NOTE

THE REFUSAL TO CLARIFY EQUIVOCAL INVOCATIONS OF THE RIGHT TO REMAIN SILENT: A COST-BENEFIT ANALYSIS

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Of all the possible evidence that the state can use to prove the guilt of a person accused of a crime, nothing is more compelling than that person's own admission of guilt.[1] But regardless of how desperately the state wants or needs a person's confession, it must observe certain constraints consistent with the Fifth Amendment to the United States Constitution.[2]

Determining exactly what federal constitutional constraints the state and its law enforcement officers must observe is, ultimately, the responsibility of the United States Supreme Court. In a panoply of decisions concerning the Fifth Amendment right against self-incrimination, the Court since 1966 has attempted to find a balance between the interests of society in securing reliable confessions and the competing interests of the individual in remaining free from compulsory self-incrimination.[3] In practice, however, the vast array

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1. *See* Bruton v. United States, 391 U.S. 123, 140 (1968) (White, J., dissenting) (noting that the "admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct").

2. Miranda v. Arizona, 384 U.S. 436, 439 (1966). The Fifth Amendment to the United States Constitution provides in part that: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

3. *See Miranda*, 384 U.S at 479–81. For a sampling of decisions after *Miranda*, see *infra* note 131.

of Fifth Amendment decisions has proven difficult to follow. Lower courts attempting to apply the Court's balancing test often meet with little success, many finding after appeal that they failed to weigh the competing interests accurately.[4]

Recently, several state and lower federal courts have had occasion to apply the Supreme Court's balancing-of-interests test in cases involving the Fifth Amendment right to remain silent. Citing *Davis v. United States*,[5] a Supreme Court case holding that police may ignore a person's equivocal request to have counsel present during a custodial interrogation, most of these courts have extended *Davis*'s holding and ruled that during a custodial interrogation police officers may ignore a suspect's equivocal request to remain silent.[6] While at first glance it seems reasonable to treat a request for

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4. *See, e.g.*, Burbine v. Moran, 753 F.2d 178 (1st Cir. 1985), *rev'd*, 475 U.S. 412 (1986); Tucker v. Johnson, 352 F. Supp. 266 (E.D. Mich. 1972), *aff'd*, 480 F.2d 927 (6th Cir. 1973), *rev'd sub nom.* Michigan v. Tucker, 417 U.S. 433 (1974); *In re* Michael C., 579 P.2d 7 (Cal. 1978), *rev'd sub nom.* Fare v. Michael C., 442 U.S. 707 (1979); People v. Spring, 713 P.2d 865 (Colo. 1985) (en banc), *rev'd*, 479 U.S. 564 (1987); State v. Barrett, 495 A.2d 1044 (Conn. 1985), *rev'd*, 479 U.S. 523 (1987); People v. Smith, 466 N.E.2d 236 (Ill.), *rev'd*, 469 U.S. 91 (1984); Minnick v. State, 551 So. 2d 77 (Miss. 1988), *rev'd*, 498 U.S. 146 (1990); People v. Quarles, 444 N.E.2d 984 (N.Y. 1982), *rev'd*, 467 U.S. 649 (1984); State v. Haas, 517 P.2d 671 (Or. 1973) (en banc), *rev'd*, 420 U.S. 714 (1975); State v. Elstad, 658 P.2d 552 (Or. Ct. App. 1983), *rev'd*, 470 U.S. 298 (1985); State v. Bradshaw, 636 P.2d 1011 (Or. Ct. App. 1981), *rev'd*, 462 U.S. 1039 (1983).

5. 114 S. Ct. 2350 (1994).

6. This Note addresses only the issue of equivocal invocations of the right to remain silent made during custodial interrogation — that is, made *after* the state has established a valid initial waiver of *Miranda* rights. *Davis* itself seems to apply only to equivocal references to a lawyer made after law enforcement has obtained the valid initial waiver. Leyva v. State, 906 P.2d 894, 901 (Utah Ct. App. 1995). Presumably, therefore, police must still clarify equivocal invocations of *Miranda* rights made during the attempt to obtain the initial waiver. For a good discussion of this distinction, see *Leyva*, 906 P.2d at 897–901.

Recent cases which have held that police may ignore a custodial suspect's equivocal request to remain silent include: United States v. Johnson, 56 F.3d 947, 955 (8th Cir. 1995); Medina v. Singletary, 59 F.3d 1095, 1101 (11th Cir. 1995); Coleman v. Singletary, 30 F.3d 1420, 1425 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1801 (1995); Irwin v. Singletary, 882 F. Supp. 1036, 1041 (M.D. Fla. 1995); Evans v. Demosthenes, 902 F. Supp. 1253, 1259 (D. Nev. 1995); United States v. Sanchez, 866 F. Supp. 1542, 1559 (D. Kan. 1994); United States v. Lincoln, 42 M.J. 315, 320 (C.M.A. 1995); Bowen v. State, 911 S.W.2d 555, 565 (Ark. 1995); State v. Williams, 535 N.W.2d 277, 285 (Minn. 1995); Leyva v. State, 906 P.2d 894, 901 n.3 (Utah Ct. App. 1995); State v. Bacon, 658 A.2d 54, 65 (Vt.), *cert. denied*, 116 S. Ct. 117 (1995); Midkiff v. Commonwealth, 462 S.E.2d 112, 115 (Va. 1995); State v. Farley, 452 S.E.2d 50, 59 (W. Va. 1994).

One court refused to extend *Davis* to equivocal requests to remain silent. State v. Strayhand, 911 P.2d 577, 592 (Ariz. Ct. App. 1995).

counsel and a request to remain silent exactly alike, there are perhaps different consequences of doing so that courts should think about.[7] If the courts weigh accurately all of the competing interests involved in determining whether or not police must clarify an equivocal request to remain silent, they should find that the costs of refusing to clarify such a request outweigh any benefits.[8]

The first federal court to extend the Supreme Court's decision in *Davis* to equivocal requests to remain silent was the Eleventh Circuit in *Coleman v. Singletary*.[9]

PART I: FACTS OF COLEMAN v. SINGLETARY

Fifteen-year-old Gerald Anthony Coleman came home from school one afternoon in January 1984 and decided to kill his father.[10] After his ten-year-old sister refused to leave the house, Coleman backed her into a closet and choked her. Several minutes later he released his grip. The young girl resumed breathing, so Coleman wrapped a belt around her neck and strangled her to death. Coleman then wrapped his sister in a blanket and left her in the closet next to her teddy bear. When he was done, Coleman got on his bike and rode to a store to buy some candy and a soda.[11]

When he returned to his house, Coleman called a suicide prevention center and said that he had killed his sister. He then left his house once again, but a police officer found him, arrested him, and read him his "*Miranda* rights."[12] Coleman told the police offi

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Other courts have relied on their own state constitutions in refusing to allow police to ignore equivocal invocations of the right to counsel or the right to remain silent. Kipp v. State, 668 So. 2d 214, 215 (Fla. 2d Dist. Ct. App. 1996); Deck v. State, 653 So. 2d 435, 436 (Fla. 5th Dist. Ct. App. 1995); State v. Hoey, 881 P.2d 504, 523 (Hawaii 1994). The Supreme Court of Florida recently agreed to review the following question, certified to be of great public importance by the Fourth District Court of Appeal:

> DO THE PRINCIPLES ANNOUNCED BY THE UNITED STATES SUPREME COURT IN *DAVIS* APPLY TO THE ADMISSIBILITY OF CONFESSIONS IN FLORIDA . . . .

State v. Owen, 654 So. 2d 200, 202 (Fla. 4th Dist. Ct. App. 1995), *rev. granted*, 662 So. 2d 933 (Fla. 1996).

7. *See infra* text accompanying notes 189–213.

8. *See infra* Part IV-B.

9. 30 F.3d 1420 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1801 (1995).

10. *Id*. at 1422.

11. *Id*. Coleman apparently never carried out his intent to kill his father.

12. *Id*. The now-familiar "*Miranda* rights" are warnings read by law enforcement officers to people who are subject to custodial interrogation. The warnings are designed

cer that he had killed his sister.[13]

At the police station two detectives again informed Coleman of his *Miranda* rights. Coleman told the detectives that he understood his rights and that he had killed his sister. The detectives turned on a tape recorder, read Coleman his *Miranda* rights once again, and asked him if he was willing to talk. Coleman said again that he was willing to talk and for the third time confessed to killing his sister.[14]

Shortly thereafter, the detectives stopped the questioning at the request of a public defender. The detectives told the public defender that she could not talk to Coleman on the phone but that she could come to the sheriff's office to see him; she declined to do so. The two detectives then turned the tape recorder back on but failed to tell Coleman that the public defender did not want him to answer any more questions.[15]

The detectives began the questioning again, but when asked if he wanted to continue, Coleman answered, "I don't know. But if he [meaning the public defender][16] said to stop it I don't want to do what he said not to do."[17] The detectives tried to clarify what

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to protect the right against self-incrimination. Before any questioning begins, the officers must warn the person in custody "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." Miranda v. Arizona, 384 U.S. 436, 444 (1966). If the law enforcement officers fail to make these warnings, the prosecution will not be allowed to use any evidence obtained from the interrogation in its case-in-chief. *Id*. at 479.

13. *Coleman*, 30 F.3d at 1422.

14. *Id*.

15. *Id*.

16. *Id*. Coleman did not know that the public defender was a woman.

17. *Id*. at 1422–23. The exact exchange was as follows:

Detective: "And what you're saying, or what you're about to say you're going to do of your own free will; is that correct?"

Coleman: "Yes. Unless, what about that one guy, though?"

Detective: "What guy?"

Coleman: "The guy—"

Detective: "Public defender."

Coleman: "Yeah."

(The detectives explained what the public defender was.)

Detective: "Okay. Tony, do you feel that you want to have a public defender?"

Coleman: "I don't know. But if he said to stop it I don't want to do what he said not to do."

Detective: "All right. Well, do you have any objections talking to us? It's up to you . . . . If you want us to stop asking you any questions, we'll do that."

Coleman: "I guess if that guy thinks it's all right, I don't care."

Coleman wanted to do, and Coleman indicated that he wanted to continue.[18] The detectives resumed the interrogation and Coleman said that he understood the difference between right and wrong, and that killing his sister was "terribly wrong."[19]

At trial, Coleman contended that he was insane at the time of the killing. But the prosecutor used Coleman's admission that killing his sister was "terribly wrong" as evidence that Coleman was sane at the time of the killing. Coleman's admission, as well as the testimony of three psychiatrists who thought he was sane,[20] resulted in his conviction for second degree murder.[21]

A Florida appeals court affirmed Coleman's conviction[22] and the Florida Supreme Court denied his writ of certiorari.[23] The United States District Court for Middle District of Florida denied his habeas corpus petition.[24]

Coleman appealed to the Eleventh Circuit Court of Appeals, contending that his statement, "I don't know. But if he said to stop it I don't want to do what he said not to do," was an invocation of his Fifth Amendment right to remain silent.[25] Coleman argued that because the detectives continued to question him after he made that statement, anything he said after that point was inadmissible.[26]

The court disagreed, overruling a vast body of well-settled Eleventh Circuit precedent.[27] The court based its decision on the United

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Id.

18. *Id*. at 1423.

19. *Id*.

20. *Id*. Two psychiatrists testified that they thought Coleman was insane at the time of the killing. *Id*.

21. *Id*. at 1422.

22. Coleman v. State, 515 So. 2d 313 (Fla. Dist. Ct. App. 1987), *rev. denied*, 523 So. 2d 576 (Fla. 1988).

23. Coleman v. State, 523 So. 2d 576 (Fla. 1988).

24. Coleman v. Singletary, 30 F.3d 1420, 1422 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1801 (1995).

25. *Id*. at 1423.

26. *Id*.

27. *See, e.g.*, United States v. Ramsey, 992 F.2d 301, 305 (11th Cir. 1993); Jacobs v. Singletary, 952 F.2d 1282, 1292 (11th Cir. 1992); United States v. Pena, 897 F.2d 1075, 1081 (11th Cir. 1990); Delap v. Dugger, 890 F.2d 285, 290 (11th Cir. 1989), *cert. denied*, 496 U.S. 929 (1990); Lightbourne v. Dugger, 829 F.2d 1012, 1018 (11th Cir. 1987), *cert. denied*, 488 U.S. 934 (1988); Christopher v. Florida, 824 F.2d 836, 841–42 (11th Cir. 1987), *cert. denied sub nom.* Dugger v. Christopher, 484 U.S. 1077 (1988); Martin v. Wainright, 770 F.2d 918, 923–24 (11th Cir. 1985), *modified on other grounds*,

States Supreme Court ruling in *Davis v. United States*.[28] *Davis* ruled that police interrogators faced with a suspect's equivocal request for an attorney need not stop and clarify the suspect's intent, but may instead proceed with the interrogation.[29] Since the Eleventh Circuit had traditionally applied a "stop and clarify" rule both to equivocal requests for an attorney and to equivocal invocations of the right to remain silent,[30] the *Coleman* court concluded that the *Davis* rule applied to equivocal invocations of the right to remain silent.[31] HELD: Coleman's statements were admissible because the police need not stop an interrogation until the suspect unequivocally invokes his right to cut off questioning.[32]

Coleman and the cases that followed in *Coleman*'s footsteps[33] are significant because they strike a direct blow to a suspect's Fifth Amendment right to be free from compulsory self-incrimination. Refusing to clarify requests to cut off questioning could result in compelled confessions or, worse yet, false confessions.[34] These costs come at comparatively little benefit to law enforcement.[35] Since the costs to individual Fifth Amendment rights outweigh any benefit that might accrue to law enforcement, refusing to clarify equivocal requests to remain silent seems to fail the Supreme Court's traditional balancing-of-interests test.[36] On the other hand, a clarification rule under which police must stop an interrogation and clarify a suspect's wishes upon any request to cut off questioning satisfies the balancing-of-interests test and comports with this country's accusatorial system of criminal justice.[37]

The Fifth Amendment right to be free from compulsory self-incrimination has a rich history which Part II of this Note briefly

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781 F.2d 185 (11th Cir.), *cert. denied*, 479 U.S. 909 (1986).

28. 114 S. Ct. 2350 (1994).

29. *Id*. at 2356.

30. *See* Martin v. Wainright, 770 F.2d 918, 924 (11th Cir. 1985) (commenting that the court saw "no reason to apply a different rule to equivocal invocations of the right to cut off questioning" as it applied to equivocal requests for counsel), *modified on other grounds*, 781 F.2d 185 (11th Cir.), *cert. denied*, 479 U.S. 909 (1986).

31. *Coleman*, 30 F.3d at 1426.

32. *Id*. Judge Johnson dissented, arguing that Coleman's statement was an unequivocal invocation of his right to remain silent. *Id*. at 1427 (Johnson, J., dissenting).

33. *See supra* note 6.

34. *See infra* Part IV-B(2).

35. *See infra* Part IV-B(1).

36. *See infra* Part IV.

37. *See infra* Part V.

traces. Part III discusses the *Coleman* court's analysis. Part IV criticizes the *Coleman* decision (and by necessity those that follow *Coleman*), not only because it may allow compelled self-incrimination under certain circumstances, but also because it conflicts with precedent, it may actually harm the interests of law enforcement, and it is repugnant to this country's accusatorial system of criminal justice. Finally, Part V of this Note recommends the adoption of a rule under which police must clarify all equivocal requests to cut off questioning.

PART II: A HISTORICAL ACCOUNT OF THE RIGHT AGAINST COMPELLED SELF-INCRIMINATION

A. Emergence of the Right in England

The right against compelled self-incrimination evolved from the common-law antipathy towards the use of the "oath *ex officio*" in English ecclesiastical courts.[38] The oath *ex officio* was a virtual "self-incriminatory oath"[39] because it forced a person to swear to God to answer truthfully any and all questions that the ecclesiastical judge might put to him.[40] The accused took the oath without a formal accusation against him and without knowing the identity of his accusers, if any.[41] After taking the oath, the accused was required to answer questions on any subject and almost always ended up confessing to something.[42]

The oath *ex officio* was first used by English ecclesiastical courts

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38. *See, e.g.*, LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 42 (1968); Edward S. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 6 (1930); E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 1 (1949); R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 769–70 (1935); John H. Wigmore, *The Privilege Against Self-Incrimination: Its History*, 15 HARV. L. REV. 610, 623 (1902).

39. Kevin Urick, *The Right Against Compulsory Self-Incrimination in Early American Law*, 20 COLUM. HUM. RTS. L. REV. 107, 110 (1988). It was known as the "oath *ex officio*" because the judge served *ex officio* and could proceed as accuser, prosecutor, judge, and jury based on his own suspicions. LEVY, *supra* note 38, at 24.

40. See Wigmore, *supra* note 38, at 615 n.2, for an example of an oath used in the 1600s: "You swear that you shall make true answers to all things that shall be asked of you."

41. LEVY, *supra* note 38, at 47.

42. *Id*.

in 1236.[43] Although the use of this inquisitional oath by the ecclesiastical courts raised the ire of many English citizens,[44] its use continued, and gradually even the sovereign's own prerogative courts began to use the oath for political purposes.[45] By the end of the sixteenth century, however, the ecclesiastical and prerogative courts that employed ecclesiastical procedures, most notably the Court of the Star Chamber and the Court of the High Commission,

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43. *Id*. at 46.

44. *Id*. at 46–47. The most notable citizen to become concerned about the use of the oath was King Henry III. *Id*. The king became angry when Bishop Robert Grosseteste began using the oath *ex officio* in 1246. *Id*. The king issued a writ to all sheriffs of Lincoln County, where Grosseteste was using the oath to harass the citizens, that prohibited the sheriffs from permitting anyone to appear before the bishop except for matrimonial and testamentary purposes. *Id*. The king met with little success, however, and he had to enjoin the bishop completely under threat of royal punishment. *Id*. at 47–48.

45. CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE 280 (Edward W. Cleary ed., 3d ed. 1984); LEVY, *supra* note 38, at 49. The sovereign's prerogative courts were "those created by the king as *parens patriae*, in the exercise of his residuary prerogative of justice remaining after the establishment of the common law courts, for the purpose of supplementing the common law justice." George J. Thompson, *The Development of the Anglo-American Judicial System*, 17 CORNELL L.Q. 203, 205 (1932). Matters for which there were no common-law writs could not be heard in the common-law courts and fell under the king's prerogative jurisdiction. *Id*. The prerogative courts included the Court of Chancery, the Court of Star Chamber, the Court of Admiralty, the ecclesiastical courts after King Henry VIII's split with Rome, and other bodies set up to administer prerogative justice including the Court of the High Commission. *Id*. at 206 & n.184.

The most notorious of the prerogative courts to employ the oath *ex officio* was the Court of the Star Chamber. MCCORMICK, *supra*, at 280. While it enjoyed wide jurisdiction over civil matters, the Star Chamber's primary purpose was "to meet the defects of the common law in dealing with crime," and it exercised almost limitless power and jurisdiction over criminal matters. Thompson, *supra*, at 234–35. The only apparent limitation on the Star Chamber's power was that it could not inflict capital punishment. *Id*. at 235. In time, the Star Chamber began to abuse its enormous power and employed not only the oath *ex officio*, but also torture in certain cases. *Id*. at 240. The unfortunate defendants who were found guilty under the Star Chamber's inquisitorial tactics sometimes suffered gratuitously cruel and humiliating punishments. The Star Chamber's list of punishments, which were imposed upon women as well as men, included "'the pillory, nailing or cutting off the ears, branding, whipping, slitting the nose, wearing in public places papers indicating the offense committed, riding around Westminster Hall with face to horse's tail,' and marching the convicted through the streets clad only in his shirt . . . ." *Id*. at 242 (quoting WILLIAM HUDSON, A TREATISE OF THE COURT OF THE STAR CHAMBER 224 (c. 1625)).

But the Star Chamber was not alone among the prerogative courts to employ the oath *ex officio*. The Court of the High Commission, a prerogative court officially established nearly a century after the Star Chamber, was authorized by Queen Elizabeth to use the oath *ex officio* to enforce the policies of the English Church. 1 Eliz., ch. 1, § 20 (1558) (Eng.); MCCORMICK, *supra*, at 280.

began to come under attack from common-law lawyers who complained that the oath *ex officio* procedure violated the law of the land.[46]

The denouement of the four-century struggle against the oath *ex officio* came in the trial of John Lilburne.[47] Lilburne was charged in 1637 with importing seditious books into England.[48] Appearing before the chief clerk of the Attorney-General, Lilburne answered questions concerning the acts for which he was charged. But when the clerk began to ask questions concerning other matters, Lilburne

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46. Earlier, in the reign of Edward III (1327–77), the Parliament had complained that the oath *ex officio* procedure violated the law of the land according to the twenty-ninth chapter of the Magna Carta. LEVY, *supra* note 38, at 51–52. That chapter provides:

> No freeman shall be taken, or imprisoned, or disseised of his freehold, or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed, nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will send no man, we will not deny, or defer to any man either justice or right.

25 Edw., ch 29 (1297) (Eng.). The common lawyers adopted this argument and embellished it to further their goals. LEVY, *supra* note 38, at 170–71.

In 1606, Sir Edward Coke, arguably the greatest common lawyer in history, was named Chief Justice of the Court of Common Pleas. Charles H. Randall, *Sir Edward Coke and the Privilege Against Self-Incrimination*, 8 S.C. L.Q. 417, 436 (1956). Lord Coke regarded use of the oath *ex officio* illegal under the "Law of the Land" and fought the prerogative courts with "writs of prohibition." *Id*. at 418. Writs of prohibition had long been used in the struggle between the common-law and ecclesiastical courts. They originated during Edward III's reign as a way to prohibit papal courts from exercising jurisdiction over a suit that should have been brought in the king's court. 27 Edw. 3, ch. 1 (1353) (Eng.); Randall, *supra*, at 437. After King Henry VIII broke away from Rome, the writs were used by common law courts to limit the jurisdiction of the king's own ecclesiastical courts. Randall, *supra*, at 437–38. In the typical case, a defendant would apply to a common-law court for a writ prohibiting the ecclesiastical court from continuing because the case concerned temporal issues. *Id*. If the court granted the writ, the ecclesiastical court could not proceed with the case. *Id*.

But Coke employed methods other than the writ of prohibition to accomplish his goals. In 1615 Coke ruled, as Chief Justice of the King's Bench, that laymen could not be examined under an oath *ex officio* procedure because *nemo tenetur prodere seipsum* ("no man is bound to accuse himself"). Boyer v. The High Comm'n, 80 Eng. Rep. 1052 (K.B. 1615). Moreover, in 1616 Coke held that ecclesiastical courts could not examine anyone under an oath *ex officio* procedure in cases concerning a penal law. Burrowes v. The High Comm'n, 81 Eng. Rep. 42, 42–43 (K.B. 1616). Coke said that the courts "ought not in such cases to examine them upon oath, notwithstanding they have jurisdiction of the cause, for that they shall not make one thereby to subject himself to the danger of a penal law." *Id*. Thus, Coke declared the oath *ex officio* procedure illegal in criminal cases. LEVY, *supra* note 38, at 256.

47. Trial of John Lilburne, 3 How. St. Tr. 1315 (1637).

48. Harold W. Wolfram, *John Lilburne: Democracy's Pillar of Fire*, 3 SYRACUSE L. REV. 213, 216 (1952).

claimed that he could refuse to answer because the "law of the land" did not require him to "do [him]self hurt."[49]

Later, appearing before the Star Chamber, Lilburne refused to swear the oath *ex officio* to answer truthfully to anything that might be asked of him.[50] Annoyed, the judges sent him to prison for contempt.[51] Lilburne still refused to swear the oath and the judges ordered that he be "whipt through the streets, from the prison of the Fleet unto the pillory."[52] While in the pillory, Lilburne fulminated against the injustice of being punished for refusing to take an "inquisition Oath" that violated the law of the land.[53] Lilburne spoke for half an hour, attracting a sympathetic crowd.[54] The warden of the Fleet prison finally had to gag him to keep him quiet.[55]

Because of Lilburne's agitation, in 1641 Parliament abolished both the High Commission and the Star Chamber.[56] The common-law accusatorial procedures replaced the inquisitorial methods of canon law and the right against compulsory self-incrimination was established in the courts that followed ecclesiastical procedure.[57]

Yet, this revolution in ecclesiastical criminal procedure did not

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49. Trial of John Lilburne, 3 How. St. Tr. 1315, 1318 (1637).

50. *Id*. at 1320.

51. *Id*. at 1323.

52. *Id*. at 1327.

53. *Id*. at 1331–32. When Lilburne argued that compelled self-incrimination violated the "law of the land," meaning the Magna Carta, he was drawing on the wisdom of those who went before him. Wolfram, *supra* note 48, at 220. The argument that the oath *ex officio* violated the Magna Carta, perhaps first made by King Henry III in 1246 and later by Parliament in the reign of Edward III, was popularized by the Puritans and used by the common lawyers as a basis to issue writs of prohibition against ecclesiastical courts. *See supra* note 46. Whether the argument was historically unsound mattered not to the Long Parliament, which King Charles called in 1640 in order to raise money for the impending English Civil War. LEVY, *supra* note 38, at 171–72. The Puritans and common lawyers who dominated the Parliament sincerely felt that procedures designed to force a man to accuse himself violated the laws of conscience and the laws of the land. *Id*.

54. LEVY, *supra* note 38, at 276.

55. 3 How. St. Tr. 1315, 1340 (1637).

56. 16 Car. 1, ch. 10 (Star Chamber), ch. 11 (High Commission) (1641) (Eng.). The act abolishing the Star Chamber accused it of exceeding its jurisdiction, issuing decrees without authority, and inflicting heavier punishments than the law warranted. 16 Car. 1, ch. 10. The act described the Star Chamber as an "intolerable burden to the subjects and the means to introduce an arbitrary power and government." *Id*. (the spelling has been modernized). All matters formerly examinable in the Star Chamber would now be redressed by the common law. *Id*. The act abolishing the High Commission also outlawed the oath *ex officio* in ecclesiastical courts. 16 Car. 1, ch. 11.

57. LEVY, *supra* note 38, at 282.

affect the common-law courts.[58] Nevertheless, because they had worked so sedulously at prohibiting the ecclesiastical and other prerogative courts from forcing a person to accuse himself, the common-law courts naturally began to concede the right against self-incrimination to defendants in common-law trials.[59] By the 1640s common-law courts began to recognize that criminal defendants could not be compelled to accuse themselves of any crime,[60] and by 1660 the right against self-incrimination in a criminal trial was firmly entrenched in the common law.[61]

But this right against compulsory self-incrimination did not apply to the pre-trial stages of the common-law process.[62] Although the common-law courts did not use an oath, in the preliminary examination of a suspect before trial the examiner would exhort a suspect to confess his guilt.[63] In the early eighteenth century, courts began to recognize that a confession compelled from an individual during these pre-trial stages might be untrustworthy.[64] Accordingly, there soon developed a rule requiring that confessions be voluntarily given by the accused in order to be admissible in court.[65] This "voluntary confessions" rule functioned as an exclusionary rule that protected the accused's right against self-incrimination in the pre-trial stages of the criminal process.[66]

B. Development of the Right in America

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58. *Id*.

59. Wigmore, *supra* note 38, at 633.

60. *See, e.g.*, Twelve Bishops' Trial, 4 How. St. Tr. 63, 75 (1641); King Charles' Trial, 4 How. St. Tr. 993, 1101 (1649); Lilburne's Trial, 4 How. St. Tr. 1269, 1280 (1649).

61. *See, e.g.*, Scroop's Trial, 5 How. St. Tr. 1034, 1039 (1660); Crook's Trial, 6 How. St. Tr. 201, 205 (1662); Reading's Trial, 7 How. St. Tr. 259, 296 (1679).

62. LEVY, *supra* note 38, at 325.

63. *Id*. at 282.

64. Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule: Part I*, 53 OHIO ST. L.J. 101, 147–51 (1992).

65. Rex v. Warickshall, 168 Eng. Rep. 234 (K.B. 1783); *see also* LEVY, *supra* note 38, at 326–28.

66. LEVY, *supra* note 38, at 329. This new "voluntariness" doctrine would influence later American courts which adopted its reasoning to determine the admissibility of extra-judicial confessions. *See infra* notes 84–88 and accompanying text.

The struggle to establish the right against self-incrimination in America was but a pale reflection of the struggle that occurred in England, perhaps because so many of the colonists had themselves experienced persecution and held strong beliefs about individual liberty.[67] Moreover, as the colonists began to arrive in the New World, the opposition to the oath *ex officio* was reaching its zenith in England.[68] Nevertheless, the colonists were still occasionally subjected to inquisitorial procedures.[69] But as the right against self-incrimination became more entrenched in the common law of England by the middle of the 1600s,[70] American courts naturally began to embrace it as well.[71] By the end of the 1600s, the colonists had taken some tentative steps toward recognizing the right, and in the eighteenth century those tentative steps became giant leaps.[72]

When the colonists officially split with the mother country in 1776, they believed that they had reverted to "a state of nature" and would have to form their system of government from a clean slate.[73] With the abuses of King George III fresh in their minds, the colonists adopted constitutions that would protect their individual liberties.[74] Virginia went beyond a mere constitution, however, and adopted a "Declaration of Rights," drafted by George Mason, that served as a model for other states and indeed served as a model for the future United States Constitution.[75] Section eight of Virginia's Declaration of Rights explicitly provided for a right against compulsory self-incrimination.[76] At least six other states followed Virginia's

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67. Morgan, *supra* note 38, at 18–19.

68. Pittman, *supra* note 38, at 769.

69. LEVY, *supra* note 38, at 333–34.

70. *See supra* notes 58–61 and accompanying text.

71. Urick, *supra* note 39, at 115.

72. *See* LEVY, *supra* note 38, at 367–68.

73. *Id*. at 405. The "state of nature" is part of the theory that a natural condition of mankind, one of perfect freedom and liberty, existed before people entered into societies. This theory was espoused by John Locke and Thomas Hobbes, among others. *See, e.g.*, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C.B. Macpherson ed., 1980) (1690); THOMAS HOBBES, LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL (Michael Oakeshott ed., 1962) (1651).

74. LEVY, *supra* note 38, at 405.

75. *Id*. at 409.

76. Section eight of the Virginia Declaration of Rights provides:

> That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he

lead and also provided in their constitutions for a right against self-incrimination.[77]

But by the late 1780s, the new nation that had been formed by the adoption of the Articles of Confederation in 1781 began to disintegrate under a weak central government.[78] In 1787, a Convention was convened in Philadelphia to draw up a new constitution that would give greater power to a national government.[79] After the Convention adjourned and submitted the new Constitution to the states for ratification, many legislatures hesitated to ratify it for fear that the new central government would abuse its power and trample the states' rights.[80]

In order to assuage the fears of the states, on June 8, 1789, James Madison moved in the First Congress of the United States that the Constitution be amended to guard against abuses of the national government.[81] When the House of Representatives debated what would later be known as the Fifth Amendment, no objections at all were raised to the inclusion of the provision against self-incrimination.[82] On September 29, 1789, the Congress submitted the proposed amendments to the thirteen states for ratification, and by December 15, 1791, the necessary three-fourths of the states had ratified the first ten amendments, making them part of "the supreme Law of the Land."[83]

C. The Constitutional Right

> cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.

Declaration of Rights (1776), *reprinted in* 10 WILLIAM F. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS: VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING 49 (1979).

77. LEVY, *supra* note 38, at 409–11. The six other states were North Carolina, Massachusetts, Maryland, New Hampshire, Delaware, and Pennsylvania. Vermont, which was an independent republic until 1791, also adopted a Bill of Rights similar to Virginia's. *Id*.

78. *See* RICHARD B. MORRIS, THE FORGING OF THE UNION: 1781–1789, at 245–66 (1987).

79. *Id*. at 268.

80. *See* IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 39–52 (1965).

81. *Id*. at 42.

82. *Id*. at 63.

83. *Id*. at 69. See U.S. CONST. art. V for the amendment procedure and U.S. CONST. art. VI, cl. 2, for the "supreme Law of the Land" clause.

The constitutional right against self-incrimination as codified in the Fifth Amendment reflected the common law's respect for human dignity and contempt for inquisitorial procedures.[84] Yet despite the centuries-long struggle to secure the right in England and the somewhat briefer struggle in America, courts virtually ignored the Fifth Amendment right against self-incrimination in the early years of this country.[85] In early federal and state courts, cases involving self-incrimination were decided under the common-law doctrine of "voluntariness."[86] The United States Supreme Court itself adopted the common-law rule against involuntary confessions for federal cases in 1884.[87] A confession was "voluntary" under this rule if it was "trustworthy," that is if the circumstances of the interrogation would not make an innocent person confess to something he did not do.[88]

In 1897, however, the Supreme Court decided *Bram v. United States* and equated the common-law voluntariness doctrine with the Fifth Amendment right against compulsory self-incrimination.[89] In *Bram*, the Court noted that when "a question arises whether a con-

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84. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

85. Urick, *supra* note 39, at 116. Professor Wigmore found 15 federal cases decided by 1868 involving the right against self-incrimination, none of which mentioned the Fifth Amendment. 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2252, at 325 (John T. McNaughton rev., 1961).

86. *See, e.g.*, United States v. Charles, 25 F. Cas. 409 (C.C.D.C. 1813) (No. 14,786).

87. Hopt v. Utah, 110 U.S. 574, 584–85 (1884). In *Hopt*, a police detective arrested a murder suspect and had him ushered away to jail in the custody of another police officer. *Id*. at 584. After two or three minutes, the detective joined them and the suspect immediately began confessing. *Id*. The evidence showed that the confession was voluntary because it was "uninfluenced by hope of reward or fear of punishment." *Id*. While acknowledging that some courts had indicated a distrust of extra-judicial confessions, the Court noted that the rule against their admissibility had been "carried too far" in some cases and ruled that this confession was admissible because it was voluntary. *Id*. The Court cited Rex v. Warickshall, 168 Eng. Rep. 234 (K.B. 1783), for the proposition that free and voluntary confessions are "evidence of the most satisfactory character." *Hopt*, 110 U.S. at 584. See *supra* notes 62–66 and accompanying text for a discussion of the *Warickshall* case and the evolution of the voluntary confessions rule. Trustworthiness, the main rationale for the common-law voluntariness doctrine, thus became the Supreme Court's rationale for excluding confessions in federal courts.

88. Herman, *supra* note 64, at 511. Subsequent Supreme Court decisions followed the common-law voluntariness doctrine adopted in *Hopt*. *See, e.g.*, Wilson v. United States, 162 U.S. 613 (1896); Pierce v. United States, 160 U.S. 355 (1896); Sparf and Hansen v. United States, 156 U.S. 51 (1895).

89. 168 U.S. 532 (1897); *see* Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 100 (1989).

fession is incompetent because not voluntary, the issue is controlled by . . . the Fifth Amendment to the Constitution."[90] The Court held that a confession will be considered involuntary if "any degree of influence" is exerted on the suspect.[91] Since Bram's confession could have been influenced by hope or fear, the Court held his confession inadmissible.[92]

D. Rise and Fall of the Due Process Voluntariness Rule: Evolution from *Brown* to *Miranda*

A little more than a decade after the *Bram* decision, the Supreme Court held that the Fifth Amendment did not apply to state proceedings.[93] Nevertheless, the Court soon learned with the case of *Brown v. Mississippi* that it needed to control the sometimes egregious behavior of the states in extracting confessions.[94] In *Brown*, three black men suspected of killing a white man were whipped until they confessed to a deputy sheriff.[95] The next day, the sheriff himself went to the jail to hear their "free and voluntary" confessions.[96] At trial three days later, the court admitted the confessions and, on that evidence alone, the defendants were convicted and sentenced to death.[97] The United States Supreme Court held that the admission of these coerced confessions violated the Due Process Clause of the Fourteenth Amendment.[98]

The Due Process Clause remained the measure by which state confession cases were judged until the 1960s.[99] While the main common-law reason for excluding coerced confessions was "trustworthiness," the due process test aimed at preventing violations of principles of justice "`so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[100] By the

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90. *Bram*, 168 U.S. at 542.
91. *Id.* at 565.
92. *Id.* at 562.
93. Twining v. New Jersey, 211 U.S. 78 (1908).
94. 297 U.S. 278 (1936).
95. *Id.* at 219.
96. *Id.* at 283.
97. *Id.* at 279.
98. *Id.* at 286.
99. Benner, *supra* note 89, at 113–14.
100. Palko v. Connecticut, 302 U.S. 319, 325 (1937) (quoting Snyder v. Massachusetts, 291 U.S. 97, 115 (1933)).

early 1940s, the Supreme Court explicitly sought through the Due Process Clause to prevent unfairness in the use of any evidence, regardless of whether that evidence was true or false.[101]

Under the due process test, the Court engaged in a flexible, case-by-case determination of whether or not a particular confession was voluntary, taking into account the totality of the circumstances including a suspect's ability to withstand the rigors of the interrogation,[102] the length of interrogation,[103] any opportunities for sleeping and eating,[104] the suspect's education,[105] and the infliction of physical pain or psychological pressure,[106] among other factors.[107] This flexible test allowed the Court to balance society's interest in effective law enforcement against the individual rights of the suspect.[108]

In 1964, however, the Supreme Court ruled that the Fifth Amendment right against self-incrimination applied to the states through the Fourteenth Amendment.[109] In *Malloy v. Hogan*, the Court stated that while *Brown v. Mississippi* had concluded that the due process voluntariness test and the Fifth Amendment right against self-incrimination were distinct, that distinction had been abandoned in subsequent cases.[110] The Court then discarded the due process test and held that the Fifth Amendment standard as articulated in *Bram* would apply in state court proceedings.[111] This decision prepared the foundation for the infamous *Miranda v. Arizona* ruling in 1966.[112]

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101. Lisenba v. California, 314 U.S. 219, 236 (1941).

102. *Id*. at 241 (suspect "exhibited a self-possession, a coolness, and an acumen . . . which negatives the view that he had so lost his freedom of action"; confession held voluntary).

103. Ashcraft v. Tennessee, 322 U.S. 143 (1944) (thirty-six hours; confession held involuntary).

104. Watts v. Indiana, 338 U.S. 49, 53 (1949) (suspect questioned for each of six straight days from six o'clock in the evening until about two or three o'clock the next morning; confession held involuntary).

105. Crooker v. California, 357 U.S. 433, 438 (1958) (college graduate with one year of law school; confession held voluntary).

106. Spano v. New York, 360 U.S. 315 (1959) ("sympathy falsely aroused"; confession held involuntary).

107. *See* Withrow v. Williams, 113 S. Ct. 1745, 1754 (1993).

108. *See* Miranda v. Arizona, 384 U.S. 436, 509 (1966) (Harlan, J., dissenting).

109. Malloy v. Hogan, 378 U.S. 1, 8 (1964).

110. *Id*. at 6–7.

111. *Id*. at 8.

112. 384 U.S. 436 (1966). The *Miranda* decision had been foreshadowed some years

Prior to the *Miranda* decision, the Court had recognized that what occurs in the interrogation of an accused affects his rights at trial. In *Escobedo v. Illinois*, the police had denied the suspect an opportunity to talk to his lawyer during a pre-trial interrogation.[113] The Court reasoned that without an attorney present during interrogation, the accused's right to have an attorney at trial would be essentially worthless.[114] It held that whenever a suspect requested a lawyer but was denied the opportunity to consult with one, and was not warned of the right to remain silent, the suspect's Sixth Amendment right to the assistance of counsel was violated.[115]

Yet the *Escobedo* decision raised more questions than it answered,[116] and the *Miranda* Court set out a lengthy opinion to try to answer them.[117] The basis for the *Miranda* decision became the Fifth Amendment right against compulsory self-incrimination rather than *Escobedo*'s Sixth Amendment right to counsel.[118]

The Court in *Miranda* tried to find a balance between the

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earlier by the dissent in Crooker v. California, 357 U.S. 433 (1958). The defendant had been denied the assistance of counsel until the police had finished questioning him. *Id*. at 436. A majority of the Court ruled that a deprivation of the assistance of counsel at a pre-trial interrogation violated due process only when the defendant was so prejudiced by the absence of counsel that his subsequent trial was unfair. *Id*. The Court found that the defendant, a college-educated man with one year of law school, had not been prejudiced enough to have been denied due process. *Id*. at 440. The four dissenters, Chief Justice Warren, and Justices Douglas, Black, and Brennan, however, argued that the accused's constitutional rights can only be protected by the presence of an attorney at all stages of the proceedings. *Id*. at 443–48 (Douglas, J., dissenting). The absence of a lawyer at the interrogation, the dissenters concluded, is always prejudicial and the Due Process Clause requires that a suspect who wants an attorney "should have one at any time after the moment of arrest." *Id*. at 448.

113. 378 U.S. 478, 485 (1964).

114. *Id*. at 487–88. "'One can imagine a cynical prosecutor saying: "Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial."'" *Id*. at 488 (quoting *Ex parte* Sullivan, 107 F. Supp. 514, 517–18 (D. Utah 1952)).

115. *Id*. at 491.

116. *See* Benner, *supra* note 89, at 119:

> Did an accused have to request counsel? If not, and police gave warnings regarding the right to silence, must counsel nevertheless be provided to give advice before any interrogation? Did the accused have to waive this new right to counsel before any interrogation could take place? Did the rule extend to suspects who were not in custody?

Id.

117. 384 U.S. 436 (1966).

118. *Id*. at 467.

state's interests and individual rights.[119] In balancing these competing interests, the Court strove to protect the individual's right against self-incrimination while at the same time promoting society's interest in obtaining reliable confessions.[120]

After a survey of then-prevailing police practices, the *Miranda* Court found that custodial questioning was "inherently compelling."[121] The Court concluded that without proper safeguards the pressures involved in the interrogation process constitute "compulsion" within the meaning of the Fifth Amendment.[122] To dispel this "conclusive presumption"[123] of compulsion, the Court held that police must follow certain procedures designed to give the custodial suspect the ability to protect his right against compulsory self-incrimination.[124]

Under *Miranda*, the police must warn the suspect "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 the right to the presence of an attorney, either retained or appointed."[125] The suspect can "knowingly and intelligently" waive these rights, but if he "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[126] Likewise, if the suspect asks for an attorney all questioning must cease.[127]

E. The Rigidity of the *Miranda* Opinion Spawns a New Approach to the Balancing of Competing Interests

The rigidity of the *Miranda* guidelines soon came under criticism from many in the legal community,[128] and a new trend be

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119. *See id*. at 479–81.

120. *Id*. at 467.

121. *Id*. A later decision characterized custodial arrest as "convey[ing] to the suspect a message that he has no choice but to submit to the officers' will and to confess." Minnesota v. Murphy, 465 U.S. 420, 433 (1984).

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

123. *Id*. at 535 (White, J., dissenting).

124. *Id*. at 467. The Court held that the Fifth Amendment right to be free from compulsion applied to the pre-trial custodial interrogation of a criminal suspect. *Id*.

125. *Id*. at 444.

126. *Id*. at 473–74.

127. *Miranda*, 384 U.S. at 474.

128. Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 106 (noting in 1977 that "*Miranda* was perhaps the most controversial of the Warren Court's criminal procedure decisions, and it has been the subject of spirited de-

came evident in the Court's "balancing-of-interests" test.[129] From the 1970s on, the Court refused to extend *Miranda* further to safeguard individual rights and, for the most part, struck the balance of interests in favor of law enforcement.[130] While many cases evidence this trend,[131] four are particularly relevant to the analysis of the Eleventh Circuit's opinion in *Coleman*.

In *Michigan v. Mosley* a suspect was given his *Miranda* rights and questioned about some robberies.[132] The suspect told the police he did not want to talk about the robberies and the police stopped the questioning.[133] After about two hours, a different police officer questioned the suspect about a murder unrelated to the robberies.[134] The suspect implicated himself in the homicide.[135]

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bate for more than a decade").

129. *See* cases cited *infra* note 131. There was one exception to this trend: Edwards v. Arizona, 451 U.S. 477 (1981). *See infra* text accompanying notes 140–46.

130. *See* New York v. Quarles, 467 U.S. 649, 662–63 (1984) (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor noted that "[s]ince the time *Miranda* was decided . . . the Court has been sensitive to the substantial burden the *Miranda* rules place on local law enforcement efforts, and consequently has refused to extend the decision or to increase its strictures on law enforcement agencies in almost any way." *Id*.

131. *See, e.g.*, Harris v. New York, 401 U.S. 222 (1971) (voluntary statements made in violation of *Miranda* admissible to impeach); Michigan v. Tucker, 417 U.S. 433 (1974) (evidence derived from a suspect's statements made in violation of *Miranda* admissible); Oregon v. Hass, 420 U.S. 714 (1975) (statements taken in violation of *Miranda* after suspect asserted rights admissible to impeach); Oregon v. Mathiason, 429 U.S. 492 (1977) (person questioned after agreeing to come to police station not in custody for purposes of *Miranda*); North Carolina v. Butler, 441 U.S. 369 (1979) (waiver of *Miranda* rights can be inferred from conduct); Rhode Island v. Innis, 446 U.S. 291 (1980) (*Miranda* implicated only by questioning designed to elicit an incriminating response); Jenkins v. Anderson, 447 U.S. 231 (1980) (pre-arrest silence before *Miranda* warnings are given is admissible to impeach); Fletcher v. Weir, 455 U.S. 603 (1982) (post-arrest but pre-*Miranda* silence can be used to impeach); California v. Beheler, 463 U.S. 1121 (1983) (person questioned after voluntarily accompanying police to station not in custody for purposes of *Miranda*); New York v. Quarles, 467 U.S. 649 (1984) (public safety exception to requirement of *Miranda* warnings before interrogation); Berkemer v. McCarty, 468 U.S. 420 (1984) (roadside questioning of motorist not custody for purposes of *Miranda*); Oregon v. Elstad, 470 U.S. 298 (1985) (statement obtained in violation of *Miranda* does not render a later statement inadmissible if proper *Miranda* warnings given in the mean time); Colorado v. Spring, 479 U.S. 564 (1987) (police need not inform suspect of subject matter of interrogation); Illinois v. Perkins, 496 U.S. 292 (1990) (*Miranda* warnings not required when suspect is unaware he is talking to police).

132. 423 U.S. 96, 104–05 (1975).

133. *Id*.

134. *Id*.

135. *Id*. at 98.

The Court found the confession admissible.[136] The Court ruled that whenever a suspect indicates the desire to remain silent, the police must stop questioning him.[137] However, the Court went on to hold that police may resume questioning after a significant period of time has passed, the suspect again waives his *Miranda* rights, and the right to cut off questioning is "scrupulously honored."[138] The Court noted that to hold otherwise would "transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity."[139]

But while the Court in *Mosley* allowed the police to re-initiate questioning of a suspect who had asserted his right to remain silent, the Court in *Edwards v. Arizona* chose not to follow *Mosley* and fashioned a different rule for assertions of the right to counsel.[140] In *Edwards*, a suspect was being questioned by police officers when he said, "I want an attorney before making a deal."[141] The police officers stopped the questioning and returned the suspect to jail.[142] The next day, however, two different police officers summoned the suspect, read him his *Miranda* rights, and proceeded to obtain a confession.[143]

The Court found the confession inadmissible, holding that once a suspect invokes his right to counsel during interrogation, he cannot be questioned again without an attorney present, unless the suspect himself initiated the conversation.[144] The Court distinguished *Mosley* by noting that *Miranda* itself distinguished between the effects of a request to remain silent and the request for an attorney.[145] The *Miranda* decision had emphasized that upon a suspect's request for counsel the interrogation must cease until an attorney was present, but it did not mention any such proscription concerning the right to remain silent.[146]

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136. *Id*. at 107.
137. *Mosley*, 423 U.S. at 104.
138. *Id*.
139. *Id*. at 102.
140. 451 U.S. 477 (1981).
141. *Id*. at 479.
142. *Id*.
143. *Id*.
144. *Id*. at 484–85.
145. *Edwards*, 451 U.S. at 485.
146. *Id*. The *Miranda* decision clearly distinguished the effects of requesting counsel and the effects of "indicating" the right to remain silent. *Miranda*, 384 U.S. at 473–74.

After the *Edwards* decision, which bolstered individual rights vis-a-vis law enforcement, the Court resumed its practice of striking the balance of competing interests in favor of law enforcement. In *Moran v. Burbine*, a public defender told detectives that she would act as counsel for a custodial suspect in the event of any questioning.[147] The police assured her that the suspect would not be questioned until the next day.[148] In fact, the police questioned him that night.[149] The Court determined that the police were not required to tell the custodial suspect that his lawyer was trying to reach him.[150] To hold otherwise, the Court reasoned, would unnecessarily injure the interests of law enforcement.[151]

The Court stated that society had a "legitimate and substantial interest" in law enforcement's ability to secure reliable confessions.[152] A suspect's interests, on the other hand, are adequately protected by full comprehension of the *Miranda* warnings.[153] Any additional benefit a properly warned suspect might receive from being informed of counsel's attempt to contact him during the interrogation, the Court noted, would be minimal and come at a great cost in lost confessions.[154]

In *Moran*, the Court limited the reach of the *Edwards* rule by limiting the circumstances under which the rule would attach.[155]

The *Mosley* Court refused to interpret the language in *Miranda* requiring the interrogation to end upon an indication of the right to remain silent as meaning the interrogation must cease for all time. *See Mosley*, 423 U.S. at 102–04 & n.10.

147. 475 U.S. 412, 417 (1986).

148. *Id*.

149. *Id*.

150. *Id*. at 426.

151. *Id*. at 426–27.

152. *Moran*, 475 U.S. at 427.

153. *Id*.

154. *Id*.

155. The Court has attempted to limit the reach of the *Edwards* rule on several other occasions so that police would not unnecessarily lose opportunities for interrogating uncounseled suspects. For example, in Oregon v. Bradshaw, 462 U.S. 1039 (1983), the Court read the language of *Edwards* narrowly and held that any statement related generally to the investigation was sufficient to allow police to re-initiate interrogation under *Edwards*. *Bradshaw*, 462 U.S. at 1045–46. Moreover, in Connecticut v. Barrett, 479 U.S. 523 (1987), the Court held that a suspect's invocation of counsel for one purpose was not an invocation for all purposes. *Id*. at 526–29.

But the Court has also extended the reach of *Edwards* on occasion. In Arizona v. Roberson, 486 U.S. 675 (1988), the Court held that a suspect who had invoked the Fifth Amendment right to counsel during an interrogation about one crime could not be questioned later without an attorney present even about another crime. *Id*. at 683; *cf*. McNeil

The Court did likewise in *Davis v. United States*.[156]

In *Davis*, the Court held that police need not stop an interrogation upon a suspect's equivocal invocation of the right to counsel.[157] A custodial suspect remarked during interrogation, "Maybe I should talk to a lawyer."[158] The interrogators asked questions to clarify his intent, and he said he was not asking for a lawyer.[159] A while later, however, the suspect said, "I think I want a lawyer before I say anything else," and the interrogation ended.[160] The suspect argued that the questioning should have ceased upon his first invocation of counsel.[161] The Court disagreed, holding that police need not stop an interrogation unless the suspect clearly requests counsel.[162]

Shortly following the *Davis* decision, the Eleventh Circuit in *Coleman v. Singletary* rejected a vast body of precedent[163] and extended the *Davis* rule to equivocal invocations of the right to remain silent.[164]

PART III: THE COLEMAN *COURT'S ANALYSIS*

The court in *Coleman v. Singletary* noted that prior to the *Davis* decision, the Eleventh Circuit had always applied the rule that if a custodial suspect made an equivocal request for an attorney, the scope of the interrogation was immediately narrowed to clarifying the suspect's intent.[165] The court described *Davis* as "a supervening decision" which changed the "clarification only" rule for equivocal requests for an attorney.[166]

But the court went on to hold that the *Davis* rule applied to

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v. Wisconsin, 111 S. Ct. 2204 (1991) (suspect whose Sixth Amendment right to counsel has attached can be questioned without an attorney present about crimes different from the one for which the suspect is under prosecution). In Minnick v. Mississippi, 111 S. Ct. 486 (1990), the Court held that a suspect who invoked his right to counsel may not be interrogated again without a lawyer present even though he had already consulted with one. *Id*. at 491.

156. 114 S. Ct. 2350 (1994).
157. *Id*. at 2356.
158. *Id*. at 2353.
159. *Id*.
160. *Id*.
161. *Davis*, 114 S. Ct. at 2355.
162. *Id*. at 2356.
163. *See supra* cases cited at note 27.
164. 30 F.3d 1420 (1994), *cert. denied*, 115 S. Ct. 1801 (1995).
165. *Id*. at 1424.
166. *Id*.

equivocal invocations of the right to remain silent.[167] The court reasoned that the *Davis* Court's concern with fashioning a "bright line" test that police officers could apply in the real world of "investigation and interrogation without unduly hampering the gathering of information," applied to invocations of the right to remain silent as well.[168] Since it had traditionally held that the same rule should apply in both situations,[169] the *Coleman* court saw no reason why it should not apply the *Davis* "threshold of clarity" rule to invocations of the right to remain silent.[170]

Characterizing Coleman's statement, "I don't know. But if he said to stop it I don't want to do what he said not to do," as equivocal,[171] the court held that the detectives did not have to stop the interrogation to clarify Coleman's intent.[172] The court limited its holding to the facts of the case, "under which a reasonable [police] officer could interpret the suspect's words to mean that, as he said, he did not know whether he wanted to stop talking."[173]

PART IV: CRITICAL ANALYSIS

The *Coleman* court's extension of the *Davis* rule to equivocal invocations of the right to remain silent should be reconsidered because it fails the Supreme Court's balancing-of-interests test. The *Coleman* court failed to distinguish between the right to remain silent and the right to have counsel present during an interrogation. As discussed below, the reasoning underlying the *Davis* Court's refusal to require clarification of requests for counsel is not appropriate for requests to cut off questioning. Because the same consequences do not attend the clarification of equivocal requests to cut off questioning as attend equivocal requests for counsel, the costs to suspects' rights in remaining free from compulsory self-incrimina-

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167. *Id*.

168. *Id*. (quoting Davis v. United States, 114 S. Ct. 2350, 2352 (1994)).

169. *See, e.g.*, Martin v. Wainright, 770 F.2d 918 (11th Cir. 1985) (commenting that there was "no reason to apply a different rule to equivocal invocations of the right to cut off questioning"), *modified on other grounds*, 781 F.2d 185 (11th Cir.), *cert. denied*, 479 U.S. 909 (1986).

170. *Coleman*, 30 F.3d at 1424.

171. One judge dissented, arguing that Coleman's statement was unequivocal. *Id*. at 1427 (Johnson, J., dissenting).

172. *Id*. at 1424–25.

173. *Id*. at 1425.

tion outweigh any benefits that might accrue to law enforcement. Moreover, the harm that the *Coleman* rule may cause to the interests of law enforcement, coupled with this country's preference for an accusatorial, rather than inquisitorial, system of criminal justice, further weighs against the rule.

A. The *Davis* Court's Balancing of Interests

In balancing the interests of law enforcement against the interests of the individual in *Davis*, the Court refused to transform the *Miranda* safeguards "`into wholly irrational obstacles to legitimate police investigative activity.'"[174] The *Davis* Court declined the invitation to extend the *Edwards* rule and require law enforcement officers to cease questioning immediately upon an equivocal request for an attorney.[175] The Court reasoned that requiring police to stop an interrogation upon an equivocal request for an attorney would amount to an "irrational obstacle" under the *Edwards* rule because "it would needlessly prevent the police from questioning a suspect *in the absence of counsel* even if the suspect did not wish to have a lawyer present."[176]

But not only did the Court refuse to require police to *honor* an equivocal request for counsel, it also refused to require police to *clarify* an equivocal request,[177] which further suggests that the Court tried to find a way around the *Edwards* rule.[178] Under the *Edwards* rule, once a suspect requests a lawyer, police can never again question the suspect alone.[179] If police officers were required to clarify a suspect's intent, some suspects would doubtless make it

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174. *Davis*, 114 S. Ct. at 2356 (quoting Michigan v. Mosley, 423 U.S. 96, 102 (1975)).

175. *Id*. at 2355. The "rigid" prophylactic rule of *Edwards* requires that all questioning cease whenever a custodial suspect requests an attorney. *Edwards*, 451 U.S. at 484–85. Most significantly, once the suspect requests an attorney, police cannot question the suspect again without his counsel present, unless, of course, the suspect initiates the communication. *Id*.

176. *Davis*, 114 S. Ct. at 2356 (emphasis added). This statement implies, of course, that *the presence of counsel* would impede law enforcement's ability to obtain a confession.

177. *Id*.

178. *Id*. at 2362 (Souter, J., concurring in the judgment) (noting that some confessions will be lost when, upon clarification, a suspect makes it clear that he is invoking counsel).

179. *Edwards*, 451 U.S. at 484.

clear that they indeed wanted a lawyer and the chance of obtaining a confession would be lost.

Prior Court decisions have recognized that society has a "legitimate and substantial" interest in helping police secure reliable confessions.[180] But the Court has also recognized that a custodial suspect has a legitimate interest in having counsel present during interrogation.[181] The presence of counsel in the interrogation room, however, interferes with society's interest by diminishing the likelihood that police will obtain a confession.[182] In balancing these two competing interests, the *Davis* Court apparently found that the interest of a properly warned suspect in having an attorney present did not outweigh society's substantial interest in having police interrogate uncounseled suspects.[183]

The Court also determined that refusing to honor or clarify an equivocal request for an attorney did not violate the suspect's constitutional rights but affected, at most, only a procedural right of *Miranda*.[184] The Court has often characterized the right to have counsel present during interrogation as a mere prophylactic right designed to assist the suspect in protecting his Fifth Amendment right to be free from compulsory self-incrimination.[185] The right to counsel during interrogation, therefore, is not constitutionally guaranteed,[186] but is a sort of psychological crutch upon which a suspect can lean in order to protect his Fifth Amendment right against self-incrimination.[187] Unlike the Sixth Amendment right to counsel, moreover, the Fifth Amendment right to counsel does not automati-

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180. Moran v. Burbine, 475 U.S. 412, 427 (1986).

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

182. *See, e.g.*, *Moran*, 475 U.S. at 431 ("We do not doubt that a lawyer's presence could be of value to a suspect"); *see supra* note 176 and accompanying text.

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

184. *Id*. at 2354 (describing the right to counsel under *Miranda* as a procedural right not protected by the Constitution). It is true that the court in *Miranda* described the right to have counsel present during an interrogation as "indispensable to the protection of the Fifth Amendment privilege." *Miranda*, 384 U.S. at 469. The Court noted that a once-stated warning will not suffice to protect a suspect who comes under the sway of the "inherently coercive" atmosphere of the interrogation; a lawyer is the only way to ensure that the suspect's right to choose between speech and silence will remain "unfettered throughout the interrogation process." *Id*. But subsequent decisions of the Court have described the right to counsel as a prophylactic one not protected by the Constitution. *See, e.g.*, Michigan v. Tucker, 417 U.S. 433, 444 (1974).

185. *See* Michigan v. Tucker, 417 U.S. 433, 444 (1974).

186. *See id*.

187. Connecticut v. Barrett, 479 U.S. 523, 528 (1987).

cally attach but must be invoked.[188]

While the right to have counsel present during interrogation must be affirmatively invoked, the individual who cannot clearly request an attorney under the *Davis* rule can still protect himself from self-incrimination by cutting off the questioning under *Miranda*.[189] Consequently, the properly "Mirandized" but inarticulate suspect who understands that he can cut off the questioning suffers no constitutional harm if his equivocal request for counsel is ignored, but is, at most, inconvenienced by having to deal with police unassisted by counsel.[190] The cost to society in clarifying equivocal references to an attorney, which could effectively preclude many uncounseled interrogations of suspects under the *Edwards* rule, is therefore greater than the arguably "minimal benefit" a properly warned suspect might reap from having an attorney present.[191] Before *Coleman*, then, the inarticulate suspect who could not request a lawyer could always indicate to police in some manner — even in an equivocal manner — that he wanted to remain silent and thereby protect his right to remain free from compulsion.[192]

B. *Coleman*'s Extension of the *Davis* Rule to the Right to Remain

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188. *Miranda*, 384 U.S. at 470.

189. To protect himself, a suspect must make an affirmative attempt to cut off the police questioning. The Court has held that a custodial suspect is unable to stand mute in the face of intense police questioning. *Miranda*, 384 U.S. at 467. The "inherently compelling" atmosphere of the interrogation room makes that impossible. *Id*. Thus, the only protection an uncounseled suspect has is his right affirmatively to cut off questioning. Recognizing this, the *Miranda* Court provided that if a suspect "is alone and indicates *in any manner* that he does not wish to be interrogated, the police may not question him." *Id*. at 445 (emphasis added).

190. This may seem unfair because a more articulate suspect may be able to invoke his right to counsel and thereby gain an advantage over an inarticulate suspect during custodial interrogation. But this type of "unfairness" argument has been effectively rebutted by at least one commentator. *See* JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 36-37 (1993).

191. *See* Moran v. Burbine, 475 U.S. 412, 427 (1986). The *Moran* Court described the presence of a lawyer in the interrogation room to be of "minimal benefit" to a custodial suspect who understood his rights. *Id*. Perhaps the benefit of a lawyer is more than minimal, but this benefit still does not outweigh the great cost to society in losing voluntary confessions.

192. *See Miranda*, 384 U.S. at 445.

Silent Fails the Balancing Test

By extending the *Davis* rule to equivocal requests to cut off questioning, the *Coleman* court failed to apply the Supreme Court's balancing-of-interests test properly. *Coleman* may lead to compelled confessions under certain circumstances,[193] and may cause innocent-but-inarticulate suspects to confess to crimes they did not commit.[194] These costs come at comparatively little benefit to law enforcement.[195]

1. The Minimal Benefits of the Coleman *Rule*

The *Coleman* court reasoned that its new rule would provide a bright line test "whose clarity and ease of application" would be lost if it required the police to clarify an equivocal request to cut off questioning.[196] Yet police under *Coleman* must still make difficult judgment calls concerning whether an invocation is equivocal or not and risk suppression later if a court finds that it is not equivocal.[197] Indeed, in the *Coleman* case itself, the court was split over whether Coleman's statement was equivocal or not.[198] If judges, who can reflect upon a statement in the dispassionate surroundings of their chambers, disagree over the equivocality of a particular statement, police officers will certainly be hard-pressed to make accurate, immediate decisions in the heat of the interrogation.[199]

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193. *See infra* text accompanying notes 204–13.

194. *See infra* note 213 and accompanying text.

195. *See infra* text accompanying notes 196–203.

196. The *Coleman* court quoted this reasoning from *Davis* as applying with equal force to the right to cut off questioning. *Coleman*, 30 F.3d at 1426. The *Davis* Court reasoned that adopting a *per se* rule under which equivocal requests for counsel are honored would force police officers "to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he hasn't said so, with the threat of suppression if they guess wrong." *Davis*, 114 S. Ct. at 2352.

197. Indeed, the *Davis* Court recognized that the threat of suppression existed under its rule if courts engaged in "second-guessing" of the equivocality of a request for counsel. *Davis*, 114 S. Ct. at 2356.

198. Two judges thought that Coleman's statement, "I don't know. But if he said to stop it I don't want to do what he said not to do," was equivocal. *Coleman*, 30 F.3d at 1423. A third judge felt that the statement was an unequivocal assertion of the right to remain silent. *Id*. at 1428 (Johnson, J., dissenting).

199. *See Davis*, 114 S. Ct. at 2363 n.7 (Souter, J., concurring in the judgment) ("In the abstract, nothing may seem more clear than a `clear statement' rule, but in police stations and trial courts the question, `how clear is clear?' is not so readily answered."); *see also* State v. Eastlack, 883 P.2d 999, 1021 (Ariz. 1994) (Kleinschmidt, J., concurring)

But not only must police worry about whether a particular assertion is equivocal or not, if they continue the interrogation without clarification they must also worry about overbearing a suspect's will.[200] Under the totality-of-circumstances approach of evaluating coerced confessions, continued interrogation after a suspect asked police to cut off the questioning would be a weighty factor against finding the confession voluntary.[201] Consequently, the contention that the *Coleman* rule is a "bright line" is simply specious.

Ignoring an equivocal request to cut off questioning will allow police to continue an interrogation despite a suspect's arguable assertion of his desire to cut off the questioning. Assuming that confessions obtained in this manner are not the products of overborne wills, the *Coleman* rule seems to give some benefit to law enforcement. Yet many of those same confessions could still be obtained despite clarifying a suspect's intent and without risking suppression later. Unlike clarifying an equivocal request for an attorney, clarifying an equivocal request to cut off questioning will not deprive the police of the opportunity to interrogate the suspect without counsel. There is no rigid *Edwards*-type rule that attaches upon a request to cut off questioning. If a suspect upon clarification does clearly invoke his right to remain silent, the police can stop the interrogation,

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(disagreeing with majority that statement "I think I better talk to a lawyer first" was equivocal), *cert. denied*, 115 S. Ct. 1978 (1995); State v. Strayhand, 911 P.2d 577, 604 n.10 (Ariz. Ct. App. 1995) (McGregor, J., concurring in part, dissenting in part) (noting that whether suspect's statements were equivocal presented a close question); Byrd v. Singletary, 655 So. 2d 67, 68 (Fla. 1995) (noting that "[a]ny allegation that a defendant has equivocally or ambiguously indicated that the defendant wishes to invoke the right to silence is a fact-based claim that must be evaluated on a case-by-case basis"), *cert. denied*, 116 S. Ct. 1270 (1996); Bane v. State, 587 N.E.2d 97, 104 (Ind. 1992) (DeBruter, J., dissenting) (disagreeing with majority that suspect's request for counsel was equivocal); State v. Williams, 535 N.W.2d 277, 290 (Minn. 1995) (Page, J., concurring in part, dissenting in part) (disagreeing with majority that suspect's request to remain silent was equivocal).

200. *See infra* text accompanying notes 204–06.

201. *See* Kipp v. State, 668 So. 2d 214, 216 (Fla. 2d Dist. Ct. App. 1996) (holding that a custodial suspect's confession was not voluntarily given because his will was seriously undermined by the continued questioning of detectives who disregarded the suspect's equivocal invocation of his right to remain silent); *see also* Withrow v. Williams, 113 S. Ct. 1745, 1754 (1993) (noting that factors such as police coercion, characteristics of accused, length of interrogation, and continuity all play a role in determining voluntariness). Refusing to clarify a suspect's wishes is tantamount to refusing to respect his rights if indeed he wanted the interrogation to end. The protection afforded to a suspect by reading him his rights is lost if the police will not allow him to exercise them. This must be taken into account when determining voluntariness.

wait a short while, and then resume the questioning.[202] Although the police will still need to read the suspect his rights and obtain a waiver before the renewed questioning,[203] these are slight problems when viewed against the possibility of a suppressed, involuntary, or unreliable confession. While the *Coleman* rule might allow interrogators to continue hammering the suspect with questions after an equivocal request to cut off questioning, the minimal benefits of doing so do not outweigh the costs to individual rights.

2. The Costs of the Coleman *Rule*

The minimal benefits of the *Coleman* decision come at a potentially high cost to individual rights. The failure to clarify an equivocal invocation of the right to cut off questioning not only violates *Miranda*[204] but may also violate some suspects' Fifth Amendment right to remain free from compulsion. As noted above, under the *Davis* rule, if a properly warned suspect cannot articulate his desire for an attorney with sufficient clarity, he can still protect himself by cutting off the questioning.[205] But if the right to cut off questioning must also be done clearly, the suspect who is unable to articulate his demands clearly enough will be without protection and subject to the "inherently compelling pressures" of the interrogation.[206]

The number of suspects who will not be able to assert their rights clearly is difficult to know. But there is evidence that a significant number of suspects might not be able to meet the threshold of clarity required by the *Coleman* rule because of their characteristic modes of speaking.[207] Many of the people subject to custodial interrogation are minorities, non-native speakers and females[208]

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

203. *Id*.

204. *Miranda*, 384 U.S. at 444–45, 473–74 (holding that if a suspect indicates in any manner that he wishes the interrogation to end, the police must stop questioning him).

205. *See supra* text accompanying notes 197–200.

206. This problem is particularly significant when one considers that the inherently compelling pressures of the interrogation may cause a person to confess to something he did not do. *See infra* note 213.

207. *See* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 263–64 (1993).

208. *See* U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 432-434 (1993). The Department of Justice compiled data for 1991 that indicated 29% of all people arrested were black and 18.7% of all people arrested were female. *Id*. Of all those persons arrested for violent crime, 44.8% were black and 11.6% were female. *Id*. Of all

who habitually adopt indirect, equivocal modes of speaking — the so-called "female register."[209] The "female register," also called the "powerless register,"[210] is a characteristic way of speaking in which "indirect and qualified modes of expression" are used by "powerless" persons in lieu of direct and assertive speech.[211] Indeed, individuals who habitually use these ways of speaking in everyday discourse are much more likely to use them during a high pressure custodial interrogation.[212] An individual who is subjected to custodial interro-

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those arrested for criminal homicide, the crime most likely to warrant vigorous interrogation, 54.8% were black and 10.3% were female. *Id*.

The Federal Bureau of Investigation's statistics for 1992 also reveal strikingly similar numbers. *See* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE U.S.: 1992 234-35 (1993). In 1992, according to the FBI, 30.3% of all persons arrested were black and 19% were female. *Id*. Of persons arrested for violent crime, 44.8% were black and 12.5% were female. *Id*. Of persons arrested for criminal homicide, 55.1% were black and 9.7% were female. *Id*.

209. Ainsworth, *supra*, note 207, at 263–64.

210. These indirect modes of speaking have been termed "the female register" because the "typical female" adopts these indirect and qualified modes of speaking. *Id*. at 263. However, a better term is probably "the powerless register" because the indirect way of speaking is not limited to women, but is also adopted by some minorities and non-native speakers, people who have traditionally been powerless in America. *Id*. at 285–86; *see also* WILLIAM M. O'BARR, LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM 69-71 (1982).

211. Professor Janet Ainsworth recently outlined the predominant characteristics of the "female register." Ainsworth, *supra* note 207, at 275–82. They are the use of hedges, tag questions, and modal verbs, and the avoidance of imperatives. *Id*. at 275–76. Hedges, expressions like "I think," "sort of," "maybe," etc., are used to lessen the emphasis of statements. For example, one might say, "I think I should stop talking now," rather than, "I will stop talking now." *Id*. Hedges could convey equivocality in an interrogation setting.

A tag question is a question put at the end of a statement that makes the speaker sound less assertive. Tag questions are sometimes used when the speaker wants to avoid confrontation. *Id*. at 278. They, too, convey equivocality in an interrogation setting: "I should stop talking now, shouldn't I?"

The use of modal verbs, like hedges, lessen the effect of a statement. *Id*. at 280. Examples of modal verbs include "might," "could," "may," etc. The use of modal verbs may make a statement sound equivocal to an interrogator: "I might need to stop talking now."

Finally, the avoidance of imperatives tends to make the speaker sound more deferential. *Id*. at 281. Rephrasing a demand into a question to avoid an imperative may also make the speaker sound equivocal: "Would you please leave me alone now?"

All these expressions may be used by individuals who find themselves the subject of an interrogation. *Id*. at 286.

212. *Id*. at 287. Professor Ainsworth noted that a "communicative context in which the speaker is, or is made to feel, relatively powerless enhances that individual's tendency to adopt the mode of expression characteristic of the female register." Researchers have shown that powerless speakers are more likely to use these characteristics when

gation and who adopts the "powerless register" may not be able to cut off questioning with sufficient clarity and could be subjected to interrogation that overbears his will or causes him to confess to something he did not do.[213]

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they are communicating with someone in a more powerful position. *Id*. at 285; *see also* O'BARR, *supra* note 210, at 69–71.

213. *See* Kipp v. State, 668 So. 2d 214, 216 (Fla. 2d Dist. Ct. App. 1996) (holding that a custodial suspect's confession was not voluntarily given because his will was seriously undermined by the continued questioning of detectives who disregarded the suspect's equivocal invocation of his right to remain silent).

Justice Souter, in his concurring opinion in *Davis*, describes a scenario in which a suspect whose wishes are ignored in contravention of his rights (or so he thinks) finally capitulates and confesses falsely in order to end the interrogation. *Davis*, 114 S. Ct. at 2362 (Souter, J., concurring in the judgment); *see* Mallott v. State, 608 P.2d 737, 741–42 (Alaska 1980) (noting that "[t]he presumption is that ignoring or rebuffing a suspect's invocation of his or her constitutional rights will convince the suspect that such rights are illusory").

The specter of an innocent person confessing because he is unable to cut off questioning is not all that far-fetched. Researchers have described three types of false confessions: voluntary, coerced-compliant, and coerced-internalized. Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence*, *in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 67, 76–78 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985). Voluntary false confessions are those purposefully offered either because the confessor wants attention, has an unconscious desire to expiate the guilt from prior crimes or immoral acts, or wants to protect the real wrongdoer. *Id*. at 76–77. The other two types of false confessions occur because of the inherent coercion of the interrogation process. *Id*. at 77.

The coerced-compliant confession is given by the confessor in order to achieve the immediate instrumental gain of having the interrogation end. *Id*. This type of confession is usually given in response to extreme forms of coercion such as physical abuse or threats to loved ones. *Id*. The confession in Brown v. Mississippi, 297 U.S. 278 (1936), was of this type. *See supra* text accompanying notes 94–98. The coerced-compliant confession is usually withdrawn after the force for compliance has ended, usually at the pretrial motion to suppress. Kassin & Wrightsman, *supra*, at 78.

The coerced-internalized confession results from the "fatigue, pressures, and suggestiveness of the interrogation process." *Id*. The suspect actually begins to believe that he committed the crime that is the subject of the interrogation. *Id*. The suspect's own memory of what really happened may even conform to that suggested by the interrogator. *Id*.

An earlier researcher also noted that:

> Police interrogation under many, if not most, circumstances can produce a trance-like state or heightened suggestibility in the suspect, and the resulting confession may or may not be true . . . . Fatigue, the anxiety aroused by accusation, and the personal instability of the suspect may all contribute to a state of abnormal brain activity and unusually great suggestibility on the part of the suspect. Moreover, the police because they are suspicious or convinced of guilt may inadvertently by the form and line of questioning suggest the nature of the offense. Truth and falsehood become hopelessly confused in the suspect's mind, and when he later gives back what originally was suggested or implied

Notwithstanding the costs to individual rights, the *Coleman* rule has other factors that must be added into the balancing test. Given the slight benefits that police derive from the *Coleman* rule and the great costs that it imposes on individual rights, these other factors decidedly tip the scales of the Supreme Court's balancing test against it.

3. Other Adverse Factors of the Coleman *Rule that Must Be Weighed*

The first additional factor that must be weighed against the *Coleman* rule is that it conflicts with precedent. The *Miranda* decision held that whenever a suspect indicates "in any manner" that he wishes the interrogation to end, police must cease the questioning.[214] Beyond the *Miranda* decision, however, the *Coleman* rule departs from the precedent set in *Michigan v. Mosley*.[215] In *Mosley*, the Court held that interrogators must "scrupulously honor" a suspect's right to cut off questioning.[216] The refusal to require police to clarify an equivocal request to cut off questioning runs afoul of this admonition. Most significantly, police who are not required to clarify an equivocal request to stop the questioning will be encouraged to scrupulously ignore or misapprehend — whether deliberately or not — a suspect's request.[217]

Another factor that weighs against the *Coleman* rule is the burden that it would place on law enforcement. As noted above, under *Coleman*, police officers in the heat of an interrogation will be en-

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by the interrogators, it may be with entire good faith.

Henry H. Foster, Jr., *Confessions and the Station House Syndrome*, 18 DE PAUL L. REV. 683, 690–91 (1969).

214. *Miranda*, 384 U.S. at 445, 473–74. While *Miranda* also stated that if a suspect indicated "in any manner" that he wanted to consult with an attorney, questioning should immediately cease, *id*. at 444–45, the opinion also contains language that a suspect must be decisive in his request for counsel. *See id*. at 485. Although this language appears in a letter from the Solicitor General to the *Miranda* Court, the *Davis* Court nevertheless seizes on that to justify its departure from the "in any manner" language appearing on pages 444 to 445 of the *Miranda* opinion. *Davis*, 114 S. Ct. at 2356.

215. 423 U.S. 96 (1975).

216. *Id*. at 104.

217. *See* Smith v. Illinois, 469 U.S. 91, 98 (1984) (noting that in the absence of a bright-line rule requiring all questioning to cease after a custodial suspect requests counsel, "the authorities through `badger[ing]' or `overreaching' — explicit or subtle, deliberate or intentional — might otherwise wear down the accused and persuade him to incriminate himself . . .").

couraged to ignore or misapprehend a suspect's request to cut off questioning. But a court reviewing the confession at a later time under less passionate circumstances may find that an alleged equivocal request to cut off questioning was actually an unequivocal request.[218] If the resulting confession also turns out to have been involuntarily given, any derivative evidence that was obtained from the confession will be suppressed.[219] Police officers thus face a threat of suppression under *Coleman* that is unreasonable considering the minimal benefit they might reap.[220]

On the other hand, clarifying an equivocal request to cut off questioning may have a salutary effect on law enforcement's ability to obtain reliable confessions. If upon clarification a suspect does in-

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218. *See supra* notes 197–99 and accompanying text; *see also Davis*, 114 S. Ct. at 2356 (noting that a chance exists that a confession will be suppressed "due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel").

219. *See* Mincey v. Arizona, 437 U.S. 385, 398 (1978) (noting that "*any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law") (emphasis in original); *see also* Kipp v. State, 668 So. 2d 214, 216 (Fla. 2d Dist. Ct. App. 1996) (holding that a custodial suspect's confession was not voluntarily given because his will was seriously undermined by the continued questioning of detectives who disregarded the suspect's equivocal invocation of his right to remain silent).

220. *See supra* text accompanying notes 197–99. An additional factor that might be weighed against the *Coleman* rule is the unnecessary waste of judicial resources that it would engender. Because many suspects will have their requests to cut off questioning ignored by police, those suspects will complain that their resulting confession was involuntary. See *supra* text accompanying notes 207–13 for a discussion of the reasons why many suspects will be unable to articulate their desires with sufficient clarity to satisfy the *Coleman* rule. The Court has retained the due process approach in situations where *Miranda* does not apply. Miller v. Fenton, 474 U.S. 104, 110 (1985). *Miranda* would not apply if the suspect never makes a request to cut off questioning after a valid waiver. Under the *Coleman* rule an equivocal request is no request. Therefore, all confessions will be subject to a due process challenge. The courts will be forced to decide, first, whether the suspect's request was indeed equivocal or not, and second, whether the resulting confession was involuntary under the due process test. Courts will have to analyze the confession considering the "totality of circumstances" surrounding the interrogation. This analysis must be done on a case-by-case basis at great and unnecessary cost to judicial resources. *See* Byrd v. Singletary, 655 So. 2d 67, 68 (Fla. 1995) (noting that whether request to remain silent was equivocal must be evaluated on a case-by-case basis), *cert. denied*, 116 S. Ct. 1270 (1996). The Supreme Court has recently recognized that an "exhaustive totality-of-circumstances" approach, when unnecessary, only contributes to the burden on the federal judicial system and should be avoided. *See* Withrow v. Williams, 113 S. Ct. 1745, 1754 (1993) (noting that "abdicating *Miranda*'s bright-line (or at least, brighter-line) rules in favor of an exhaustive totality-of-circumstances approach on habeas would [not] do much of anything to lighten the burden on busy federal courts"). This concern is true for the state court systems as well.

deed state that he wants the questioning to stop, the police can always return later and resume the interrogation after a valid waiver.[221] Scrupulously honoring a suspect's wishes will make him feel more comfortable and will allow the interrogating officer to convey an "understanding, considerate, and sympathetic feeling" toward the suspect, which helps to establish rapport.[222] Establishing rapport is indispensable to a successful interrogation.[223] Good rapport encourages conversation, which, in turn, encourages the suspect to confess.[224]

Finally, this country's preference for an accusatorial system of criminal justice weighs heavily against the *Coleman* rule. Refusing to honor a suspect's wishes evokes the specter of oath *ex officio* procedures used more than three centuries ago in such inquisitorial bodies as the Star Chamber and the High Commission.[225] The *Coleman* court failed to recognize that under the common-law criminal justice system, it is society that must shoulder the burden of proving its charges against the suspect.[226] Most significantly, the United States adheres to a regime of law "that presumes innocence and assures that a conviction will not be secured by inquisitorial means."[227] By allowing police to ignore a suspect's equivocal assertion of his right to cut off the interrogation, the *Coleman* court subjects the inarticulate suspect to the modern day equivalent of an inquisition by making him "the deluded instrument of his own conviction."[228] The *Coleman* rule is incongruous with an accusatorial system of justice.

Given the overall disutility of the *Coleman* rule, coupled with its incongruity with an accusatorial society, even the slightest chance that someone will be compelled into confessing, or that an innocent person will confess, outweighs the minimal net benefit that police may derive from it. Clarifying equivocal requests to cut off question-

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

222. FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 30 (2d ed. 1967); ARTHUR S. AUBRY, JR. & RUDOLPH R. CAPUTO, CRIMINAL INTERROGATION 52 (2d ed. 1972).

223. INBAU & REID, *supra* note 222, at 23.

224. AUBRY & CAPUTO, *supra* note 222, at 52.

225. *See supra* notes 43–46 and accompanying text.

226. Watts v. Indiana, 338 U.S. 49, 54 (1948).

227. Miller v. Fenton, 474 U.S. 104, 116 (1985).

228. 2 WILLIAM HAWKINS, PLEAS OF THE CROWN ch. 46, § 34 (8th ed. 1824). "The law will not suffer a prisoner to be made the deluded instrument of his own conviction." *Id*.

ing will not have the same consequences that clarifying equivocal requests for an attorney have and will not seriously harm the interests of law enforcement. Indeed, clarifying equivocal requests to cut off the interrogation may even help law enforcement obtain reliable confessions. Even under a balancing test that tips the scales in favor of law enforcement, this rule is unreasonable. The *Coleman* decision should therefore be replaced with a clarification rule under which police interrogators stop and clarify a suspect's intent upon all reasonably arguable invocations of the right to remain silent.

PART V: RECOMMENDATION — A CLARIFICATION RULE

Since the overall costs of the *Coleman* rule outweigh its net benefits to law enforcement under the Supreme Court's balancing test, this Note recommends the adoption of a clarification rule under which any reasonably arguable request to cut off questioning must be clarified.

The adoption of a clarification rule will help protect the innocent-but-inarticulate suspect from confessing to something he did not do. The rule would also remain true to *Miranda* and function to protect the individual's constitutional right to remain free from compulsory self-incrimination. It would not amount to an irrational obstacle to effective law enforcement because, unlike clarifying an equivocal request for an attorney, a request to cut off questioning does not forever rob the police of the opportunity to interrogate uncounseled custodial suspects. A clarification rule would also help the police by diminishing the number of suppressed confessions.[229] Finally, a clarification rule would be more compatible with this nation's accusatorial system of justice.

The confusion that might result from having two rules, one requiring clarification of requests to remain silent, and the other not requiring clarification of requests for counsel, will not pose an insurmountable problem for law enforcement.[230] Since *Edwards*, the Su-

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229. *See Davis*, 114 S. Ct. at 2356 (noting that "[c]larifying questions help protect the rights of the suspect . . . 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 . . . ").

230. If for some reason the presence of two different rules were a significant problem, the only way to have the same rule for both the right to remain silent and requests for counsel, given the problems with requiring a threshold of clarity for the right to remain silent, would be for the Supreme Court to retreat from its decision in *Davis*,

preme Court has treated invocations of the right to remain silent and requests for counsel differently and the police have adjusted.[231] Police most often will be able to distinguish between the equivocal request for counsel on the one hand, and the equivocal right to remain silent on the other, and proceed accordingly. If, however, a suspect does make an equivocal request and the interrogators cannot determine what the suspect wants, the only reasonable course is for the interrogators to seek clarification. Indeed, the Supreme Court in *Davis* indicated that even faced with an equivocal request for an attorney, it will often be good police practice to clarify the request.[232]

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which is quite unlikely. However, the Court would probably have applied a clarification rule to equivocal requests for counsel if it had not been for the rigid *Edwards* rule. The Court has a history of trying to get around the *Edwards* rule, *see supra* note 155, and it might be time for the Court to think about applying a *Mosley*-type rule to invocations of counsel. See *supra* text accompanying notes 132–39, for a discussion of the *Mosley* case. If, as in *Mosley*, police were allowed to re-initiate questioning of a suspect after he invoked the right to counsel, as long as a valid waiver were obtained or whatever other safeguards the Court might require, then many of the confusing rules either extending or limiting the *Edwards* protection could be abandoned.

231. *See supra* text accompanying notes 140–46.

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