitution.⁵⁶ The Court explained that the holding in *Edwards* provided a “second layer of

48. *Id.* at 456.

49. *Id.* at 454.

50. *Id.* (stating agents also informed petitioner that he was a suspect, “that he was not required to make a statement, [and] that any statement could be used against him”) (citing Art. 31, UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. § 831; MIL. RULE EVID. 305; MANUAL FOR COURTS-MARTIAL A22-13 (1984)).

51. *Id.* at 455.

52. *Id.* (noting that according to uncontradicted testimony, the investigating agents made it very clear that they were not trying to violate petitioner’s rights, they would cease questioning if petitioner wanted a lawyer, and they would not continue the investigation until it was determined whether he was asking for a lawyer).

53. *Id.*

54. *Id.*

55. *Id.* at 457 (citing *Miranda v. Arizona*, 384 U.S. 436, 469–73 (1966)).

56. *Id.* (quoting *Michigan v. Tucker*, 417 U.S. 433, 443–44 (1974)) (“The right to counsel established in *Miranda* was one of a ‘series of recommended “procedural safeguards” . . . [that] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.’” (alterations in original)).

prophylaxis” to the right to counsel under the Fifth Amendment.⁵⁷ The requirement that a clear invocation of the right to have counsel present during custodial interrogations prohibits further questioning and serves to “prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.”⁵⁸ When “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.”⁵⁹

The Court viewed the holding in *Edwards* as a bright-line rule and that “clarity and ease of application would be lost” if officers were required to cease questioning “if a suspect makes a statement that *might* be a request for an attorney.”⁶⁰ The Court stated that, unless it held *Edwards* does not extend to ambiguous statements, “[p]olice officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though [the suspect] has not said so, with the threat of suppression if they guess wrong.”⁶¹ The Court ultimately held, “If the suspect’s statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.”⁶² The Court also stated, “To avoid difficulties of proof and to provide guidance to officers conducting interrogations, [the determination of whether a suspect actually invoked his right to counsel] is an objective inquiry.”⁶³ In fashioning its holding, the Court attempted to balance the constitutional interests of the individual with the workability of the rule as applied to officers when faced with an ambiguous statement during interrogation.⁶⁴ The *Davis* holding, requiring a request for counsel be clear and unequivocal, is therefore the ultimate result of that balancing.⁶⁵

The Court, however, did recognize a potential issue with holding that

57. *Id.* at 458 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991)).

58. *Id.* (quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)).

59. *Id.* at 459 (citing *McNeil*, 501 U.S. at 178) (emphasizing that fact the *Edwards* rule was directed at clearly asserted invocations of the right to counsel under *Miranda*).

60. *Id.* at 461.

61. *Id.*

62. *Id.* at 461–62.

63. *Id.* at 458–59 (citing *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987)).

64. *See id.* at 461–62.

65. *See id.*

a request for counsel must be clear and unequivocal.⁶⁶ The imposition of a requirement of “a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present.”⁶⁷ The Court addressed this concern by framing the primary protection of the holding in *Miranda* for suspects under custodial interrogation is the warnings themselves, not the presence of counsel during such questioning.⁶⁸ The Court in *Davis* viewed the *Miranda* warnings as “sufficient to dispel whatever coercion is inherent in the interrogation process.”⁶⁹

One problem with the *Davis* court’s interpretation of the *Miranda* protections is that it is inherently inconsistent with the *Miranda* opinion.⁷⁰ The Court in *Miranda* explicitly stated that a “mere warning” was not sufficient to protect the privilege against self-incrimination and the presence of counsel is essential to insure the privilege is protected.⁷¹ Further, the *Davis* court’s statement that the *Miranda* warnings are alone sufficient is not supported by *Moran v. Burbine*, the case the Court relied on in making this assertion.⁷² Justice Souter—in his concurrence in *Davis*—stated:

While *Moran* held that a subject’s knowing and voluntary waiver of the right to counsel is not undermined by the fact that police prevented an unsummoned lawyer from making contact with him, it contains no suggestion that *Miranda* affords as ready a tolerance for police conduct frustrating the suspect’s subjectively held (if ambiguously expressed) desire for counsel.⁷³

The *Davis* court’s holding places the burden of clarification on the suspect, which in turn permits the confusion created by an ambiguous or equivocal statement to work to the detriment of the individual suspect.⁷⁴ This is exactly

66. *Id.* at 460.

67. *Id.*

68. *Id.*

69. *Id.* (quoting *Moran v. Burbine*, 475 U.S. 412, 427 (1986) (internal quotation mark omitted)).

70. Compare *id.*, with *Miranda v. Arizona*, 384 U.S. 436, 469–70 (1966).

71. *Miranda*, 384 U.S. at 469–70.

72. See *Davis*, 512 U.S. at 460.

73. *Id.* at 472 (Souter, J., concurring) (citing *Burbine*, 475 U.S. at 423).

74. See *id.* at 469–70 (discussing the realities of interrogations and noting these realities have dissuaded the Court over the years “from placing any burden of clarity upon individuals in custody” (citations omitted)).

the type of danger posed by custodial interrogation that the *Miranda* ruling sought to mitigate.⁷⁵

Moreover, the *Davis* court's discussion of the use of clarifying questions when faced with an ambiguous or equivocal statement presents cause for concern.⁷⁶ The Court began this discussion by first asserting that "when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney."⁷⁷ The Court then reasoned that "[c]larifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel."⁷⁸ The Court then "decline[d] to adopt a rule requiring officers to ask clarifying questions."⁷⁹ The Court simply stated, "If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him."⁸⁰ Justice Souter in the concurrence in *Davis* stated:

[T]wo precepts have commanded broad assent: that the *Miranda* safeguards exist "to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process," and that the justification for *Miranda* rules, intended to operate in the real world, "must be consistent with . . . practical realities[.]"⁸¹

Justice Souter further stated, "A rule barring government agents from

75. See *Miranda*, 384 U.S. at 457–58 (discussing the Court's concern with the inherently coercive environment produced by custodial interrogations and contending "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice").

76. See *Davis*, 512 U.S. at 461–62.

77. *Id.* at 461.

78. *Id.*

79. *Id.* ("[I]f we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, [the] clarity and ease of application [of the *Edwards* rule] would be lost," and "[p]olice officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong.").

80. *Id.* at 461–62.

81. *Id.* at 468–69 (Souter, J., concurring) (internal citations omitted) (second alteration in original).

further interrogation until they determine whether a suspect's ambiguous statement was meant as a request for counsel fulfills both ambitions."⁸² Justice Souter proposed such a rule would be in keeping with the spirit of *Miranda*, "assur[ing] that a suspect's choice whether or not to deal with police through counsel will be 'scrupulously honored.'"⁸³ Indeed, a rule requiring that clarifying questions be asked when a suspect makes an ambiguous or equivocal request for counsel seems to effectuate the goals of the *Miranda* holding in safeguarding the privilege against self-incrimination.⁸⁴ Further, clarifying questions would allow police to avoid the very situation feared by the majority in *Davis* where police would have to guess at the intentions of a suspect.⁸⁵

b. Criticisms in the wake of Davis. In recent years, the *Davis* ruling and its potential impact on lower courts have been subjected to criticism.⁸⁶ Commenters have criticized *Davis* for the internal inconsistency created by the Court's use of an objective standard in determining whether the right to counsel has been invoked.⁸⁷ *Davis* has been further criticized as lacking guidance for lower courts regarding the requisite level of clarity in applying the objective inquiry to statements made by suspects and thus, leading to

82. *Id.* at 469.

83. *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 479 (1966)).

84. *See Miranda*, 384 U.S. at 479.

85. *See Davis*, 512 U.S. at 474–75 (Souter, J., concurring).

As for practical application, while every approach, including the majority's, will involve some "difficult judgment calls," the rule argued for here would relieve the officer of any responsibility for guessing "whether the suspect in fact wants a lawyer even though he hasn't said so[.]" To the contrary, it would assure that the "judgment call" will be made by the party most competent to resolve the ambiguity, who our case law has always assumed should make it: the individual suspect.

Id. (footnote omitted) (citation omitted).

86. *See generally, e.g.*, Harvey Gee, *An Ambiguous Request for Counsel Before, and Not After a Miranda Waiver*: *United States v. Rodriguez*, *United States v. Fry* and *State v. Blackburn*, 5 CRIM. L. BRIEF 51 (2009); David A. Kaiser & Paul Lufkin, *Deconstructing Davis v. United States: Intention and Meaning in Ambiguous Requests for Counsel*, 32 HASTINGS CONST. L.Q. 737 (2005).

87. *See, e.g.*, Kaiser & Lufkin, *supra* note 86, at 747–48 (arguing that the objective standard from *Davis* "allows the actual intentions of the actual speaker to be ignored, in favor of what those words *could* be construed to mean by some other speaker, in some other context").

inconsistent results among the various courts in applying the *Davis* rule.⁸⁸

David Kaiser and Paul Lufkin contend the “objective inquiry” employed by the Court in *Davis* permits courts to ignore the speaker’s intention as a factor to consider in determining whether the right to counsel has been sufficiently invoked.⁸⁹ Framing the issue, Kaiser and Lufkin state:

It is a contradiction for a listener to say to a speaker: “I understand, from what you have just said, that you actually want to have a lawyer present; however, what you have said does not count as request for counsel, because you have not clearly articulated the request.” . . . [I]f the listener understands the speaker’s intent to communicate a meaning, then that *is* the meaning of the utterance. It is irrelevant that the same request could be made in another way, which might, by some standard, be considered more “clearly” articulated. But *Davis* makes it possible for a court to rule a suspect’s request “ambiguous” (and thus disqualify it as an invocation of the right to counsel) on precisely this contradictory basis.⁹⁰

Kaiser and Lufkin argue that by shifting the burden of clarity to the speaker—the suspect under *Davis*—interrogators are permitted to ignore expressed intention of the desire of counsel’s presence and instead continue questioning until there is an utterance sufficient to invoke the right to counsel.⁹¹ In Kaiser and Lufkin’s view, *Davis* creates a linguistic inconsistency in the Court’s analysis which works to the detriment of individuals because the type of statement needed to invoke the right to counsel—absent the consideration of the intent of the speaker—does not reflect the manner in which many ordinary persons express requests.⁹² The *Davis* Court’s approach suggests an individual would need to state something to the effect of, “At this time I decline to speak to you further and demand an attorney be made available to me at once!”⁹³

88. See Gee, *supra* note 86, at 55.

89. Kaiser & Lufkin, *supra* note 86, at 756 (stating “it is a theoretical contradiction to ignore the intent of a speaker in favor of some purportedly ‘objective’ standard of meaning”).

90. *Id.* at 758.

91. See *id.* at 760.

92. See *id.* at 758 (“[A] phrase like ‘Maybe I should talk to a lawyer,’ viewed in terms of actual linguistic practice, may in reality simply reflect the way ordinary people are inclined to express requests, particularly requests directed to persons in authority.” (citation omitted)).

93. See *id.*

But this is the sort of formulistic statement no actual person other than a lawyer would ever utter. In ordinary life, of course, statements of desire are considered perfectly clear even when they are much less blunt. What the *Davis* majority takes as equivocation in a phrase like, “Maybe I should talk to a lawyer,” viewed in terms of actual linguistic practice, may in reality simply reflect the way ordinary people are inclined to express requests, particularly requests directed to persons in authority.⁹⁴

The reality is, ordinary people express their desires through their intentions as much as the plain language they employ to express them. The objective inquiry’s formalistic approach fails to recognize these realities in real-world interrogations and invites the police to ignore the plain intention of a statement to the detriment of a lay person.

In addition, Assistant Federal Defender Harvey Gee contends, “The *Davis* decision allows lower courts, as both a constitutional and a practical matter, to ignore ambiguous requests.”⁹⁵ The *Davis* Court provided little to no guidance on what is meant by clear and unequivocal, and “[a]s such, jurisdictions [are] free to develop their own standard for clarity, thereby creating even more uncertainty than before the *Davis* decision.”⁹⁶ Gee further critiques *Davis* as providing lower courts with the task of “second-guessing . . . police judgments that a request for counsel was sufficiently ambiguous to alleviate the need for clarification.”⁹⁷ The primary concern raised by prospective second-guessing of the police by the lower courts is “[s]tatements that may be perceived as somewhat equivocal can be ignored regardless of whether they are a suspect’s earnest request for counsel, and as a result, the suspect may believe that any other requests for counsel or further objections to questioning may be futile.”⁹⁸ As this Note discusses, lower courts have engaged in this second-guessing and applied varying standards of clarification, leading to the very uncertainty feared by Gee.⁹⁹

94. *Id.*

95. Gee, *supra* note 86, at 51 n.1, 55.

96. *Id.*

97. *Id.*

98. *Id.*

99. *See infra* Part I.C.

*C. In the Wake of Davis: Application of the Court's Rule Regarding
Ambiguous or Equivocal Statements by Suspects*

1. *Statements Found to be Ambiguous by Lower Courts*

After the Court's decision in *Davis*, the rule to be applied by lower courts is, when "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[, the Court does] not require the cessation of questioning [by police]." ¹⁰⁰ The Court in *Davis* explained "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." ¹⁰¹ The following demonstrates the application of the *Davis* rule by various courts to statements made by suspects referencing counsel where the court found the statement ambiguous and, therefore, insufficient to invoke the right to counsel.

a. The statements in State v. Spears. In 1996, the Arizona Supreme Court applied the *Davis* holding to two different statements referencing counsel. ¹⁰² The relevant facts of *Spears* were recounted by the court as follows:

When defendant arrived at the sheriff's station around noon on January 25, he was handcuffed to a bench for about an hour. He was then placed in a holding cell until 3:55 a.m. the next morning when the Mesa police interviewed him. At the beginning of the interview, the police read defendant his *Miranda* rights for the first time. Defendant waived his right to counsel and spoke with police. Twice during the interview, defendant made a reference to getting an attorney. The interview ended after the second reference to getting an attorney when defendant

100. *Davis v. United States*, 512 U.S. 452, 459 (1994) (citations omitted).

101. *Id.* (citation omitted) (quoting Souter, J., concurring).

102. *State v. Spears*, 908 P.2d 1062, 1071 (Ariz. 1996).

unequivocally requested a lawyer.¹⁰³

In the first statement regarding counsel that the court in *Spears* addressed, the defendant said, “It’s just her word against mine then. You want to arrest me for stealing a car, then let me call a lawyer and I’ll have a lawyer appointed to me and, because this is going no where [sic]. I didn’t steal her car.”¹⁰⁴ Applying the *Davis* rule, the court held that the statement made by the defendant “amount[ed] only to an ambiguous request for counsel, and under *Davis* the police were not required to stop questioning defendant at that point.”¹⁰⁵

In its application of *Davis*, the court provided scant analysis as to why this statement was either ambiguous or unequivocal.¹⁰⁶ The lack of actual analysis in the court’s opinion is unsurprising when one considers that *Davis* gave no real guidance as to what statements should be considered sufficiently clear to invoke the right to counsel.¹⁰⁷ Furthermore, the lack of analysis suggests this court employed a self-crafted, arbitrary standard of clarity.¹⁰⁸ Further, the lack of analysis by this court evidences the concern of unpredictability and uncertainty regarding standards of clarity among the various courts in applying *Davis* to statements made by suspects.¹⁰⁹

In contrast, later in its opinion, the court applied *Davis* to a second statement made by the defendant which referenced counsel and found that statement to be sufficiently clear to invoke the right to counsel.¹¹⁰ This Note discusses the court’s treatment of the later statement below.¹¹¹

103. *Id.* at 1070.

104. *Id.* at 1071.

105. *Id.* n.1 (relying at least partially on an admission in the defendant’s brief that “Mr. Spears’ first request . . . did *not* constitute an unequivocal request for counsel”).

106. *See id.* The defendant’s attorney admitted that the defendant’s “first request for an attorney did *not* constitute an unequivocal request for counsel,” but argued that the police officers needed to clarify whether the defendant wanted to invoke his right to counsel. *Id.* n.1. The court stated that *Davis* did not require such affirmative clarification, but did acknowledge that defendant’s brief was filed one month before *Davis* was filed. *Id.*

107. *See id.*; *see also* *Davis v. United States*, 512 U.S. 452, 461–62 (1994); Gee, *supra* note 86, at 55.

108. *See Spears*, 908 P.2d at 1071.

109. *See* Gee, *supra* note 86, at 55.

110. *See Spears*, 908 P.2d at 1071.

111. *See infra* Part I.C.2.d (discussing the *Spears* court’s analysis of the defendant’s later statement).

b. The statement in State v. Morgan. In 1997, the Iowa Supreme Court addressed the application of the *Davis* rule in *State v. Morgan*.¹¹² In *Morgan*, the defendant stated, "I think I need an attorney."¹¹³ Due to the similarity between the statement made in *Davis* and the statement made by the defendant in *Morgan*, the court relied on the express holding in *Davis* and found the defendant's statement was ambiguous and equivocal and therefore insufficient to invoke the right to counsel.¹¹⁴ The court further cited pre-*Davis* precedent supporting the holding that an inquiry by a suspect about the need for an attorney was insufficient to invoke the right to counsel.¹¹⁵ Although the court was limited in its analysis due to the similarity of the statement to the statement in *Davis*, it is clear from the court's citation to pre-*Davis* precedent it will not treat questions regarding the advisability of counsel as sufficient to invoke the right.¹¹⁶

c. The statement in State v. Harris. In 2007, the Iowa Supreme Court addressed the application of *Davis* to a statement made by a suspect in *State v. Harris*.¹¹⁷ In *Harris*, the defendant was being subjected to a custodial interrogation when he said, "If I need a lawyer, tell me now."¹¹⁸ The court contended this statement was just an inquiry into the need for counsel by a suspect and as such was ambiguous and equivocal.¹¹⁹ Citing *Davis*, the court stated, "Officers have no obligation to stop questioning an individual who makes an ambiguous or equivocal request for an attorney."¹²⁰ The court concluded that, because the statement made by the defendant here was ambiguous, the police did not need to cease the interrogation at that point in time.¹²¹ The court's holding in *Harris* confirms the court's stance that inquiries into the advisability of counsel, under *Davis*, are insufficient to

112. *State v. Morgan*, 559 N.W.2d 603, 608 (Iowa 1997).

113. *Id.* at 607–08.

114. *Id.* at 608.

115. *Id.* (citing *State v. Johnson*, 318 N.W.2d 417, 430 (Iowa 1982)) ("[A]n inquiry regarding the need or advisability of speaking with an attorney is not an invocation of the right to counsel.").

116. *See id.*; *see also Johnson*, 318 N.W.2d at 430.

117. *State v. Harris*, 741 N.W.2d 1, 6–7 (Iowa 2007).

118. *Id.* at 6.

119. *Id.*

120. *Id.* (citing *Davis v. United States*, 512 U.S. 452, 461–62 (1994)).

121. *Id.*

invoke the right to counsel's presence during custodial interrogations.¹²² The issue with this position, however, is that an inquiry relating to counsel may be a suspect's earnest attempt to invoke the right, and allowing police to simply ignore such inquiries will only frustrate the right to counsel as a protection for the privilege against self-incrimination.¹²³ In totality, this position on inquiries does not account for the practicality of how people ordinarily express requests and thus potentially punishes those who lack the knowledge or ability required to invoke the right to counsel by effectively creating a bar to its invocation.¹²⁴

d. The statements in Commonwealth v. Hilliard. In 2005, the Supreme Court of Virginia addressed the application of *Davis* to statements made by a suspect during custodial interrogation in *Commonwealth v. Hilliard*.¹²⁵ The court in *Hilliard* addressed the appropriate test for statements regarding counsel.¹²⁶ The court stated, "The question whether a suspect actually invoked his right to counsel involves an objective inquiry."¹²⁷ In the first statement the *Hilliard* court viewed in light of *Davis*, the defendant said, "Can I have someone else present too, I mean just for my safety, like a lawyer like y'all just said?"¹²⁸ The court concluded, "This first exchange, which occurred immediately after Hilliard was advised of his *Miranda* rights, was merely an inquiry requesting a clarification or affirmation of the rights that had just been explained to him."¹²⁹ This conclusion is similar to the Iowa Supreme Court's holdings in both *Harris* and *Morgan* and similarly does not recognize that an inquiry into counsel can be a suspect's earnest attempt to invoke the right to counsel.¹³⁰ The court reasoned that "Hilliard continued to speak with the detectives instead of requesting the presence of counsel after being told that the decision was 'up to [him]'.¹³¹ Citing *Davis*, the court held "that Hilliard's first reference to the presence of an attorney was not an

122. See *id.*; see also *State v. Morgan*, 559 N.W.2d 603, 608 (Iowa 1997).

123. See *Gee*, *supra* note 86, at 55; *Kaiser & Lufkin*, *supra* note 86, at 758.

124. See *Kaiser & Lufkin*, *supra* note 86, at 758.

125. *Commonwealth v. Hilliard*, 613 S.E.2d 579, 584–86 (Va. 2005).

126. *Id.* at 584.

127. *Id.* (citing *Davis v. United States*, 512 U.S. 452, 459 (1994)).

128. *Id.* at 585.

129. *Id.* (citations omitted).

130. Compare *id.*, with *State v. Harris*, 741 N.W.2d 1, 6 (Iowa 2007), and *State v. Morgan*, 559 N.W.2d 603, 608 (Iowa 1997).

131. *Hilliard*, 613 S.E.2d at 585 (alteration in original).

unambiguous request for counsel, and the detectives were not required to stop questioning him under the *Edwards* rule.”¹³² The court considered another statement made by the defendant in *Hilliard*:

I need to say that . . . I’m not saying that I know anything. I’m not saying that I know the person. You know what I’m saying? The only thing, . . . like I said, I would like to have somebody else in here because I may say something I don’t even know what I am saying, and it might f[] me up, might jam me up in some incidents, and I don’t want that to happen, man.¹³³

The court “conclude[d] that Hilliard’s second alleged request for an attorney was equivocal because it failed to communicate more than an uncertainty about the wisdom of continuing the interrogation without consulting another person.”¹³⁴

2. Statements Found to be Unambiguous by Lower Courts

In contrast, other courts have applied the same standard announced in *Davis* and found statements made by suspects during custodial interrogation satisfied the federal constitutional requirements for the invocation of the right to counsel.¹³⁵ Further, some courts have—within a single opinion—applied *Davis* to later statements made by a suspect and found the statement sufficiently clear to invoke the right to counsel without explanation as to how the later statement differed from the earlier one.¹³⁶

a. *The statements in Alvarez v. Gomez*. The Fourth Circuit considered the application of the *Davis* holding to a group of statements made by a suspect in *Alvarez v. Gomez*.¹³⁷ In *Alvarez*, the defendant was suspected in the shooting death of a Los Angeles industrial waste inspector.¹³⁸ Pursuant

132. *Id.* (citing *Davis*, 512 U.S. at 461–62; *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981); *Commonwealth v. Redmond*, 568 S.E.2d 695, 700 (Va. 2002)).

133. *Id.* at 582, 585 (alterations in original).

134. *Id.* at 586 (citing *Midkiff v. Commonwealth*, 462 S.E.2d 112, 115–16 (Va. 1995) (holding the expression of a reservation about the wisdom of continuing the interrogation without the presence of counsel does not clearly communicate a desire to invoke his right to counsel); *Burket v. Commonwealth*, 450 S.E.2d 124, 132 (Va. 1994)).

135. *See infra* Part I.C.2.a–d.

136. *See, e.g.*, *State v. Harris*, 741 N.W.2d 1, 7 (Iowa 2007); *Hilliard*, 613 S.E.2d at 586.

137. *Alvarez v. Gomez*, 185 F.3d 995, 996–98 (9th Cir. 1999).

138. *Id.* at 996.

to an arrest warrant, police located and arrested the defendant, and in three separate interviews, the defendant made incriminating statements implicating himself as the shooter.¹³⁹ At trial, recorded statements made during two separate interrogations of the defendant were introduced into evidence.¹⁴⁰ At the beginning of the first recorded interview was the following exchange between the defendant (Alvarez) and the interviewing officers (Miller and Lange):

MILLER: “Do you understand those rights?” (referring to *Miranda* rights)

ALVAREZ: “Yes.”

MILLER: “Okay. Do you wanna give up the right to remain silent? Mario, you wanna talk to us about this incident?”

ALVAREZ: “Can I get an attorney right now, man?”

MILLER: “Pardon me?”

ALVAREZ: “You can have attorney right now?”

MILLER: “Ah, you can have one appointed for you, yes.”

ALVAREZ: “Well, like right now you got one?”

MILLER: “We don’t have one here, no. There’s not one present now.”

LANGE: “There will be one appointed to you at the arraignment, ah, whether you can afford one. If you can’t one will be appointed to you by the court.”

ALVAREZ: “All right.”

MILLER: (says something unintelligible)

ALVAREZ: “I’ll—I’ll talk to you guys.”

MILLER: “Okay. You wanna talk to us without a lawyer here, right?”

ALVAREZ: “Yeah.”¹⁴¹

After the trial, the defendant was convicted of car theft and first-degree

139. *Id.*

140. *Id.*

141. *Id.* at 996–97 (emphases omitted).

felony murder.¹⁴² After exhausting his state remedies, the defendant filed a habeas petition attacking the conviction.¹⁴³ The magistrate judge who heard the petition found that the defendant had clearly and unequivocally invoked his right to counsel at the start of the taped interview.¹⁴⁴ Based on his finding, “the magistrate judge recommended that the district court grant the habeas petition and vacate the conviction.”¹⁴⁵ The district court, however, declined to do so and concluded the defendant’s references to counsel “were a request for information, not a request for counsel and denied the petition.”¹⁴⁶

The Fourth Circuit applied the holding in *Davis* and found that the statements made by the defendant constituted an unequivocal request for an attorney.¹⁴⁷ The court stated:

Alvarez asked three questions: (1) “Can I get an attorney right now, man?” (2) “You can have attorney right now?” and (3) “Well, like right now you got one?” A review of the relevant authority reveals that Alvarez’s thrice-repeated questions, when considered together, constituted an unequivocal request for an attorney.¹⁴⁸

In applying *Davis*, the court reasoned that the three questions asked by the defendant “made the requisite ‘expression of a desire’ for the help of a lawyer if one were available,” and thus, the right to counsel was successfully

142. *Id.* at 997.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 997–98.

148. *Id.* at 998. The court cited to numerous examples of clear invocations of the right to counsel including:

Smith v. Illinois, 469 U.S. 91, 97 (1984) (deeming a suspect’s statement, “Uh, yeah, I’d like to do that,” upon hearing of his right to counsel a clear invocation); [*United States v.*] *de la Jara*, 973 F.2d [746, 750 (9th Cir. 1992)] (deeming “Can I call my attorney?” or “I should call my lawyer” a clear invocation of the right to counsel); *Robinson v. Borg*, 918 F.2d 1387, 1389 (9th Cir. 1990) (deeming “I have to get me a good lawyer, man. Can I make a phone call?” a clear invocation of the right to counsel); *Shedelbower v. Estelle*, 885 F.2d 570, 571–73 (9th Cir. 1989) (deeming “You know, I’m scared now. I think I should call an attorney” a clear invocation of the right to counsel); *Smith [v. Endell]*, 860 F.2d [1528, 1529–31 (9th Cir. 1988)] (deeming “Can I talk to a lawyer?” a clear invocation of the right to counsel).

Id. (footnote omitted).

invoked.¹⁴⁹ Citing *Edwards*, the court further stated that, because the defendant invoked his right to counsel, the police should have ceased the interview at that point.¹⁵⁰ Beyond citing to related precedent, the Fourth Circuit provided no further analysis of why this series of questions constituted a clear invocation of the right to counsel under *Davis*.¹⁵¹ The Fourth Circuit's holding that questions referring to counsel were sufficient to invoke the right to counsel seems to be at odds with the decisions of other courts in applying the same *Davis* test to similar questions asked by suspects.¹⁵² The lack of clarity in the standards set forth by the *Davis* opinion are the likely source of these inconsistent conclusions amongst the various jurisdictions.¹⁵³

b. The later statement in State v. Harris. The Iowa Supreme Court in *Harris* had considered an additional statement made by the defendant, finding that this statement was sufficiently clear and unequivocal under *Davis*.¹⁵⁴ In response to the detective asking the defendant for his "side of the story," the defendant stated: "I don't want to talk about it. We're going to do it with a lawyer. That's the way I got to go."¹⁵⁵ The detective then asked what the defendant meant, and the defendant replied, "You got all these trick questions. I don't understand."¹⁵⁶ The detective then asked, "You want to do it with a lawyer, is that what you're saying?"¹⁵⁷ The defendant replied, "Yeah, because I don't understand all these questions."¹⁵⁸ The Iowa Supreme Court held that, at this point in the interrogation, the defendant

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

150. *Id.*

151. *See id.* at 997–98.

152. *See, e.g., State v. Harris*, 741 N.W.2d 1, 6 (Iowa 2007) (citing *State v. Washburne*, 574 N.W.2d 261, 267 (Iowa 1997)) (holding an inquiry into the need for counsel by a suspect was ambiguous and equivocal); *Commonwealth v. Hilliard*, 613 S.E.2d 579, 586 (Va. 2005) (holding inquiry into the right to counsel was not sufficient to invoke the right to counsel under *Davis*).

153. *See supra* Part I.B.1 (discussing the Court's opinion in *Davis*). In fact, this Author contends the confusion among the courts can be seen in the differing conclusions between the district court in *Alvarez* and the conclusion of the Fourth Circuit. *See Alvarez*, 185 F.3d at 997 (stating the district court concluded questions were not sufficient to invoke the right to counsel).

154. *Harris*, 741 N.W.2d at 7.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

had “clearly and unequivocally requested an attorney” and thus had invoked the right to counsel under *Davis*.¹⁵⁹ The court cited *Miranda* and stated that, after the defendant had successfully invoked his right, questioning regarding the crime should have ceased.¹⁶⁰

c. *The later statement in Commonwealth v. Hilliard*. The Supreme Court of Virginia considered a later statement referencing counsel in *Hilliard*.¹⁶¹ The court framed the alleged request by the defendant as follows:

Hilliard’s third alleged request for an attorney occurred about one hour later in the interrogation. . . . Hilliard asked, “Can I get a lawyer in here?” Detective White responded, “Do you want to do that?” Hilliard then stated, “I already have a lawyer. I mean, I can talk to you, don’t get me wrong. But I just want to make sure I don’t, like I said before, just jam myself up.”¹⁶²

The court considered this exchange in context with all the circumstances—including the prior statements by the defendant¹⁶³—and, applying *Davis*, found that, as a whole, the statements as a matter of law constituted an unequivocal request for counsel and thus, the detectives were required to cease questioning.¹⁶⁴ The court in *Hilliard*, in addressing the later statement by the defendant, declared as a matter of law the statement was an invocation of the right to counsel.¹⁶⁵ However, the court provided no further analysis other than stating it was looking at the totality of the circumstances in making its determination whether the statements amounted to an unequivocal invocation.¹⁶⁶

d. *The later statement in State v. Spears*. The Arizona Supreme Court in *Spears* considered an additional statement made by the defendant which referenced counsel later in his interrogation with police.¹⁶⁷ The defendant

159. *Id.* The court in *Harris* went on to state the defendant “could not have been more clear—he wanted an attorney present during police questioning.” *Id.*

160. *Id.* (citing *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)).

161. *Commonwealth v. Hilliard*, 613 S.E.2d 579, 586 (Va. 2005).

162. *Id.*

163. *Id.* at 585–86; see *infra* Part I.C.1.d.

164. *Hilliard*, 613 S.E.2d at 586.

165. *Id.*

166. See *id.*

167. *State v. Spears*, 908 P.2d 1062, 1071 (Ariz. 1996).

stated: “And if you’re going to pursue this and try to pin it on me, I want a lawyer because I’m not going to say nothing else until I can talk to a lawyer.”¹⁶⁸ The *Spears* court held “that under *Davis*, this request for counsel was unambiguous so the police should have stopped the interview at this point.”¹⁶⁹ The court merely stated it was applying *Davis* and then provided little to no analysis as to why this later statement was either ambiguous or unequivocal.¹⁷⁰

3. *The Issues with the Application of Davis by the Lower Courts*

A consistent theme throughout the various cases that have applied *Davis* has been a lack of analysis explaining why a statement is or is not sufficient to invoke the right to counsel.¹⁷¹ The lack of analysis is rooted in *Davis*’s silence regarding what standard should be applied by courts in determining whether a statement is sufficiently clear for constitutional purposes and thus, has led the various courts to develop their own standards for clarity.¹⁷² While it is apparent some courts are unwilling to treat inquiries into counsel as sufficient to invoke the right, the varying standards of clarity employed by courts have created uncertainty as to what the appropriate standard should be under *Davis*.¹⁷³ Further, the standards that have been employed by courts have failed to recognize practical issues, placing a high burden of clarity on suspects who, for lack of knowledge or some other reason, are unable to invoke their right to counsel despite their best attempts to do so.¹⁷⁴ In sum, the *Davis* standard, as applied by the lower courts, has subjected similar statements to differing standards of clarity and thus yielded differing, inconsistent, and unpredictable results.¹⁷⁵

168. *Id.*

169. *Id.*

170. *See id.* (adding that because “at trial the state did not introduce any part of defendant’s statement made after this valid request for counsel, . . . no erroneous evidence was presented”).

171. *See, e.g., Alvarez v. Gomez*, 185 F.3d 995, 997–98 (9th Cir. 1999); *Spears*, 908 P.2d at 1071.

172. *See Davis v. United States*, 512 U.S. 452, 461–62 (1994); *Gee, supra* note 86, at 55.

173. *See, e.g. Alvarez*, 185 F.3d at 997–98; *State v. Harris*, 741 N.W.2d 1, 6–7 (Iowa 2007); *State v. Morgan*, 559 N.W.2d 603, 608 (Iowa 1997).

174. *See Kaiser & Lufkin, supra* note 86, at 758.

175. *See, e.g., Alvarez*, 185 F.3d at 997–98; *Harris*, 741 N.W.2d at 6–7.

II. STATE CONSTITUTIONAL INTERPRETATIONS OF THE INVOCATION OF
THE RIGHT TO COUNSEL UNDER THE STATE CONSTITUTIONAL
PARALLEL TO THE FIFTH AMENDMENT OF THE UNITED STATES
CONSTITUTION

The Court's purpose in establishing the constitutional safeguards in *Miranda* was to ensure the individual's privilege against self-incrimination would be secured from arbitrary governmental infringement.¹⁷⁶ Further, the Court stressed the presence of an attorney during custodial interrogations would "insure that statements made in the government-established atmosphere are not the product of compulsion."¹⁷⁷ The dangers associated with police interrogations, as identified by the Court, are as real and prevalent today as they were when the Court decided *Miranda* in 1966.¹⁷⁸

For example, an empirical study by Steven A. Drizin and Richard A. Leo describes the significance of interrogative pressure on suspects who ultimately—albeit falsely—confess.¹⁷⁹ Drizin and Leo recognize that "[i]nterrogation-induced false confession[s] [have] always been a leading cause of miscarriages of justice in the United States."¹⁸⁰ In fact, the primary cause of 14 to 25 percent of documented cases which resulted in a wrongful conviction stemmed from an interrogation-induced false confession.¹⁸¹

176. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

177. *Id.* at 466.

178. See generally, e.g., RICHARD A. LEO, *POLICE INTERROGATION AND AMERICA JUSTICE* (2008) (noting the historical development of police interrogations in the United States and analyzing current trends in police methods of interrogations, highlighting the coercive nature of these types of governmental interactions); Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogations in America*, 18 CRIME, LAW, & SOC. CHANGE 35, 36 (1992) (explaining the "changes in the nature of police interrogation that have occurred during the last half-century in America").

179. See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 918–21 (2004).

180. *Id.* at 920 (citations omitted).

181. *Id.* (citing Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 491–96 (1998)). The authors concede, "[I]t is not presently possible to provide a valid quantitative estimate of the incidence or prevalence of interrogation-induced false confessions in America." *Id.* (citing Richard A. Leo & Richard J. Ofshe, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. L. POL. & SOC'Y 189, 191 (1997)). The authors, however, contend despite the inability to

Further, the authors contend “the data reported in [their article] suggest that interrogation-induced false confession may be a bigger problem for the American criminal justice system than ever before.”¹⁸² With these considerations in mind, this Note will analyze how various jurisdictions have addressed the protections afforded to defendants during police interrogations under their state constitution.

A. States That Have Elected to Afford Additional Protection to the Privilege Against Self-Incrimination

1. Hawai‘i

The Hawai‘i Supreme Court addressed the issue of ambiguous or equivocal requests for the presence of counsel by a suspect during interrogation in *State v. Hoey*.¹⁸³ In *Hoey*, the defendant was charged with robbery in the first-degree and kidnapping after robbing and binding the night supervisor of a video arcade located in the university district of Honolulu.¹⁸⁴ The court noted that, after being arrested, the defendant was advised of his *Miranda* rights then asked, “You think you’ll need an attorney now?”¹⁸⁵ The defendant responded, “I don’t have money to buy one.”¹⁸⁶ The detective then replied, “No, well, I’m just saying do you think you’ll need an attorney?”¹⁸⁷ The defendant finally answered, “Right now, I don’t think so.”¹⁸⁸ After this response, the detective did nothing to clarify further the defendant’s remarks concerning counsel during his interrogation of the

exactly quantify the problem with interrogation induced false confessions, “[T]he research literature has established that such confessions occur with alarming frequency.” *Id.* at 920–21 (citations omitted).

Social psychologists, criminologists, sociologists, legal scholars, and independent writers have documented so many examples of interrogation-induced false confession in recent years that there is no longer any dispute about their occurrence. Nevertheless, there is good reason to believe that the documented cases of interrogation-induced false confession understate the true nature and extent of the phenomenon.

Id. at 921.

182. *Id.*

183. *State v. Hoey*, 881 P.2d 504, 519–24 (Haw. 1994).

184. *Id.* at 508–09.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

defendant.¹⁸⁹ A short time later during the interrogation, the defendant fully confessed to the crime.¹⁹⁰

The court began its analysis concerning the ambiguous assertion of the right to counsel by setting forth the general principles that govern the question in relation to the privilege against self-incrimination.¹⁹¹ The court framed the privilege against self-incrimination as “fundamental to our system of constitutional rule.”¹⁹² The court further noted “the protections which the United States Supreme Court enumerated in *Miranda* have an independent source in the [Hawai‘i] Constitution’s privilege against self-incrimination.”¹⁹³ After discussing the general principles governing the privilege against self-incrimination and how it related to the Hawai‘i Constitution, the court began “with the proposition that if a defendant makes an *unequivocal* request for counsel while being ‘Mirandized,’ all questioning must terminate until counsel is present.”¹⁹⁴ The court cited *Miranda*, *Edwards*, and even its own court precedent in support of this position.¹⁹⁵ The court, however, turned to the issue of *ambiguous* statements made by a suspect and stated:

The cases cited . . . do not reach the issue of a defendant’s *equivocal* invocation of *Miranda* rights, and the jurisdictions that have addressed it are split into three camps regarding whether cessation of questioning is required or whether the interrogating police officer may seek to clarify the meaning of a defendant’s ambiguous statements.¹⁹⁶

The court characterized the first “camp” as those courts that have “held that a defendant’s ambiguous expression of interest in the presence of an attorney requires that further questioning cease altogether.”¹⁹⁷ The second camp, according to the court, consists of courts that have “required *clarifying* questions with regard to the defendant’s comprehension or waiver of the

189. See *id.* (stating, though, that the detective did tell the defendant that if he “decide[d] to answer [the detective’s] questions without an attorney being present, [he] still [had] the right to stop answering at any time”).

190. *Id.*

191. *Id.* at 519–20.

192. *Id.* at 519 (quoting *State v. Nelson*, 748 P.2d 365, 368 (Haw. 1987)).

193. *Id.* at 520 (quoting *Nelson*, 748 P.2d at 369).

194. *Id.* at 521 (citing *Miranda v. Arizona*, 384 U.S. 436, 471–72 (1966)).

195. *Id.*

196. *Id.*

197. *Id.* (citations omitted).

right to counsel as a necessary precondition to further *substantive* questioning.”¹⁹⁸ The final camp characterized by the court consisted of the courts that have “found an effective waiver despite an ambiguous assertion of the right to counsel.”¹⁹⁹ Later in the opinion, the Hawai‘i Supreme Court aligned itself with those courts in the second camp.²⁰⁰

The court then turned its analysis to the Court’s holding in *Davis* and provided a lengthy quote from the opinion summarizing its holding.²⁰¹ The court, however, declined to follow the minimum protections required by the federal interpretation in *Davis* and elected to afford citizens broader protections under the Hawai‘i Constitution.²⁰²

[W]e hold that (1) when a suspect makes an ambiguous or equivocal request for counsel during custodial interrogation, the police must either cease all questioning or seek non-substantive clarification of the suspect’s request, and (2) if, upon clarification, the defendant unambiguously and unequivocally invokes the right to counsel, all substantive questioning must cease until counsel is present. Conversely, we hold that if, upon clarification, the defendant voluntarily, knowingly, and intelligently waives the presence of counsel, substantive questioning may continue.²⁰³

The court, therefore, aligned itself with the second “camp” of courts by requiring officers to ask non-substantive clarifying questions when faced with an ambiguous invocation of the right to counsel.²⁰⁴ In support of its decision to require clarifying questions, the court quoted the reasoning of Justice Souter’s concurring opinion in *Davis* that states, principally:

A rule barring government agents from further interrogation until they determine whether a suspect’s ambiguous statement was meant as a request for counsel fulfills [two] ambitions. It assures that a suspect’s choice whether or not to deal with police through counsel will be scrupulously honored, and it faces both the real-world reasons why misunderstandings arise between suspect and interrogator and the real-world limitations on the capacity of police and trial courts to apply fine

198. *Id.* at 522 (citations omitted).

199. *Id.* (citations omitted).

200. *See id.* at 523.

201. *Id.* at 522–23.

202. *Id.* at 523.

203. *Id.*

204. *See id.* at 522–23.

distinctions and intricate rules.²⁰⁵

The court ultimately held the failure of the detective to clarify the statements made by the defendant—which were inconsistent with an understanding of the *Miranda* warnings—constituted an equivocal request for counsel and retracted the validity of the defendant’s waiver of his *Miranda* rights.²⁰⁶

By aligning itself with the second “camp,” the Hawai’i Supreme Court crafted a rule that addresses the concerns raised in the application of *Davis*.²⁰⁷ The court, citing to the Souter concurrence in *Davis*, recognized the practical realities associated with police interrogations and the misunderstandings that may arise.²⁰⁸ As Kaiser and Lufkin noted, the objective standard of *Davis* fails to take into account the intent of the speaker and instead would ignore intent altogether.²⁰⁹ Ignoring intent altogether can only lead to a frustration of the speaker’s honest attempt to invoke the right to counsel.²¹⁰ The approach of the court in *Hoey* sufficiently protects the intent of the speaker by requiring non-substantive clarifying questions when faced with an ambiguous or equivocal reference to counsel.²¹¹ The rule ensures that express or even unexpressed intent by a suspect does not go unaddressed by mandating the interrogation stop and nonsubstantive questions be asked to clarify the intent behind the statement whenever police are faced with an ambiguous reference to the presence of counsel.²¹² In considering the issues with attempting to guess at the intent of the suspect, requiring clarifying questions is an effective means of addressing these ambiguous or equivocal statements because police may simply ask the only person who would know for a fact what was meant—the suspect.²¹³ Further, in regard to the workability of the rule in *Hoey*, courts have employed similar rules pre- and post-*Davis*.²¹⁴

205. *Id.* (quoting *Davis v. United States*, 512 U.S. 452, 468–69 (1994) (Souter, J., concurring)).

206. *Id.* at 524.

207. *See* Kaiser & Lufkin, *supra* note 86, at 758.

208. *See Hoey*, 881 P.2d at 523.

209. Kaiser & Lufkin, *supra* note 86, at 758.

210. *See id.*

211. *See Hoey*, 881 P.2d at 523.

212. *See id.*

213. *See Davis v. United States*, 512 U.S. 452, 474–75 (1994) (Souter, J., concurring).

214. *See, e.g., State v. Risk*, 598 N.W.2d 642, 648–49 (Minn. 1999).

2. Minnesota

The Minnesota Supreme Court first addressed the issue of a suspect's invocation of the right to counsel in the pre-*Davis* case *State v. Robinson*.²¹⁵ In *Robinson*, the court began with a discussion on various approaches to equivocal statements made by a suspect referencing counsel including: the per se bright-line approach; the totality of the circumstances approach; and a third approach that required officers ask clarifying questions.²¹⁶ Under the per se bright-line approach, "no matter how equivocal or ambiguous a request for, or even a reference to, counsel may be, further questioning of the suspect must cease."²¹⁷ Under the "totality of the circumstances" approach, an equivocal statement can invoke the right to counsel, but not every reference to counsel will sufficient to invoke the right to counsel.²¹⁸ The final approach discussed by the court requires:

[I]f an accused's equivocal comment "arguably" can be construed as a request for counsel, all further interrogations must promptly cease except that further limited narrow questions designed to "clarify the earlier comment and to ascertain the accused's true desires respecting the aid of counsel" may be asked by interrogators.²¹⁹

The Minnesota Supreme Court ultimately elected to follow the third approach, stating it was "more reasonable, pragmatic and fairer to the accused as well as the state than the 'per se bright line' approach, or the less precise 'totality of circumstances' analysis."²²⁰ The court held, "when a suspect indicates by an equivocal or ambiguous statement, which is subject to a construction that the accused is requesting counsel, all further questioning must stop except that narrow questions designed to 'clarify' the accused's true desires respecting counsel may continue."²²¹

The Minnesota Supreme Court addressed the issue once more in the post-*Davis* case *State v. Risk*.²²² In *Risk*, the defendant was arrested in suspicion of a murder that had occurred two days prior.²²³ On three separate

215. *State v. Robinson*, 427 N.W.2d 217, 221–24 (Minn. 1988).

216. *Id.* at 222–23.

217. *Id.* at 223 (citations omitted).

218. *Id.* (citing *People v. Krueger*, 412 N.E.2d 537, 540 (Ill. 1980)).

219. *Id.* (citations omitted).

220. *Id.*

221. *Id.* (footnote omitted).

222. *State v. Risk*, 598 N.W.2d 642, 647–50 (Minn. 1999).

223. *Id.* at 644.

occasions the defendant was interrogated by police and during the course of these interactions made reference to counsel.²²⁴ The court addressed the law before *Davis* by looking to *Miranda*, *Edwards*, and its holding in *Robinson*, stating when confronted with an equivocal or ambiguous statement police must cease substantive questioning and clarify the desires of the accused.²²⁵ In addressing the law after *Davis*, the court contended, "On more than one occasion since the Court issued its decision in *Davis*, we have stated that we still consider the *Robinson* 'stop and clarify' approach an appropriate prophylactic measure to protect an accused's rights against compelled self-incrimination under the Minnesota Constitution."²²⁶ In *Risk*, the court reaffirmed the rule adopted in *Robinson*.²²⁷ The court acknowledged the rule as construed in *Robinson* afforded more protection than required under the federal interpretation of *Davis*.²²⁸ The court stated, however, the rule in *Robinson* is consistent with Minnesota's "long tradition of assuring the right to counsel."²²⁹ The court further justified its holding by framing the reaffirmation of the rule in *Robinson* as not an issue of constitutional interpretation, but rather the creation of a different prophylactic rule designed to protect the individual's privilege against self-incrimination.²³⁰ "The *Miranda* right to counsel is not a right found in the Fifth Amendment, but instead a prophylactic rule fashioned by the Court to protect the right against coerced confessions."²³¹ Further, "[a]doption of a different prophylactic rule designed to protect the accused's right against compelled self-incrimination is consistent with *Miranda*'s express desire not to create a 'constitutional straitjacket which will handicap sound efforts at reform.'"²³² The holding in *Risk* falls in line with cases that have found the clarifying questions approach to be the most effective means of ensuring the rights of the accused are protected when police are faced with an ambiguous request

224. *Id.* at 644–47.

225. *Id.* at 647–48.

226. *Id.* at 648 (citing *State v. Parker*, 585 N.W.2d 398, 404–05 (Minn. 1998) ("acknowledging the federal 'clear and unequivocal' standard of *Davis* but reaffirming the *Robinson* approach . . . under the Minnesota Constitution"); *State v. Juarez*, 572 N.W.2d 286, 290 (Minn. 1997) ("discussing *Davis* yet noting that we adopted a more protective rule in *Robinson*")).

227. *Id.* at 648–49.

228. *Id.* at 649.

229. *Id.* (quoting *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 831 (Minn. 1991)).

230. *Id.*

231. *Id.* (citing *Davis v. United States*, 512 U.S. 452, 458 (1994)).

232. *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, at 467 (1966)).

for counsel.²³³

3. *New Jersey*

The New Jersey Supreme Court adopted a rule similar to *Robison* in *State v. Chew*.²³⁴ In *Chew*, the court considered whether statements admitted at the defendant's trial for capital murder violated the defendant's constitutional rights.²³⁵ The court stated while the New Jersey law governing the privilege against self-incrimination parallels the federal law, the right itself is grounded in common and statutory law, rather than constitutional law.²³⁶ The court went on to state, however, that "New Jersey law in some circumstances affords greater protection of the right against self-incrimination than does federal law."²³⁷ The court considered *Davis*, but found "[b]ecause the right to counsel is so fundamental, an equivocal request for an attorney is to be interpreted in a light most favorable to the defendant."²³⁸ In affording more protection for the privilege against self-incrimination, the court in *Chew* held, "When a suspect makes a statement that arguably amounts to an assertion of *Miranda* rights and the interrogating agent recognizes that the statement is susceptible to that construction, questioning should cease and the police should inquire of the suspect about the correct interpretation of the statement."²³⁹ Similar to the

233. *See id.* at 648.

234. *Compare* *State v. Chew*, 695 A.2d 1301, 1317–18 (N.J. 1997), *with* *State v. Robinson*, 427 N.W.2d 217, 222–23 (Minn. 1988).

235. *Chew*, 695 A.2d at 1309, 1315.

236. *Id.* at 1316.

237. *Id.* The court provided an example of New Jersey affording more protection through its "expanded ancillary rights in requiring readministration of *Miranda* warnings as a condition to continued interrogation after invocation of the right to remain silent." *Id.* (citing *State v. Hartley*, 511 A.2d 80, 100 (N.J. 1986)).

238. *Id.* at 1317–18 (citations omitted).

239. *Id.* at 1318 (citations omitted). It is important to note, the New Jersey Supreme Court further addressed the privilege against self-incrimination in the 2006 case *State v. Boretsky*. 894 A.2d 659, 666–67 (N.J. 2006). The defendant in *Boretsky* relied on the court's holding in *Chew* and claimed police responding to a 9-1-1 call were required to clarify his statements regarding his lawyer during their interaction with him. *Id.* at 662–63. The court, however, rejected the defendant's argument and held the emergency aid exception trumped the application of *Miranda* and its protection of the privilege against self-incrimination to the defendant's situation. *Id.* at 666. Because *Miranda* did not apply, the court concluded that an ambiguous invocation of the right to counsel is equivalent to an anticipatory invocation of the right to counsel outside the custodial interrogation setting and thus is ineffective. *Id.* at 667.

court in *Hoey*, the *Chew* court grounded its rule in the importance of the privilege against self-incrimination under its state constitution.²⁴⁰

B. *Iowa and the Invocation of the Right to Counsel in Light of Davis v. United States*

The Fifth Amendment to the U.S. Constitution “applies to the State of Iowa through the Due Process Clause of the Fourteenth Amendment.”²⁴¹ “Although the Iowa Constitution does not contain an equivalent provision against self-incrimination, [the Iowa Supreme Court has] held such a right to be implicit in the ‘due process of law’ guaranteed by Article I, section 9.”²⁴² On several occasions the Iowa Supreme Court has addressed the issue of what is required of a suspect invoking the right to counsel under the Fifth Amendment.²⁴³

1. *Addressing the Question in State v. Morgan*

The Iowa Supreme Court briefly addressed the issue of an equivocal invocation of the right to counsel in *State v. Morgan*.²⁴⁴ The court considered whether the “statement ‘I think I need an attorney’ constituted an invocation of the right to counsel.”²⁴⁵ In applying *Davis*, the Iowa Supreme Court found that the statement made by the defendant was actually he “might need a lawyer,” and such a statement was equivalent to the statement made in *Davis* and, as such, was insufficiently clear to invoke the right to counsel.²⁴⁶ Beyond reciting the holding of *Davis* and stating it agreed with the lower court’s findings, the Iowa Supreme Court provides little to no analysis in *Morgan* of the statement made by the defendant other than, “We find [the defendant] did not successfully invoke his right to counsel.”²⁴⁷ The court followed the Court’s holding in *Davis*, without any real discussion of the issue under the Iowa Constitution.²⁴⁸

240. Compare *Chew*, 695 A.2d at 1316, 1317–18 (citations omitted), with *State v. Hoey*, 881 P.2d 504, 519 (Haw. 1994).

241. *State v. Iowa Dist. Ct.*, 801 N.W.2d 513, 517 (Iowa 2011).

242. *Id.* at 518 n.2 (citing *State v. Height*, 91 N.W. 935, 938 (Iowa 1902)).

243. See, e.g., *State v. Effler*, 769 N.W.2d 880 (Iowa 2009); *State v. Morgan*, 559 N.W.2d 603 (Iowa 1997).

244. See *Morgan*, 559 N.W.2d at 608.

245. *Id.*

246. *Id.*

247. See *id.*

248. See *id.* at 608–09 (“Requiring law enforcement personnel to record

2. *Raising Questions in State v. Effler*

The Iowa Supreme Court discussed the holding in *Davis* and ambiguous requests for counsel in *State v. Effler*.²⁴⁹ Although the general opinion dealt with issues regarding the effect of a split decision among the justices on lower court holdings, the concurring and dissenting opinions address the invocation of the right to counsel under *Davis* and the Fifth Amendment.²⁵⁰ Justice Appel's concurrence implored

criminal counsel to explore thoroughly the possibility that [the Iowa Supreme Court] will approach the Iowa Constitution in a different fashion than the United States Supreme Court approaches parallel provisions of the Federal Constitution. Indeed, [*Effler*] demonstrates why this court should exercise its independent judgment under the Iowa Constitution and not necessarily follow the majority of the United States Supreme Court.²⁵¹

Justice Appel went on to critique Iowa Supreme Court precedent as it related to the invocation of the right to counsel under *Davis*; in particular, Justice Appel criticized *Morgan*, stating:

Morgan is a conclusory opinion with no analysis of the underlying issue. It rests solely upon the authority of *Davis*, a 5-4 decision. Further, it was decided at a time when this court routinely adopted federal constitutional precedent as a basis for decisions under the Iowa Constitution. Since *Morgan* was decided, this court has demonstrated . . . a greater willingness to depart from federal precedents on important state constitutional questions than it had shown in the past.²⁵²

The concurrence by Justice Appel in *Effler* raised important considerations and, when considered in conjunction with the policy interests associated with the prevalence of interrogation-induced false confessions, called for additional protections that should be afforded under the Iowa

interrogations or to ask such clarifying questions are issues that may be argued both pro and con as matters of public policy. We are confident, however, that such procedures are in no way mandated by any provision in the Iowa Constitution.”).

249. *State v. Effler*, 769 N.W.2d 880, 884 (Iowa 2009).

250. *Id.* at 891–98.

251. *Id.* at 894 (Appel, J., concurring).

252. *Id.* at 896.

Constitution.²⁵³

III. A PROPOSAL FOR IOWA IN AFFORDING ADDITIONAL PROTECTION FOR SUSPECTS

If there has been a consistent theme among courts in affording greater protections under their state constitutions, it has been a willingness to depart from federally established constitutional jurisprudence.²⁵⁴ Iowa precedent falls in line with the precedent of other jurisdictions that have elected to interpret their state constitutions more broadly, and thus, Iowa should follow those courts who have departed from the *Davis* holding.²⁵⁵

A. Iowa's History of Forging Its Own Path in the Realm of Constitutional Jurisprudence

The Iowa Supreme Court “zealously guard[s] [its] ability to interpret the Iowa Constitution differently from authoritative interpretations of the

253. See *id.* at 894–98; see also *supra* Part II. Since *Effler*, the question of the invocation of the right to counsel under the Iowa Constitution has found its way to the Iowa Court of Appeals. See *State v. Levin*, No. 13-1233, 2014 WL 7343228, at *2–3 (Iowa Ct. App. Dec. 24, 2014). The defendant in *State v. Levin* appealed his convictions for first-degree murder and third-degree kidnapping arguing, among other things, that he had made a sufficiently clear request for counsel during a police interrogation. *Id.* at *2. In making reference to the presence of counsel, the defendant stated, “I might (inaudible) myself a lawyer.” *Id.* at *1. Despite this reference to counsel, the officers proceeded to continue questioning the defendant and eventually the defendant made incriminating statements. *Id.* In addressing the request for counsel, the Iowa Court of Appeals began by quoting the rule from *Davis*. *Id.* at *2–3. The court then turned to the Iowa Supreme Court and the *Morgan* opinion as precedent in applying the *Davis* holding in Iowa. *Id.* at *3. In addition, the court addressed *Effler*, noting the Iowa Supreme Court was evenly split on the issue of applying an independent analysis under the Iowa Constitution. See *id.* The court aptly pointed out the split decision of the court rendered the *Effler* opinion a precedential nullity. *Id.* Ultimately, like previous Iowa cases on point, the *Levin* court held the statement to be insufficient to invoke the right to counsel based on the similarity of the statement to those made in *Davis* and *Morgan*, with little other discussion on the subject. See *id.* While the issue was presented in the Iowa Court of Appeals, the Iowa Supreme Court has declined to address the questions raised in *Levin*, leaving the standard for the invocation of the right to counsel under the Iowa Constitution an open question. See *Further Reviews*, IOWA COURTS (July 16, 2015), <http://www.iowacourts.gov/wfdata/files/FurtherReviews/July%2016%202015.pdf> (denying petition for further review).

254. See, e.g., *State v. Hoey*, 881 P.2d 504, 523 (Haw. 1994); *State v. Risk*, 598 N.W.2d 642, 649 (Minn. 1999).

255. See *infra* Part III.A.

United States Constitution by the United States Supreme Court”²⁵⁶—for example, the Iowa Supreme Court’s rejection of the good faith exception to the warrant requirement in *State v. Cline*.²⁵⁷ In addressing the court’s approach to interpreting issues of state constitutional law, it stated:

[W]e strive to be consistent with federal constitutional law in our interpretation of the Iowa Constitution, but we “jealously guard our right and duty to differ in appropriate cases.” Indeed, the Iowa Constitution is declared to “be the supreme law of the State . . . ,” and it is the responsibility of this court, not the United States Supreme Court, to say what the Iowa Constitution means. Therefore, our court would abdicate its constitutional role in state government were it to blindly follow federal precedent on an issue of state constitutional law.²⁵⁸

The Iowa Supreme Court has differed from the federal interpretation of the Equal Protection clause as well.²⁵⁹ In addressing the trend of the court in interpreting the Iowa Constitution independently, the court in *State v. Ochoa* stated:

We have subsequently emphasized that while we recognize opinions of the United States Supreme Court as “persuasive,” we “jealously” protect our authority to follow our own independent approach. This Iowa case law shows a slow but perceptible shift away from a lockstep or lockstep-lite approach toward a greater recognition of the independent nature of our state constitutional provisions.²⁶⁰

It is important to note, just arguing the Iowa Supreme Court “*can* interpret the Iowa Constitution differently is not the same as presenting an independent constitutional argument.”²⁶¹ Iowa Supreme Court precedent confirms a trend in Iowa of differing from federal precedent concerning

256. *State v. Wilkes*, 756 N.W.2d 838, 842 n.1 (Iowa 2008) (citing *In re Detention of Garren*, 620 N.W.2d 275, 280 n.1 (Iowa 2000)); see *Effler*, 769 N.W.2d at 894–95 (Appel, J., concurring).

257. *State v. Cline*, 617 N.W.2d 277, 284–85, 293 (Iowa 2000).

258. *Id.* at 285 (citations omitted).

259. See *Racing Ass’n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 3–4, 16 (Iowa 2004) (holding a differential tax issue invalid under article 1, section 6 of the Iowa Constitution).

260. *State v. Ochoa*, 792 N.W.2d 260, 267 (Iowa 2010) (citations omitted).

261. *State v. Young*, 863 N.W.2d 249, 284 (Iowa 2015) (Mansfield, J., specially concurring).

various constitutional matters.²⁶² Chief Justice Mark Cady of the Iowa Supreme Court notes, “Our Iowa Constitution, like other state constitutions, was designed to be the primary defense for individual rights, with the United States Constitution Bill of Rights serving only as a second layer of protection, especially considering the latter applied only to actions by the federal government for most of our country's history. Iowa’s forefathers wanted a constitution that would be alive and vibrant, not constrained to the past.”²⁶³ Despite long-held practices in custodial interrogations, the court should differ once again with respect to the invocation of the right to counsel under the Iowa Constitution based on the practical implications of the current rule of law in the context of custodial interrogations.²⁶⁴ As the Chief Justice notes,

[A] long history of a particular practice does not alone justify its future, and our Iowa history of interpretation does not mean we should not consider any change. However, the adoption of originalism today would tend to minimize the role of courts in recognizing constitutional rights in Iowa and, in turn, would significantly reduce the role of Iowa’s constitution in the lives of Iowans. Originalism was not our founders’ intent. It would also undermine the history of Iowa’s contemporary interpretation approach as followed from the beginning. Originalism is simply contrary to what our Iowa forefathers set out to accomplish, and Iowa’s history bears this out.”²⁶⁵

B. Possibility for a Bright Line to be Drawn in the Sand of the Iowa Constitution

1. The All-or-Nothing Approach

One way the Iowa Supreme Court could address situations where an

262. See *id.* at 281 (right to counsel in misdemeanor cases); *State v. Baldon*, 829 N.W.2d 785, 803 (Iowa 2013) (validity of consent to search in parole agreements); *Ochoa*, 792 N.W. 2d at 290–91 (warrantless searches of parolees); *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009) (same-sex marriage); *State v. Cline*, 617 N.W.2d 277, 293 (Iowa 2000) (good-faith exception to the exclusion rule).

263. Mark S. Cady, *A Pioneer's Constitution: How Iowa's Constitutional History Uniquely Shapes Our Pioneering Tradition in Recognizing Civil Rights and Civil Liberties*, 60 DRAKE L. REV. 1133, 1145 (2012).

264. See *supra* Part II.

265. Cady, *supra* note 263, at 1144.

ambiguous or equivocal request for counsel is made is by requiring that all questioning cease upon the occurrence of such an event.²⁶⁶ This type of all-or-nothing approach embraces the concept behind the Court's holding in *Edwards* and applies it liberally to the context of ambiguous requests for counsel.²⁶⁷ This approach, however, has several limitations. First, the practical effect of such a rule would require that police officers cease questioning whenever a reference to counsel is made.²⁶⁸ As addressed by the Court in *Davis*, this places an unreasonable burden on the limited resources of law enforcement and needlessly prevents them from engaging in otherwise legitimate investigative activity.²⁶⁹ Further, placing this type of restriction on police interrogations would frustrate the public's interest in seeing those who commit crimes brought to justice.²⁷⁰ Paul Cassell, Professor of Law at University of Utah College of Law, frames the issue as the problem of "lost confessions."²⁷¹ Cassell states, "The lost confession problem arises because restrictions on interrogations can reduce the number of confessions police obtain, which will in turn prevent police from solving crimes."²⁷² Finally, the all-or-nothing approach does not necessarily create a bright-line rule. The ambiguity arises when one considers what type of reference to counsel would be sufficient? Just using the word lawyer in a sentence? Or any of its synonyms? What about if a suspect mentions an attorney by name? In totality, the all-or-nothing approach does not simplify the issue of an ambiguous statement; rather it creates even more confusion. In light of the alternatives, Iowa should refuse to adopt a rule which will ultimately lead to the frustration of justice.

2. *Clarifying Questions*

An alternative method to the all-or-nothing approach is a rule requiring that clarifying questions be asked when officers are faced with an

266. See, e.g., *State v. Hoey*, 881 P.2d 504, 521–23 (Haw. 1994).

267. See *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981).

268. See *Hoey*, 881 P.2d at 521–23; *State v. Robinson*, 427 N.W.2d 217, 223 (Minn. 1988).

269. *Davis v. United States*, 512 U.S. 452, 460 (1994); see also *Michigan v. Mosley*, 423 U.S. 96, 102 (1975) (addressing the "absurd" results of a liberal interpretation of *Miranda*); *Miranda v. Arizona*, 384 U.S. 436, 474 (1966) (rejecting the contention police stations need in-house lawyers present at all times to assist suspects).

270. See Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—And from Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497, 498 (1998).

271. *Id.*

272. *Id.*

ambiguous reference to the presence of counsel.²⁷³ The use of clarifying questions post-*Davis* is not a radical new concept and, in fact, has been employed by other jurisdictions with success.²⁷⁴ Even the Court in *Davis* noted the use of clarifying questions by police is “good police practice.”²⁷⁵ In addition, the use of clarifying questions rectifies the burden shifting created in *Davis* that allows ambiguous statements to work to the detriment of suspects by placing the burden back on the government to clarify the intent of the speaker.²⁷⁶

The proposed bright-line rule could essentially encompass the holding from *Robinson* as its starting point:

[I]f an accused’s equivocal comment “arguably” can be construed as a request for counsel, all further interrogations must promptly cease except that further limited narrow questions designed to “clarify the earlier comment and to ascertain the accused’s true desires respecting the aid of counsel” may be asked by interrogators.²⁷⁷

Utilizing the holding from *Robinson* as the basis, the Iowa Supreme Court should go further in crafting its own rule of constitutional jurisprudence by requiring the response by a suspect to these clarifying questions be unambiguous.²⁷⁸ One of the main issues with imposing a bright-line rule for ambiguous references to counsel is the ability of police officers applying the rule to real world situations.²⁷⁹ The courts have been hesitant to require police to attempt to interpret the intention of suspects when ambiguous references regarding counsel are made.²⁸⁰ By requiring the response to clarifying questions be unambiguous—primarily a “yes” or “no” response—Iowa would remove the burden placed on police in attempting to ascertain the intent of the suspect.²⁸¹ Further, the practical application of the rule would be to simply require that the officer frame the question as mandating

273. See, e.g., *Hoey*, 881 P.2d at 523.

274. See generally Cheryl M. Bailey & Jay M. Zitter, Annotation, *What Constitutes Assertion of Right to Counsel Following Miranda Warnings—State Cases*, 83 A.L.R. 4th 443 Part II.D (1991) (summarizing cases ambiguous requests for counsel were followed by police officers’ use of clarifying questions).

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

276. See *supra* note 76 and accompanying text.

277. *State v. Robinson*, 427 N.W.2d 217, 223 (Minn. 1988) (citations omitted).

278. See *id.*

279. See e.g., *Davis*, 512 U.S. at 461.

280. See *id.* at 474–75 (Souter, J., concurring).

281. See *id.* at 469.

only a “yes” or a “no” response from the suspect, thus making this addition relatively easy to implement by police.²⁸²

The requirement of an unambiguous response by the suspects implicates the potential for abuse in the form of leading questions by an officer. If a suspect were to make an ambiguous reference to counsel, police could circumvent this by steering the suspect around the invocation of the right to counsel through the use of leading questions. For example, if a suspect in a custodial interrogation were to say, “Maybe an attorney would be a good idea,” an officer could—consistent with a general rule requiring clarifying questions—reply, “You don’t really need an attorney, do you? I mean we are just trying to get your side of the story.” The concern being, while the officer is in fact clarifying the intent of the suspects, the use of a leading question would suggest to the suspects they should not invoke the right to have counsel present for fear of casting suspicion on themselves. This concern is especially prevalent in situations where the suspect lacks education or has minimal working knowledge of the criminal justice system.²⁸³

The solution to this limitation is for Iowa to create a presumption in favor of the defendant once he has made an ambiguous reference to counsel. The presumption would be that, once an ambiguous reference has been made, the right is presumptively invoked unless the officer overcomes it with non-leading clarifying questions. The use of leading questions would, in application, be insufficient to overcome this presumption and thus, a court would find the right to counsel was invoked and—pursuant to *Edwards*—questioning should have ceased.²⁸⁴ If the police, however, ask valid, non-substantive clarifying questions and obtain an unambiguous response from the suspect that does not invoke the right to counsel, a court should find the presumption has been overcome and questioning need not cease.

The optimal result for the Iowa Supreme Court would be to develop a set of standardized non-substantive, clarifying questions police are required to ask when faced with an ambiguous reference to counsel. One possible framework would be for the officer to simply ask, “Are you requesting an attorney be here while you speak with me—yes or no?” This plainly and understandably states the question and then requires an unambiguous response by the suspect. Another possibility would be for the officer to restate the right to counsel’s presence during questioning, then ask the

282. *See id.*

283. *See id.* at 460.

284. *See Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981).

suspect if they would like an attorney present, “You have the right to have an attorney present during questioning—do you want an attorney present—yes or no?” By developing a set of standardized questions for use by police, the Iowa Supreme Court would be removing another layer of ambiguity inherently present in these situations by making it clear what questions will be sufficient under Iowa constitutional jurisprudence.

It is further important to note, when police are faced with a clear invocation of the right to counsel, they should not be permitted to ask clarifying questions. The policy reason behind making this an explicit prohibition is it prevents police from talking a suspect out of the need for counsel. In addition, it prohibits law enforcement from using a new rule of constitutional jurisprudence to undermine the longstanding rule in *Edwards*.²⁸⁵

IV. CONCLUSION

With the practical issues asserted in the application of *Davis* and the realities of police interrogation, the climate is ripe for the Iowa Supreme Court to once again set the tone in the realm of constitutional jurisprudence and provide the necessary protections for defendants under the Iowa Constitution. The proposed rule in this Note provides a satisfactory balance between affording protections to defendants and practical workability.

*Levi James Grove**

285. *See id.*

* B.A., Iowa State University, 2013, J.D. Candidate, Drake University Law School, 2016. I would like to express my great appreciation to Professor Melissa Weresh for all of her valuable and constructive suggestions in the composition of this Note. Her willingness to devote time to assist me in this endeavor has been very much appreciated and can never truly be thanked. A special thank you goes to Jeffrey Kappelman, whose comments on the early drafts of this Note were invaluable to its development. I would also like to thank my mother, Deb Bussan, as well as my family and friends who have encouraged and supported me through my time in law school. A quote, often attributed to the German philosopher Karl Marx, states, “Surround yourself with people who make you happy. People who make you laugh, who help you when you’re in need. People who genuinely care. They are the ones worth keeping in your life. Everyone else is just passing through.”