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A Work in Progress: The "Mirandization" of Article I, Section 12

INTRODUCTION

Few phrases are better known than "you have the right to remain silent, and anything you say can be used against you in a court of

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law."[1] The United States Supreme Court's decision in *Miranda v. Arizona* had sweeping effects—and completely overhauled the way the criminal justice system handles criminal confessions. Before *Miranda*, courts determined the admissibility of a suspect's statements obtained during police interrogation using the "voluntariness" test.[2] That test asked whether, in the totality of the circumstances, a suspect's will was overborne due to police coercion.[3] The Supreme Court recognized the difficulty in applying that test, so it decided *Miranda* in order to give suspects more control over the interrogation process and to give courts and law enforcement clearer rules for determining the admissibility of confessions. The reasoning behind the court's decision was that if suspects have control over the interrogation process, courts need not delve into the voluntariness analysis.[4]

Miranda gave suspects control over interrogations in two important ways. First, police must tell suspects what their rights are during interrogation—that is where the warnings come into play.[5] After warnings are given, police must obtain a voluntary and intelligent waiver of those rights before beginning questioning. Second, even if a suspect initially waives his or her *Miranda* rights, the suspect may invoke those rights at any time during questioning.[6] If a suspect invokes his or her rights, police are prohibited from asking any further questions.

While the voluntariness test still exists under the Fifth Amendment, it is more difficult to successfully bring a voluntariness claim after *Miranda*. That is because *Miranda*, in theory, gives suspects control over interrogation, so absent overt police misconduct, it is difficult to prove a suspect's statements were coerced. Therefore, the focus of litigation regarding the admissibility of confessions during police

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1 George Thomas, *The End of the Road for* Miranda v. Arizona, 37 AM. CRIM. L. REV. 1, 12 (2000) ("[T]he typical TV viewer has heard *Miranda* warnings given hundreds of times, with no discernible effect on the 'good guys' getting the confession from the guilty suspects."). Ask yourself: How many times have you seen a suspect on TV ask for a lawyer after receiving *Miranda* warnings?

2 *See* Dickerson v. United States, 530 U.S. 428, 432–35 (2000) (explaining the history of the *Miranda* warning requirement).

3 *Id.* at 434.

4 *Id.* at 435; Miranda v. Arizona, 384 U.S. 436, 441–42 (1966) (explaining the Court granted certiorari "to explore some facets of the problems . . . of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow").

5 *Miranda*, 384 U.S. at 444–45.

6 *Id.* ("If, however, [the suspect] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.").

interrogation usually centers on whether police complied with *Miranda*. The problem, however, is that *Miranda* has arguably not given criminal suspects the control it promised. In the cases following *Miranda*, the United States Supreme Court has made it difficult for suspects to actually exert control over interrogation.[7]

For example, it is relatively easy for the prosecution to show that a suspect waived his rights under the Fifth Amendment. That is because police need not obtain an explicit waiver. Instead, "[a]s a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford."[8] Thus, while it is good police practice to ask a suspect whether he or she understood the warnings and agrees to talk to police, that is not required to show waiver. To show a suspect waived his or her rights, police may simply read suspects the warnings and then begin asking questions. If a suspect answers those questions, then, absent evidence otherwise, he will likely be presumed to have voluntarily and intelligently waived their rights.

Suspects also face difficulty while trying to invoke their *Miranda* rights. Under current case law, in order to invoke a suspect's right to have counsel present during interrogation, a suspect must make a clear and assertive statement. In other words, the suspect's statement must meet a certain "threshold of clarity" in order for the statement to trigger any constitutional protection.[9] To meet such a threshold, statements generally must be direct and assertive. For example, the statement "I want a lawyer" would satisfy the requirements, but the statement "give me a lawyer dog" might not.[10] The latter example shows some of the

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7 See discussion of *Davis v. United States*, 512 U.S. 452 (1994) below. One way the U.S. Supreme Court has rolled back the protections arguably established by *Miranda* is that after *Davis* it is difficult for suspects to invoke their rights.

8 Berghuis v. Thompkins, 560 U.S. 370, 385 (2010). In *Berghuis*, the detectives asked the defendant to sign a form to indicate he understood his rights, but the defendant refused. *Id.* at 375. It was unclear whether the detectives obtained any verbal confirmation from the defendant that he understood his rights. *Id.* The Court nevertheless held that the defendant waived his rights when he chose to speak to the detectives. *Id.* at 387.

9 *See* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 302–04 (1993) (discussing the "threshold of clarity" approach).

10 Recently, the Louisiana Supreme Court made national news when it found that a suspect's request for a "lawyer dog" was not a clear invocation. Tom Jackman, *The Suspect Told Police 'Give Me a Lawyer Dog.' The Court Says He Wasn't Asking for a Lawyer*, WASH. POST (Nov. 2, 2017), www.washingtonpost.com/news/true-crime/wp/2017/

problems with such a rule: requiring suspects to speak in a clear and assertive manner "fail[s] to give legal effect to indirect modes of speaking [and] has negative repercussions for many groups in society" who do not speak in direct or assertive ways.[11]

To be sure, courts face a difficult task in defining the scope of constitutionally permissible interrogation. Interrogation is an important investigative tool for law enforcement. A confession may allow police, who have limited resources, to spend more time and effort investigating other crimes.[12] Confessions help prosecutors negotiate plea agreements, which save the time and valuable resources of not only prosecutors and law enforcement but courts as well.[13] Finally, sometimes confessions are necessary to prove a crime—for example, "[s]ome of the most heinous crimes, such as child abuse, may involve no physical evidence and no witnesses, other than the child who may be incompetent to testify."[14] Faced with that difficulty, the United States Supreme Court has announced bright-line rules such as the one in *Davis v. United States*, which held that a suspect does not invoke his right to have an attorney present during questioning unless he articulates his desire to do so clearly.[15]

State courts, in interpreting their respective state constitutions, are able to provide more protection for suspects in interrogation. Oregon has done so and has developed its own set of standards to guide police in interrogating suspects and to protect the rights afforded to suspects under the Oregon Constitution.[16]

This Comment focuses primarily on one aspect of *Miranda* rights, namely, what happens if a suspect tries to invoke his right to counsel but fails to clearly articulate his desire to do so?[17] Such a statement is

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11/02/the-suspect-told-police-give-me-a-lawyer-dog-the-court-says-he-wasnt-asking-for-a-lawyer/.

11 Ainsworth, *supra* note 9, at 264. Although *Davis* was decided after Ainsworth surveyed the problems associated with requiring clear invocations of *Miranda* rights, those problems are still present—perhaps even more so—under current Fifth Amendment jurisprudence.

12 Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168, 1199 (2001).

13 *Id.* at 1200.

14 *Id.* at 1199.

15 Davis v. United States, 512 U.S. 452, 459–60 (1994).

16 Article I, section 12, of the Oregon Constitution states in relevant part that "[n]o person shall . . . be compelled in any criminal prosecution to testify against himself." OR. CONST. art. II, § 12.

17 *Miranda* protects both the right to have an attorney present during questioning and the right to remain silent. *See* Berghuis v. Thompkins, 560 U.S. 370, 381 (2010). ("[T]here is

commonly referred to by courts as an equivocal invocation of a suspect's rights. An equivocal invocation is difficult to define, but this Comment will attempt to articulate a workable definition.[18] The test to determine whether a suspect invoked his or her rights in Oregon asks whether a reasonable officer would understand the suspect to be asserting his rights under the totality of the circumstances.[19] The test is a factual one, conducted on a case-by-case basis. As a Multnomah County Circuit Court judge once described: "It's not cut and dried; it's not absolute. As a judge you have to look at it on a case by case basis."[20]

Under that standard, courts must determine whether a suspect invoked his *Miranda* rights, equivocally invoked his *Miranda* rights, or did not invoke at all. A close look at the times when a statement has been found to be unequivocal, or clear, and when a statement is found to be equivocal shows that courts tend to follow particular guidelines when examining the facts of each case. For example, if the suspect expresses a "present desire" to do something, courts are likely to find that the statement is an unequivocal invocation.[21] By contrast, if a

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no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*."). This Comment discusses the right to counsel. *Berghuis* was incorrect in noting that there is no principled reason to adopt different standards for the two rights, as the U.S. Supreme Court has done so in other contexts. For example, the federal rule states that police may interrogate a suspect even after he has asserted his right to remain silent, as long as police "scrupulously honored" the suspect's right. *See* Michigan v. Mosley, 423 U.S. 96, 104 (1975) (citing Miranda v. Arizona, 384 U.S. 436, 474, 479 (1966)). Thus, the Federal Constitution provides more stringent protection of the right to counsel than it does the right to remain silent. *See* Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under* Miranda, 17 WM. & MARY BILL RTS. J. 733, 781 (2009). In Oregon, courts treat the two similarly. *See* State v. McAnulty, 356 Or. 432, 455, 338 P.3d 653, 669 (2014) (holding that when a suspect unequivocally invokes her right to remain silent, all interrogation must cease unless the suspect waives the right). In *McAnulty*, the suspect waived her previously invoked right to remain silent after she initiated conversation with police. *Id.* at 456, 338 P.3d at 669. However, the Oregon Supreme Court did not hold that a suspect must first initiate conversation after invoking her right to remain silent before police may obtain a waiver. Under the federal rule, sufficient passage of time may be enough to allow police to obtain a waiver of a previous invocation in order to continue interrogation. *See* Strauss, *supra*, at 779 (discussing the six *Mosely* factors for determining whether a suspect's rights were "scrupulously honored").

18 A suspect may also equivocally invoke his right to remain silent. In fact, many courts have held that silence itself is an equivocal invocation of the right to remain silent. Strauss, *supra* note 17, at 792.

19 State v. Brown, 276 Or. App. 308, 317, 367 P.3d 544, 549–50 (2016).

20 Melody Finnemore, *Some Say the Right to Silence Is Still Golden—But Not Everyone Agrees*, OR. ST. B. BULL., June 2016, at 17, 18.

21 *See* State v. Alarcon, 259 Or. App. 462, 467–68, 314 P.3d 364, 368 (2013) (comparing statements where a suspect asks "when can I" to situations where a suspect asks "will I have

suspect makes a statement that seems as though she is inquiring about her future options, the statement will likely be considered an equivocal, or ambiguous, invocation.[22] Thus, a question regarding a suspect's *Miranda* rights may be viewed as an equivocal invocation, while a definitive statement may be viewed as an unequivocal request for counsel. The guidelines are not perfect, however. One Oregon court found the following statement was an equivocal invocation: "This is something where I need to get a lawyer. I don't know what to do now."[23] The court determined that the suspect did not unequivocally invoke his *Miranda* rights based on that statement.[24]

Oregon courts seemingly recognize that the distinction between equivocal and clear invocations is a fine one and provide special rules governing interrogations where the suspect equivocally invokes his rights. For instance, the Oregon Constitution seemingly requires police officers to clarify whether the suspect wishes to have an attorney present during questioning even if the suspect only equivocally invokes his right to counsel. To properly clarify, police must ask only "neutral questions" aimed at determining whether the suspect intended to invoke his *Miranda* rights.[25] Clarification arguably has a similar effect as the *Miranda* warnings—like the warnings themselves, clarification helps inform suspects of their constitutional rights.[26]

However, as discussed below, the Oregon Supreme Court has never expressly held that the duty exists and therefore has not explained the contours of the rule. For example, the Oregon Court of Appeals held in *State v. Roberts* that the suspect's question, "Do I need one?" was not an equivocal request for an attorney.[27] The suspect asked whether he needed "one" immediately after he was read his *Miranda* warnings.[28] The court held that because "the only reasonable interpretation of defendant's question is that he had not yet formed any intent to invoke

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an opportunity to"—the latter situation is more likely to be considered an equivocal invocation).

22 *Id.*

23 State v. Field, 231 Or. App. 115, 118, 218 P.3d 551, 554 (2009).

24 *Id.* at 124, 218 P.3d at 557.

25 State v. Montez, 309 Or. 564, 572–73, 789 P.2d 1352, 1359 (1990).

26 *See* Roscoe C. Howard Jr. & Lisa A. Rich, *A History of* Miranda *and Why It Remains Vital Today*, 40 VAL. U. L. REV. 685, 705 (2006) ("What *Miranda* warnings were designed to do . . . is to strike a balance between law enforcement and the criminal suspect that gives the suspect, or any ordinary citizen, a moment to consider the rights bestowed upon them by the Constitution and make an informed decision about whether to waive those rights.").

27 State v. Roberts, 291 Or. App. 124, 133, 418 P.3d 41, 47 (2018).

28 *Id.* at 126, 418 P.3d at 44.

his right, and was seeking additional information that the detectives were not required to provide."[29] As discussed below, the duty to clarify *does* provide suspects with additional information regarding their *Miranda* rights. Therefore, questions about the rights themselves should be considered equivocal invocations, and officers should be required to clarify whether suspects wish to invoke their rights. But that does not mean the officers in *Roberts* were required to tell the suspect that he did need a lawyer. Instead, it means that the officers should have, at the very least, reminded the suspect that it was up to him, but if he wanted an attorney to be present during questioning he was entitled to one.

Other states follow the "per se" approach, which treats even ambiguous references to counsel as per se invocations.[30] Thus, even if a suspect makes an unclear reference to an attorney that is not "sophisticated" or in the "legally proper form," it is sufficient to invoke the right to counsel and end interrogation.[31] Notably, a statement that may be considered equivocal under Oregon law may be considered an adequate invocation in a state that follows the per se approach. If a statement indicating the suspect may have intended to exercise his right to counsel is adequately clear, all interrogation must cease until an attorney is made available to the suspect.[32]

By contrast, under the Federal Constitution, the standard for clarity is much higher—police may continue interrogation until the suspect is able to clearly articulate his desire to speak with an attorney.[33] Under the federal rule, called the "threshold of clarity" approach, courts must ask only whether the statement was clear or unclear. If the statement was clear, interrogation must end.[34] If it was unclear, officers can continue to ask questions.[35] While the federal rule may be easier for courts to adjudicate, it also makes it difficult to invoke *Miranda* rights

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29 *Id.* at 133, 418 P.3d at 47.

30 *See* People v. Traubert, 608 P.2d 342, 346 (Colo. 1980); State v. Elmore, 500 A.2d 1089, 1092 (N.J. Super. Ct. App. Div. 1985); Hunt v. State, 632 S.W.2d 640, 642 (Tex. Ct. App. 1982).

31 *Traubert*, 608 P.2d at 346 (quoting People v. Harris, 552 P.2d 10, 12 (Colo. 1976)).

32 *Id.*

33 *See* Davis v. United States, 512 U.S. 452, 459 (1994) (adopting the threshold of clarity approach).

34 *Id.*

35 *Id.*

because officers do not have to clarify the suspect's intentions when he is unable to clearly articulate his desire to invoke his rights.[36]

The United States Supreme Court adopted the threshold of clarity approach as the federal rule in *Davis*.[37] In doing so, however, it recognized there are problems with ignoring equivocal invocations. Justice O'Connor, writing for the majority, stated: "We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present."[38] The Court therefore recognized that some suspects may have difficulty meeting the threshold of clarity required to invoke their right to an attorney after *Davis*. However, in the next sentence, the majority ignored those concerns, noting that under the Federal Constitution, "the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves."[39]

Oregon courts have decided that requiring police to clarify equivocal invocations strikes the proper balance between honoring a suspect's constitutional rights and allowing police to thoroughly investigate crimes. If officers are required to clarify ambiguous invocations, it may be easier for suspects to invoke their *Miranda* rights. However, if after being asked clarifying questions, suspects remain unable to make it clear to police that they are asserting their rights, police may continue questioning.[40] Under the Oregon Constitution, therefore, suspects arguably have heightened protection compared to the protection provided under the Federal Constitution. However, under Oregon law, not every suspect who equivocally invokes his or her right to counsel receives the benefit of being asked clarifying questions. In the Oregon Supreme Court case *State v. Meade*, the court created an exception to the duty to clarify based on the rule of initiation.[41] Therefore, in cases in which the rule of initiation applies, police have no duty to clarify equivocal invocations. This Comment takes a second look at *Meade*.

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36 *See* Marcy Strauss, *Understanding* Davis v. United States, 40 LOY. L.A. L. REV. 1011, 1056 (2007) ("[T]here is some evidence to support the theory that women and minorities often phrase requests for counsel in ways that the courts interpret as ambiguous.").

37 *Davis*, 512 U.S. at 461.

38 *Id.* at 460.

39 *Id.*

40 *See* People v. Duff, 317 P.3d 1148, 1169 (Cal. 2014).

41 See discussion of *State v. Meade*, 327 Or. 335, 340, 963 P.2d 656, 660 (1998), in Part III below.

Although the decision was correctly decided, it is problematic that some suspects, who for whatever reason are unable to invoke their rights clearly, are not afforded the chance to clarify their intent. This Comment suggests a solution to that problem.

Part I of this Comment addresses the basic principles established by *Miranda* regarding the right to have counsel present during interrogation. Next, Part II looks specifically at Oregon's approach and the ongoing debate surrounding invocations. In doing so, this Comment will address critiques that *Meade* was inconsistent with prior Supreme Court decisions. Part II also argues that *Meade* was consistent with prior case law when it suggested that police officers have a duty to clarify equivocal invocations under the Oregon Constitution. As discussed in Part III, *Meade* adopted the rule of initiation announced in *Edwards v. Arizona* and *Oregon v. Bradshaw* under article I, section 12. In doing so, *Meade* held that in some situations, the duty to clarify may be obviated by the suspect's own actions.[42] In so holding, the court relied on the rule of initiation, which states that after a suspect invokes his right to counsel, police may not question the suspect any further unless the suspect himself reinitiates conversation with police.[43] While the rule of initiation was correctly applied, *Meade* brings to light a problem with the warnings themselves. This Comment addresses those problems. Ultimately, this Comment will argue that the Oregon Supreme Court should adopt a rule requiring police to clarify for suspects (or, rather, inform suspects in the first instance) *how* they should invoke their right to counsel at the outset of interrogation. Such a rule would ensure every suspect has the opportunity to benefit from the clarification rule, regardless of whether initiation occurs.

I
BACKGROUND

A. Miranda v. Arizona

The famous words "you have the right to remain silent" come from *Miranda*.[44] There, the Court laid out exactly what law enforcement must tell a suspect at the outset of interrogation and specified that a

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42 *Meade*, 327 Or. at 340, 963 P.2d at 660.

43 *See* Edwards v. Arizona, 451 U.S. 477, 484–85 (1981); Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983).

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

suspect must waive his rights before police begin questioning.[45] The waiver must be voluntary, knowing, and intelligent.[46] However, the *Miranda* decision did more than require police to warn suspects of their rights. The Court also stated:

> If, however, [the suspect] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.[47]

Thus, under *Miranda*, once a suspect is warned of his rights and waives them, he nevertheless may invoke them at any time during the interrogation. Additionally, *Miranda* seems to contemplate the possibility that a suspect may invoke his rights "in any manner" during interrogation.[48]

While *Miranda* warnings provide the suspect with valuable information, invocation is arguably more important—as set forth below, invocation is how suspects are able to assert control over interrogation. Without the ability to assert control over interrogation, the purpose of *Miranda* is not fulfilled. *Miranda* allowed courts to move away from the "voluntariness" analysis, but with the understanding that a suspect was able to invoke his or her *Miranda* rights at any time. If a suspect does not, for whatever reason, have the ability to invoke his or her rights, then there is no longer any reason to move away from the voluntariness analysis.[49]

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45 *Id.*

46 *Id.*

47 *Id.* at 444–45.

48 *Id.* at 445.

49 The Oregon Supreme Court eventually adopted the *Miranda* rule under article I, section 12, of the Oregon Constitution. *See* State v. Roble-Baker, 340 Or. 631, 638, 136 P.3d 22, 27 (2006). However, it does not appear Oregon has moved away from the voluntariness analysis in the same way. *See, e.g.*, State v. Belle, 281 Or. App. 206, 383 P.3d 327 (2016); State v. Rodriguez-Moreno, 273 Or. App. 627, 359 P.3d 532 (2015). If suspects were informed at the outset of interrogation *how* to invoke their rights, perhaps a bigger step away from the voluntariness test would be warranted under article I, section 12.

B. Edwards v. Arizona

Fifteen years after *Miranda*, the Supreme Court decided *Edwards*.[50] In *Edwards*, the defendant was charged with robbery, burglary, and first-degree murder.[51] The defendant was arrested at his home, transported to the police station, and subsequently read his *Miranda* rights.[52] The defendant stated that he understood his rights and was willing to talk to the police.[53] However, once he was informed of the charges against him, the defendant asked to discuss a plea arrangement stating, "I want an attorney before making a deal."[54]

The next day, two police detectives returned to talk with the defendant.[55] When the detention officer informed the defendant that two detectives wished to speak with him, the defendant stated that he did not want to talk.[56] The detention officer responded that the defendant "had to" do so.[57] Before interrogating the defendant, the police detectives informed him of his *Miranda* rights for a second time.[58] Thereafter, the defendant said that he was willing to talk to the detectives and implicated himself in the crime.[59]

The Court held that the defendant's statements were inadmissible because the police violated his Fifth Amendment rights.[60] In reaching that conclusion, the Court clarified what was first suggested in *Miranda*—when a suspect invokes the right to have an attorney present during interrogation, interrogation must cease until an attorney is made available to the suspect.[61] Because the suspect's statement, "I want an attorney before making a deal," was an invocation of the right to an attorney, the question was whether the defendant subsequently waived his rights when he agreed to talk to the police after hearing the *Miranda* warnings a second time.[62]

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50 Edwards v. Arizona, 451 U.S. 477 (1981).
51 *Id.* at 478.
52 *Id.*
53 *Id.*
54 *Id.* at 479.
55 *Id.*
56 *Id.*
57 *Id.*
58 *Id.*
59 *Id.*
60 *Id.* at 480.
61 *Id.* at 485.
62 *Id.* at 487.

The standard for establishing waiver at the outset of interrogation is set forth in *North Carolina v. Butler*.[63] There, the Supreme Court held that in order to establish a valid wavier, an "express written or oral statement of waiver" is usually strong evidence that the waiver was valid.[64] However, express waiver is not always necessary.[65] Instead, the question is "whether the defendant in fact knowingly and voluntarily waived the rights delineated in [*Miranda*]."[66] Thus, at the outset of interrogation, valid waiver can be established by initially warning the suspect of his *Miranda* rights as long as it is established that the suspect knowingly and voluntarily waived his rights, under the "particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."[67]

The Court in *Edwards* extended that holding, noting that a suspect may waive his rights even after he has invoked his right to have counsel present during interrogation.[68] But, under *Edwards*, the Court seemed to suggest that the standard for establishing a waiver after the suspect has already invoked his right to counsel is higher than the standard set forth in *Butler*.[69] The Court noted that "additional safeguards are necessary when the accused asks for counsel" such that a valid waiver cannot be established by showing that a suspect responded to further interrogation, even if the suspect was warned of his rights.[70] Rather, the Court established the rule of initiation. Unless a lawyer is made available to the suspect or the suspect initiates further communication with the police, there can be no more interrogation after a suspect invokes the right to have counsel present.[71]

However, the rule of initiation is limited. In a footnote, the Court noted:

> If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be "interrogation." In that event, the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and

63 North Carolina v. Butler, 441 U.S. 369 (1979).

64 *Id.* at 373.

65 *Id.*

66 *Id.*

67 *Id.* at 374–75 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

68 Edwards v. Arizona, 451 U.S. 477, 484 (1981).

69 *See id.*

70 *Id.*

71 *Id.* at 484–85.

> found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with authorities.[72]

Thus, in *Edwards*, the Court held that after a suspect invokes his right to counsel, police cannot obtain a waiver if they initiate conversation with a suspect.[73] Instead, the suspect himself must initiate the conversation.[74] *Edwards* also did not hold that initiation by a suspect, on its own, would constitute a waiver of a previously invoked right to counsel.[75] Instead the suspect must both reinitiate the conversation *and* knowingly and voluntarily waive his rights.[76]

C. Oregon v. Bradshaw

The United States Supreme Court later clarified that establishing a post-invocation waiver based on a suspect's initiation is a two-part analysis.[77] In *Bradshaw*, the Court reversed the decision of the Oregon Court of Appeals, which reversed the defendant's convictions for first-degree manslaughter, driving while under the influence of intoxicants, and driving with a revoked license.[78] The Oregon Court of Appeals reversed the defendant's convictions because it found that the defendant's *Miranda* rights were violated.[79]

When the defendant was taken to the police station, detectives advised him of his rights.[80] The defendant recounted details about the night, after which he was placed under arrest and again advised of his rights.[81] After a detective told the defendant his theory of what had happened that night, the defendant stated that he "[wanted] an attorney before it goes very much further."[82] Thereafter, the detective stopped interrogation.[83] However, later on, the suspect was transferred to a different location.[84] Sometime during transportation, the defendant

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72 *Id.* at 486 n.9.
73 *Id.* at 484–85.
74 *Id.*
75 *Id.* at 486 n.9.
76 *Id.*
77 *See* Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983).
78 *Id.* at 1039–41.
79 *Id.* at 1041.
80 *Id.*
81 *Id.*
82 *Id.* at 1041–42.
83 *Id.* at 1042.
84 *Id.*

asked the transporting officer, "Well, what is going to happen to me now?"[85] The officer responded, "You do not have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say—because—since you have requested an attorney, you know, it has to be at your own free will."[86] The defendant responded that he understood, and during the ensuing conversation the officer asked the defendant to take a polygraph test.[87] The defendant agreed, and the polygraph test indicated that the defendant was not telling the truth about what happened the night of the accident.[88]

The Oregon Court of Appeals held that any statements made after the suspect invoked his rights were inadmissible.[89] The court explained that although the defendant initiated the conversation with the officer, that initiation did not amount to a waiver of his rights after he invoked them.[90] Therefore police were barred from further questioning.[91] The Oregon Supreme Court denied review, but the United States Supreme Court reversed, explaining that the Oregon Court of Appeals misapplied the *Edwards* test.[92]

The Court explained that *Edwards* did not hold that initiation must also amount to a waiver of a previously invoked right to counsel.[93] Instead, it held only that, after a suspect invokes his right to counsel, a subsequent waiver can only be obtained when a suspect initiates conversation with police.[94] It explained:

> But even if a conversation taking place after the accused has "expressed his desire to deal with the police only through counsel," is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation.[95]

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85 *Id.*
86 *Id.*
87 *Id.*
88 *Id.*
89 *Id.* at 1042–43.
90 *Id.* at 1044.
91 *See id.*
92 *Id.*
93 *Id.*
94 *Id.*
95 *Id.* (quoting Edwards v. Arizona, 451 U.S. 477, 484 (1981)).

Therefore, the Court made clear that initiation by itself does not constitute a waiver, but police may obtain a waiver if the suspect initiates conversation with police.[96]

As discussed in more detail below, the rule announced in *Edwards* and *Bradshaw* was seemingly adopted under article I, section 12, by the Oregon Supreme Court in *Meade*. However, while *Butler* and *Edwards* decided the question of whether the suspect waived the right to have counsel present in the context of a clear invocation of his rights, the Court in *Meade* was faced with a question involving waiver in the context of an equivocal invocation. *Meade* held that, in cases where the suspect immediately initiates conversation with police, the police are not required to clarify a suspect's equivocal invocation of the right to counsel.[97] Therefore, in some cases police may never clarify to suspects that they have the right to invoke *Miranda* rights at any time, while in other cases police are required to provide suspects with such additional information.

II
ARTICLE I, SECTION 12: THE RIGHT AGAINST SELF-INCRIMINATION AND THE DUTY TO CLARIFY

A. Introduction

For a long time, Oregon's constitutional doctrine regarding the right against self-incrimination remained in lockstep with federal constitutional doctrine. However, the Oregon Supreme Court broke stride with the federal doctrine after the United States Supreme Court decided *Davis v. United States*. *State v. Montez* is the only case the Oregon Supreme Court decided that involved equivocal invocations before the United States Supreme Court decided *Davis*. Shortly after the U.S. Supreme Court decided *Davis*, the Oregon Supreme Court decided *State v. Charboneau*.[98] Both *Montez* and *Charboneau* stand for the proposition that a detective is permitted under article I, section 12, to ask clarifying questions after a suspect equivocally invokes his or her rights. However, because of the historical context in which these cases were decided, they also likely stand for the proposition that police are required to follow up with clarifying questions if a suspect makes an equivocal request for counsel. Many federal circuits at the time had

96 *Id.*

97 State v. Meade, 327 Or. 335, 342, 963 P.2d 656, 660–61 (1998).

98 State v. Charboneau, 323 Or. 38, 913 P.2d 308 (1996).

announced similar rules, so the Oregon Supreme Court's decisions in those cases were unsurprising.[99]

This section will discuss *Davis*, in which the United States Supreme Court definitively held that the Federal Constitution does not require police to clarify equivocal invocations of the right to counsel.[100] After the United States Supreme Court decided *Davis*, however, Oregon courts maintained that article I, section 12, requires officers to clarify equivocal invocations.[101] In *Meade*, the Oregon Supreme Court further confirmed this requirement.[102] Critics of *Meade* suggest that *Meade* misinterpreted *Montez* and *Charboneau* when it confirmed that article I, section 12, requires police to clarify equivocal invocations.[103] As set forth below, although the Oregon Supreme Court's analysis in *Meade* was consistent with its decisions in *Montez* and *Charboneau*, the Supreme Court should clarify the rule going forward.[104] The court in *Meade* suggested that if a suspect equivocally invokes his right against self-incrimination, law enforcement has a duty to clarify the suspect's intent.[105] The decision in *Meade* also correctly applied the two-step initiation rule announced in *Edwards* and *Bradshaw*, and therefore stopped short of expressly adopting an exception to the duty to clarify under the Oregon Constitution.

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99 *See* Ainsworth, *supra* note 9, at 301–12 (discussing the circuit split later resolved by *Davis*).

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

101 *See Meade*, 327 Or. at 342, 963 P.2d at 660–61.

102 *Id.*

103 Jacyntha Vu, *Self-Incrimination—The Interrogating Officers' Obligation to Clarify an Equivocal Request for Counsel May Be Obviated if the Suspect Independently Initiates Further Substantive Conversation Concerning the Charge Under Investigation.* State v. Meade*, 963 P.2d 656 (1998)*, 31 RUTGERS L.J. 1272, 1276 n.28 (2000) ("Under *Charboneau* and *Montez*, it would seem that the Oregon Supreme Court had followed the *Davis* opinion and decided not to require clarifying questions as well.").

104 It is the Oregon Department of Justice's position that article I, section 12, does not require police officers to clarify equivocal invocations. *See, e.g.*, Brief for Plaintiff-Appellant at 34, State v. Nichols, 361 Or. 101, 390 P.3d 1001 (2017), 2016 WL 5888062, at *17. The Department's position is understandable considering that the Oregon Supreme Court has not expressly held that such a requirement exists. Furthermore, a written opinion on the requirement would help provide guidance to law enforcement and lower courts in applying the rule. Interrogation is an adversarial proceeding and an important part of law enforcement's job. Although this paper submits that there is a duty to clarify under article I, section 12, the Oregon Supreme Court should address the contours of that duty. For example, what kind of questions should police ask? Is it enough to remind a suspect that he or she has *Miranda* rights, or must police specifically ask whether a suspect is invoking those rights?

105 *Meade*, 327 Or. at 341, 963 P.2d at 660.

B. State v. Montez

The Oregon Supreme Court heard *Montez* on direct appeal because cases involving the death penalty are appealable directly to the Oregon Supreme Court.[106] In that case, Detective Goodale, a Portland detective, travelled to Pocatello, Idaho, to interview the defendant regarding a murder because the defendant had been arrested in Idaho on unrelated charges.[107] The detective read the defendant his *Miranda* rights at the outset of the interview, and the defendant did not challenge the fact that he was "advised of, understood, and voluntarily waived his *Miranda* rights before talking."[108]

Instead, defendant asked the court to suppress his statements during the interview because the defendant claimed he invoked his rights after his initial waiver.[109] After the detective asked the defendant a question about another person who may have been involved in the murder, the defendant replied, "I think I need a lawyer to talk about the rest of it so I don't get linked up."[110] The detective then asked whether the defendant "was telling us that he wanted an attorney and did not want to talk with us anymore."[111] The defendant replied "no," so the detective reminded the defendant that he had the right to have a lawyer present during questioning.[112] The defendant stated "that was not what he wanted," so the detective asked again if he was "still willing to talk with us."[113] The defendant replied that he would "talk to [detectives] without one."[114] The detectives continued questioning the defendant, and the defendant eventually confessed to participating in the murder, but did not admit to actually committing the murder himself.[115]

Over the course of the next two days, the defendant agreed to polygraph testing.[116] After the polygraph administrator told the defendant that the tests indicated that the defendant was being

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106 State v. Montez, 309 Or. 564, 567, 789 P.2d 1352, 1356 (1990). In Oregon, cases involving death penalties are appealable directly to the Oregon Supreme Court. OR. REV. STAT. § 138.052(1) (2017).

107 *Montez*, 309 Or. at 567, 789 P.2d at 1356.

108 *Id.*

109 *Id.* at 571, 789 P.2d at 1358.

110 *Id.* at 568, 789 P.2d at 1357.

111 *Id.*

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.* at 568–69, 789 P.2d at 1357.

untruthful, the defendant told the polygrapher that he "did not want to talk to him anymore."[117] The polygrapher then turned the defendant back over to the detectives, who resumed their questioning.[118] During that time, the defendant still insisted that, although he had been involved in events surrounding the murder, it was his codefendant who had actually killed the victim.[119] The detectives, in response to the defendant's insistence that he did not commit the murder, returned the defendant to his cell.[120]

Soon after, the defendant asked to speak again to Detective Goodale, and asked that Goodale "bring his tape recorder."[121] When Goodale arrived, he re-advised the defendant of his *Miranda* rights.[122] It was during this conversation that the defendant made incriminating statements.[123] The defendant was charged and convicted on three counts of aggravated murder.[124] The trial court sentenced the defendant to death.[125]

On direct appeal, the defendant argued that the trial court erred in denying his motion to suppress the statements he made to Detective Goodale.[126] The trial court found that the defendant's statement "I think I need a lawyer to talk about the rest of it so I don't get linked up" was an ambiguous statement and that the detective's following statements were "a reasonable inquiry whether or not [defendant] wanted an attorney."[127] Therefore, the trial court found that the defendant's statements made during his interview with Detective Goodale were admissible.[128]

Without much analysis, the Oregon Supreme Court affirmed the decision of the trial court. The Supreme Court agreed that the defendant did not "unequivocally" invoke his right to an attorney, and the detective's clarifying questions were permissible because they did not

117 *Id.* at 569, 789 P.2d at 1357.
118 *Id.*
119 *Id.*
120 *Id.*
121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.* at 569–70, 789 P.3d at 1357–58.
125 *Id.* at 571, 789 P.2d at 1358.
126 *Id.*
127 *Id.* at 572, 789 P.2d at 1359.
128 *Id.*

"constitute further interrogation or badgering."[129] The detective's "neutral questions, intended only to clarify whether and to what extent defendant was invoking his right to counsel, did not probe beyond that limited and permissible inquiry."[130]

In holding that officers were permitted to ask clarifying questions, the court effectively announced that it would not follow the "per se" approach. Under the per se approach, ambiguous or equivocal requests for counsel are treated like unequivocal invocations. Thus, even if a suspect fails to clearly articulate his desire to have an attorney present during questioning, as long as the request is sufficiently clear to constitute at least an equivocal request for counsel, interrogation must end.[131] Under the per se approach, police are not permitted to ask clarifying questions.[132] Therefore, by holding that police are permitted to ask clarifying questions when a suspect makes an equivocal invocation of his right to counsel, the court in *Montez* held that Oregon would not follow the per se approach. Effectively, then, the court in *Montez* appeared to follow either the clarification approach or the threshold of clarity approach.

Notably, many federal courts at the time followed the clarification approach. In fact, at the time the court decided *Montez*, the Ninth Circuit required police to clarify ambiguous invocations.[133] Of course, the Oregon Supreme Court is not impeded from providing less protection to criminal defendants than the Federal Constitution provides nationally.[134] However, it is unlikely the Oregon Supreme Court would interpret the Oregon Constitution in a way that provides less protection to suspects than the Federal Constitution without a good reason for doing so. As Justice Brennan of the United States Supreme Court once stated:

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129 *Id.* (referencing Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983)).

130 *Id.* at 572–73, 789 P.2d at 1359.

131 See Justice Durham's dissent in *State v. Meade*, 327 Or. 335, 342–53, 963 P.2d 656, 661–67 (1998), for a discussion of the three approaches.

132 *See* People v. Traubert, 608 P.2d 342 (Colo. 1980).

133 *See, e.g.*, United States v. Fouche, 883 F.2d 1284, 1287 (9th Cir. 1987).

134 State v. Kennedy, 295 Or. 260, 262, 666 P.2d 1316, 1318 (1983) ("[A]ll questions of state law [must] be considered and disposed of before reaching a claim that this state's law falls short of a standard imposed by the Federal Constitution on all states."). Thus, practically speaking, if the Oregon Constitution provided less protection than the Federal Constitution, and the police officer's conduct violated the Fifth Amendment and not article I, section 12, Oregon courts could reverse a conviction on federal grounds, rather than heightening Oregon constitutional protections to meet United States Supreme Court standards.

> [S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretations of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law — for without it, the full realization of our liberties cannot be guaranteed.[135]

That sentiment was echoed by Justice Hans Linde of the Oregon Supreme Court, explaining, "State courts are returning to their state charters to deal with issues that for forty years they left to be debated and resolved by the national Supreme Court. The question in the state courts no longer is whether to give independent attention to state constitutional issues, but how."[136]

Justice Linde of the Oregon Supreme Court further summed up the relationship between state constitutions and the Federal Constitution by noting:

> Of course we pay attention and respect to Supreme Court opinions on issues common to the two constitutions, and it is to be expected that on many such issues courts will reach common answers. The crucial step for counsel and for state courts, however, is to recognize that the Supreme Court's answer is not presumptively the right answer, to be followed unless the state court explains why not. The right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand. The answer may turn out the same as it would under federal law. The state's law may prove to be more protective than federal law. The state law also may be less protective. In that case the court must go on to decide the claim under federal law, assuming it has been raised.[137]

Situations where state constitutions provide less protection than the Federal Constitution create more complicated cases for state courts. In Oregon, when a party raises constitutional issues on appeal, the Oregon Supreme Court analyzes the issue first under the Oregon Constitution before turning to the Federal Constitution.[138] As a practical matter,

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135 William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

136 Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 166 (1984).

137 *Id.* at 179.

138 *See, e.g.*, *Kennedy*, 295 Or. at 262, 666 P.2d at 1318; State v. Soriano, 68 Or. App. 642, 645, 684 P.3d 1220, 1222 (1984) (en banc) ("While many guarantees of the state and federal constitutions have their roots in the same sources, they are embodied in different

providing criminal suspects less constitutional protection under article I, section 12, than the Federal Constitution provides under the Fifth Amendment creates much more work for the Oregon Supreme Court. In every appeal, Oregon courts would be required to analyze the issue under state law, find that it does not protect the suspect, and then fully analyze the issue again under federal law to determine whether the suspect is protected under the Federal Constitution.

Additionally, when a criminal defendant raises only a state constitutional claim on appeal, but is protected only under the Federal Constitution (and not protected under the state constitution), courts have three options. First, courts can deny relief under the state constitution and decline to analyze the issue under the Federal Constitution because the defendant failed to raise the federal issue on appeal. Assuming the right is incorporated, however, such a course of action may violate the defendant's federal constitutional rights.[139] Second, courts may be in a position where they must grant a criminal defendant relief under the Federal Constitution even if the defendant never raises the issue.[140] Or—the third option—the state court could avoid the problem altogether and treat the federal constitutional protections as a floor for its state constitutional doctrine. It is no wonder, then, why state courts usually choose the third option and provide at least the same amount of protection to criminal defendants under state constitutions as provided under the Federal Constitution.[141]

Therefore, the Oregon Supreme Court needs a specific (and likely compelling) reason to provide less protection for criminal defendants under the Oregon Constitution than is provided under the Federal Constitution. Finding a specific and compelling reason may be difficult, as *Davis* is a widely criticized opinion. Many Fifth Amendment scholars believe that the "threshold of clarity" approach

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constitutions, with different ultimate interpreters, and may reflect variations in their values and purposes.").

139 *See* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. L. REV. 503, 522 (1985) ("[A] state denies and deprives rights and equality if it . . . denies redress for violations."). Of course if the court chose option two, a criminal defendant could raise the issue in a post-conviction proceeding. However, that is not as efficient as option number three.

140 *See generally* Sterling v. Cupp, 290 Or. 611, 614, 625 P.2d 123, 126 (1981); *Kennedy*, 295 Or. at 262, 666 P.2d at 1318 (discussing the relationship between the Oregon Constitution and the Federal Constitution).

141 *See* Brennan, *supra* note 135, at 495 ("Of late, however, more and more state courts are construing state constitutional counterparts of the provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased.").

established by *Davis*, which allows police to ignore equivocal invocations of the right to counsel, is inconsistent with *Miranda* itself.[142] *Miranda* specified that a suspect was free to invoke his rights "in any manner."[143] The threshold of clarity approach seems inconsistent with that phrasing—after *Davis*, suspects may not invoke "in any manner"; rather, they must invoke only in a clear manner.

Additionally, a survey of invocation cases since *Davis* found that there is evidence showing women and minorities have a difficult time invoking their rights.[144] Many others have echoed similar concerns.[145] Overall, Strauss found "there is clear evidence to support the proposition that women, minorities, and Caucasian males fail to demand an attorney in declarative, clear language. Instead, the use of questions, hedges, and imprecise language in the custodial interrogation setting is very common among all suspects of any race or gender."[146] Although the threshold of clarity approach may make it easier for police to attain confessions, that is not a compelling reason to follow the federal rule. The ease of eliciting confessions is accomplished by making it more difficult for criminal suspects to invoke their rights—particularly if the suspect is a woman or minority.

Considering that it is likely that the Oregon Supreme Court in *Montez* was operating under the assumption that the Federal Constitution may require officers to clarify ambiguous invocations, there is a small chance the court provided less protection than the clarification approach. Additionally, since *Montez* and *Charboneau* (discussed below), almost all Oregon appellate decisions regarding the issue have assumed, based on the permissive language in those cases, that article I, section 12, requires police to clarify equivocal

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142 *See* Strauss, *supra* note 36, at 1012 n.10 (collecting criticisms of *Davis v. United States*); C. Antoinette Clarke, *Say It Loud: Indirect Speech and Racial Equality in the Interrogation Room*, 21 U. ARK. LITTLE ROCK L. REV. 813, 820–21 (1999); Floralynn Einesman, *Confessions and Culture: The Interaction of* Miranda *and Diversity*, 90 J. CRIM. L. & CRIMINOLOGY 1, 32–33 (1999); Tom Chen, Note, Davis v. United States*: "Maybe I Should Talk to a Lawyer" Means Maybe* Miranda *is Unraveling*, 23 PEPP. L. REV. 607, 643 (1996); Samira Sadeghi, Comment, *Hung Up on Semantics: A Critique of* Davis v. United States, 23 HASTINGS CONST. L.Q. 313, 330 (1995); Alexa Young, Note, *When is a Request a Request?: Inadequate Constitutional Protection for Women in Police Interrogations*, 51 FLA. L. REV. 143, 144 (1999)).

143 Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

144 Strauss, *supra* note 36.

145 *See* Strauss, *supra* note 17, at 764 (discussing criticism of *Davis*).

146 Strauss, *supra* note 36, at 1057.

invocations.[147] While the court may have failed to clearly announce the rule, Oregon appellate courts seem to be operating under the assumption that article I, section 12, requires police officers to ask clarifying questions after a suspect equivocally invokes the right to counsel during interrogation.

C. Davis v. United States

After the Oregon Supreme Court decided *Montez*, the Supreme Court weighed in on the issue in *Davis*.[148] There, the defendant, a member of the United States Navy, was charged and convicted of unpremeditated murder.[149] During an interrogation conducted by Naval Investigative Service (NIS) agents, the defendant stated, "[m]aybe I should talk to a lawyer."[150] The NIS agents testified that, in response to defendant's statement about a lawyer:

> We made it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer . . . .[151]

The defendant then told the NIS agents that he was not asking for a lawyer and that he did not want a lawyer, after which the interview continued for another hour.[152]

The defendant appealed his conviction to the United States Military Court of Appeals, claiming that statements made during his interrogation were obtained in violation of *Miranda* because his statement "[m]aybe I should talk to a lawyer" was an invocation, and thus the detectives were required to end questioning.[153] The Court of Appeals disagreed, and found that the defendant's request for counsel was ambiguous and that the NIS agents properly clarified whether the defendant actually wished to invoke his rights.[154] The court also noted

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147 *See, e.g.*, State v. Avila-Nava, 356 Or. 600, 341 P.3d 714 (2014); State v. Hudson, 253 Or. App. 327, 290 P.3d 868 (2012); State v. Field, 231 Or. App. 115, 218 P.3d 551 (2009); State v. Holcomb, 213 Or. App. 168, 159 P.3d 1271 (2007).

148 Davis v. United States, 512 U.S. 452 (1994).

149 *Id.* at 454–55.

150 *Id.* at 455.

151 *Id.* (alterations omitted).

152 *Id.*

153 *Id.* at 456.

154 *Id.*

the different approaches that jurisdictions use when dealing with a suspect's equivocal request for counsel.

> Some jurisdictions have held that any mention of counsel, however ambiguous, is sufficient to require that all questioning cease. Others have attempted to define a threshold standard of clarity for invoking the right to counsel and have held that comments falling short of the threshold do not invoke the right to counsel. Some jurisdictions, including several federal circuits, have held that all interrogation about the offense must immediately cease whenever a suspect mentions counsel, but they allow interrogators to ask narrow questions designed to clarify the earlier statement and the accused's desires respecting counsel.[155]

Notably, the Military Court of Appeals had previously addressed the issue of whether police were permitted to ask clarifying questions after an ambiguous invocation and held that clarifying questions were in fact permitted.[156] Thus, when faced with the issue again in *Davis*, the Court of Military Appeals found that the defendant's statements were admissible because the officers properly clarified the defendant's ambiguous request for counsel, and thus the court determined that the defendant was not, in fact, invoking his right against self-incrimination.[157]

The United States Supreme Court affirmed.[158] Justice O'Connor wrote the majority opinion and was joined by four other Justices.[159] The Court held that the defendant's statement "[m]aybe I should talk to a lawyer" was not a clear request for counsel.[160] However, the Court did not analyze the issue any further. Instead, the Court held that, although it may be "good police practice" to clarify ambiguous statements to determine whether the suspect actually wants an attorney, police are not required to do so.[161] Instead, if a suspect's statement is not a clear request for counsel, police officers have no obligation to end

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155 United States v. Davis, 36 M.J. 337, 341 (C.M.A 1993) (internal quotations omitted) (citing Smith v. Illinois, 469 U.S. 91, 96 n.3 (1984) (compiling cases showing different approaches taken by various jurisdictions)). Before *Davis*, the Fifth, Ninth, and Eleventh Circuits had explicitly adopted the "clarification approach." *See* United States v. Mendoza-Cecelia, 963 F.2d 1467, 1472 (11th Cir. 1992); United States v. Fouche, 833 F.2d 1284, 1287 (9th Cir. 1987); United States v. Cherry, 733 F.2d 1124, 1130 (5th Cir. 1984).

156 United States v. Sager, 36 M.J. 137, 145 (C.M.A. 1992).

157 *Davis*, 36 M.J. at 342.

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

159 *Id.* at 453.

160 *Id.* at 462.

161 *Id.* at 461.

interrogation.[162] Therefore, the defendant's statements that he made to the police after he equivocally invoked his right to counsel were admissible at trial.[163]

D. State v. Charboneau

Shortly after the United States Supreme Court decided *Davis*, the Oregon Supreme Court decided *Charboneau*.[164] The court answered the same question as it did in *Montez*: Were the defendant's statements—made after he equivocally invoked his right to counsel and after the detectives asked clarifying questions—admissible? In *Charboneau*, the defendant asked a detective if he would "have the opportunity to call an attorney tonight."[165] In response, the detectives attempted to clarify whether the defendant wished to continue questioning.[166] They asked the defendant, "What do you want to do? Do you want to call or what? What option do you want to complete with regard to that?"[167] The defendant responded that he was willing to continue interrogation.[168]

The defendant argued that his statement was an unequivocal request for counsel and that any further questioning by the detectives violated his article I, section 12, constitutional rights.[169] The Oregon Supreme Court disagreed.[170] Instead, the court explained that "[i]n the totality of the circumstances, defendant's question simply does not constitute, as a matter of law, an unequivocal request for a lawyer."[171] Instead, the court agreed with the trial court's finding that the defendant's statement was "at most, an equivocal request."[172] After the defendant equivocally requested an attorney, the detective asked the defendant clarifying questions, intending to determine whether the defendant wanted to speak with a lawyer before continuing interrogation.[173] Therefore,

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162 *Id.* at 461–62.

163 *Id.* at 462.

164 State v. Charboneau, 323 Or. 38, 913 P.2d 308 (1996).

165 *Id.* at 52, 913 P.2d at 316.

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.* at 54, 913 P.2d at 317.

170 *Id.* at 55, 913 P.2d at 318.

171 *Id.*

172 *Id.*

173 *Id.* at 55–56, 913 P.2d at 318. Based on the court's reasoning, "neutral questions" likely means questions "directed only to whether defendant intended to invoke his right to counsel." *Id.* at 56.

citing *Montez*, the court held that the detective's questions "did not probe beyond that limited and permissible inquiry."[174] Thus, the defendant's article I, section 12, rights were not violated.[175]

The court in both *Montez* and *Charboneau* narrowly addressed the issue before it, but in doing so did not foreclose upon the possibility that police are required to clarify whether a suspect intended to invoke his rights after uttering an ambiguous statement regarding a lawyer. In both cases, the court was presented with a situation in which a detective asked clarifying questions after a suspect made an equivocal request for counsel. Thus, the question was whether a law enforcement officer is permitted to ask clarifying questions. Answering that question in the affirmative, the court foreclosed on the possibility that Oregon would follow the per se approach. That is so because the per se approach treats even equivocal references to counsel as per se invocations, so officers are not permitted to ask even clarifying questions.[176]

Furthermore, since the time *Charboneau* and *Montez* were decided, the Oregon Supreme Court and Court of Appeals have suggested in dictum that article I, section 12, not only permits but also requires officers to clarify ambiguous invocations.[177] In doing so, Oregon courts recognize the difficulty in invoking *Miranda* rights. As Justice Linde wrote, the right question is "what the state's guarantee means and how it applies to the case at hand."[178] Considering that the duty to clarify is likely the rule in Oregon, the question is what does that guarantee mean and how should it be applied in cases where the suspect reinitiates conversation with police after equivocally invoking the right to counsel? The Oregon Supreme Court partly answered that question in *State v. Meade*, discussed below.

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174 *Id.* at 56, 913 P.2d at 318 (quoting State v. Montez, 309 Or. 564, 572–73, 789 P.2d 1352, 1359 (1990)).

175 *Id.* at 58, 913 P.2d at 320.

176 State v. Meade, 327 Or. 335, 347, 963 P.2d 656, 663 (1998) (Durham, J., dissenting).

177 *See, e.g.*, State v. Nichols, 361 Or. 101, 106 n.3, 390 P.3d 1001, 1005 n.3 (2017) (noting that *Meade* suggested the duty to clarify exists under article I, section 12) ; State v. McAnulty, 356 Or. 432, 456–57, 338 P.3d 653, 670 (2014); State v. Sanelle, 287 Or. App. 611, 617, 404 P.3d 992, 996–97 (2017); State v. Alarcon, 259 Or. App. 462, 468, 314 P.3d 364, 368–69 (2013).

178 Linde, *supra* note 136, at 179.

III
A SECOND LOOK AT *STATE V. MEADE*

A. Exception to the Duty to Clarify

Meade was a criminal case where the defendant was charged with sodomy and sexual abuse.[179] Before his arrest, the defendant was traveling internationally. When the defendant arrived back in Portland, two police detectives greeted him at the airport and escorted him to the police station.[180] Once there, the detectives read the defendant his *Miranda* rights and told him that the purpose of the interview was to investigate allegations that he had sexually abused his girlfriend's daughter.[181]

After questioning the defendant for about an hour, the defendant stated that "if he needed a lawyer, he wanted one."[182] The detectives paused their questioning, but before they had the opportunity to say anything further, the defendant put his hands up as if to indicate that he wished for the detectives to refrain from speaking and said, "You've talked a lot. I want to say a few things."[183] The defendant continued talking about his relationship with his girlfriend and told the detectives that it seemed as though they wanted him to confess to something that he did not do.[184] One officer then stated, "No, I don't want you to confess to something that you didn't do, but I have this investigation and I believe you did it."[185] The detectives resumed questioning, eliciting several incriminating statements from the defendant.[186]

Before trial, the defendant moved to suppress statements he made during interrogation that he claimed were obtained in violation of his article I, section 12, right against self-incrimination.[187] The trial court granted the defendant's motion, finding that the defendant's statement that "if he needed a lawyer, he wanted one" was an equivocal request for counsel and that the police were then required to limit their questioning to clarifying questions to determine whether the defendant

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179 *Meade*, 327 Or. at 337, 963 P.2d at 658.
180 *Id.*
181 *Id.*
182 *Id.*
183 *Id.*
184 *Id.* at 337–38, 963 P.2d at 658.
185 *Id.* at 338, 963 P.2d at 658.
186 *Id.*
187 *Id.*

invoked his article I, section 12, rights.[188] The state appealed the trial court's decision.[189] The Court of Appeals reversed, and the Oregon Supreme Court affirmed.[190]

In affirming, the court assumed that the trial court correctly concluded that the defendant's statement about a lawyer was an equivocal request for counsel.[191] The State argued that the defendant waived his right to counsel by putting up his hands and stating, "You've talked a lot. I want to say a few things."[192] The issue, then, was whether "the interrogating officers' obligation, discussed in [*Montez* and *Charboneau*], to clarify an equivocal invocation of the right to counsel be obviated, if the suspect thereafter, and without prompting from the officers, initiates further substantive conversation concerning the charge under investigation."[193] By phrasing the issue in such a way, the court in *Meade* made clear that Oregon would not adopt the approach followed by federal courts after *Davis*—the "threshold of clarity" approach—and acknowledged that under *Montez* and *Charboneau*, police officers have a duty to clarify equivocal references to counsel.[194]

In *Meade*, the suspect's own actions eliminated the need for clarification because the statements he made after referencing counsel focused on the substance of the charges against him.[195] Thus, the court in *Meade* both reaffirmed that article I, section 12, requires police to clarify equivocal invocations and, as discussed below, announced an exception to that rule. While the exception is not incorrect, it brings to light problems with the current approach to clarification. Taking a second look back at *Meade*, Oregon courts must now consider what the constitutional requirement of clarification means in cases going forward.

The majority in *Meade* found that it did not matter whether the suspect invoked his rights because his subsequent actions indicated a "willingness and desire" to continue, which constituted an initiation of conversation with police.[196] The court in *Meade* then moved on to the

188 *Id.* at 338, 963 P.2d 658–59.
189 *Id.*
190 *Id.* at 338–39, 963 P.2d at 659.
191 *Id.* at 339, 963 P.2d at 659.
192 *Id.* at 339–40, 963 P.2d at 659.
193 *Id.* at 340, 963 P.2d at 659.
194 *Id.*
195 *Id.* at 341, 963 P.2d at 660.
196 *Id.*

second step of the analysis laid out in *Edwards* and *Bradshaw* and asked whether the suspect's waiver was knowing and voluntary.[197] In deciding whether the defendant knowingly and voluntarily waived his right to counsel, the court considered that the defendant

> is highly educated, having earned a doctorate degree in psychology; defendant was advised of his *Miranda* rights at the beginning of the interview, waived them immediately, and engaged in a lengthy, substantive discussion with the detectives about the case; the trial court found that defendant understood his rights when he waived them initially, that he was alert throughout the interview, and that his statements before the equivocal request for counsel were the result of free, unconstrained, and informed choice; and, finally, the period between the time when defendant equivocally invoked his rights and then initiated substantive discussion was very short. Nothing occurred during that period that reasonably could have altered defendant's understanding of his rights.[198]

However, something did occur during the period between the defendant's initial waiver and his equivocal invocation—the defendant indicated that he wanted a lawyer.

The majority opinion in *Meade* prompted a dissent. However, the dissent in *Meade* agreed with the majority's conclusion that if a suspect reinitiates conversation with police after making an ambiguous reference to counsel, the police may obtain a waiver and continue interrogation.[199] Instead, the dissent simply found that, under the facts presented in *Meade*, the suspect's actions did not sufficiently constitute a waiver.[200]

Thus, both the majority and the dissent in *Meade* came to the same conclusion—in some situations, the duty to clarify may be obviated if a suspect initiates further conversation with police.[201] Such a holding brings to light a problem in Oregon's law—some suspects who equivocally invoke will receive the benefits of clarification and some will not. The difficulty with such a conclusion is that Oregon courts recognize that it is difficult for a suspect to clearly invoke *Miranda* rights, which is part of the reason why clarification is required in the

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197 *Id.* ("Having concluded that defendant initiated the conversation with detectives, we turn to the remaining issue, *viz.*, whether the waiver was knowing and voluntary under the totality of the circumstances.")

198 *Id.* at 341–42, 963 P.2d at 660 (internal citation omitted).

199 *See* State v. Boyd, 360 Or. 302, 313, 380 P.3d 941, 947–48 (2016) (discussing *Meade*). *Boyd* made clear that the court in *Meade* relied on *Bradshaw* and *Edwards* in its "particular formulation of the test." *Id.* at 313, 380 P.3d at 948.

200 *Meade*, 327 Or. at 353, 963 P.2d at 666–67.

201 *Id.* at 341 n.4, 963 P.2d at 660 n.4.

first place. Thus, every suspect should receive the benefits of clarification, not just those suspects who do not reinitiate conversation with police.

Justice Durham, in his dissent, noted that the duty to clarify was "rooted in common sense."[202] He explained that the duty to clarify serves two purposes.[203] First, it helps determine whether, by equivocally invoking his right to counsel, a suspect "actually intended to exercise his personal right to seek legal advice before proceeding with the interview."[204] Similarly, a second purpose of the duty to clarify "is that it relieves police officers of the difficult burden of guessing whether a suspect's statement was an unequivocal or merely ambiguous invocation and, thus, protects the admissibility of subsequent incriminating statements should the suspect choose to make them."[205]

A third purpose (or rather, effect) of clarifying equivocal invocations was not mentioned in *Meade*. The third purpose of clarifying questions is to help inform suspects of their rights. Justice Durham noted, "In the face of an ambiguous invocation, asking a clarifying question provides *assurance* that the 'right to choose between speech and silence remains unfettered throughout the interrogation process.'"[206] Not only does clarification provide the courts with assurance that a confession was obtained voluntarily, clarification also provides the suspect with assurance that their rights will be honored. In other words, if police clarify whether a suspect wishes to invoke his right to have counsel present during interrogation, it serves the purpose of reminding the suspect that he has such a right in the first place.

The purposes of clarification matter in every case. Thus, even if the suspect reinitiates after an equivocal invocation, the need to clarify the suspect's invocation still matters. As discussed below, police should be required to clarify how to invoke *Miranda* rights at the outset of interrogation, so that even if the duty to clarify again is obviated, the suspect may have a better understanding of their rights in the first place. In other words, the *Miranda* warnings themselves should contain clarifying language explaining to suspects how to invoke their rights.

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202 *Id.* at 349, 963 P.2d at 665.

203 *Id.*

204 *Id.*

205 *Id.* at 349–50, 963 P.2d at 665.

206 *Id.* at 349 (quoting Connecticut v. Barrett, 479 U.S. 523, 528 (1987)) (emphasis in original).

B. New Clarification Rule

The purpose of clarification is better served if the warnings themselves clarify to the suspect how to invoke his or her *Miranda* rights. Coincidentally, the purpose of the *Miranda* warnings is markedly similar to the purpose of clarification. The purpose of the *Miranda* warnings is to inform suspects of their rights during questioning by the police and to help protect suspects from the "inherently coercive" environment of interrogations.[207] To determine whether the warnings given to suspects at the outset of interrogation are adequate, the legal test the Supreme Court developed is whether the warning "reasonably convey[s]" to the defendant his rights.[208] Oregon employs a similar standard—warnings are adequate if they "accurately and effectively" convey the substance of the suspect's rights.[209] However, while every jurisdiction requires that suspects must be informed of what their rights are, no jurisdiction currently requires police to inform suspects how to invoke their rights.[210] In fact, "there is little reason to believe police—who have ample incentives to avoid invocation" will provide suspects with guidance on how to invoke their rights if police are not required to do so.[211]

Furthermore, criminal defense lawyers have found that

> many suspects make statements during the process of police interrogation and are surprised to learn thereafter that they had a constitutional right to remain silent or have an attorney present during questioning. This pattern suggests that *Miranda* warnings as currently delivered by the police are not an effective means of informing suspects [of their rights] . . . . [N]otwithstanding the warnings, they believed either that their silence could be used against them as evidence of guilt or, more frequently, that by remaining silent they would forfeit their opportunity to be released on bail.[212]

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207 Miranda v. Arizona, 384 U.S. 533–34 (1966) (White, J., dissenting); *see also id.* at 458 (majority opinion) ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.").

208 David B. Altman, *Fifth Amendment—Coercion and Clarity: The Supreme Court Approves Altered* Miranda *Warnings*, 80 J. CRIM. L. & CRIMINOLOGY, 1086, 1103 (1990) (discussing Duckworth v. Eagan, 492 U.S. 195 (1989)).

209 State v. Vondehn, 348 Or. 462, 481, 236 P.3d 691, 703 (2010).

210 *See* Berghuis v. Thompkins, 560 U.S. 370, 409–10 (2010) (Sotomayor, J. dissenting) ("[T]he *Miranda* warnings give no hint that a suspect should use those magic words . . . .").

211 *Id.* at 410.

212 Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1827–28 (1987).

Others have suggested that the warnings actually encourage suspects to talk to police.[213] They claim that "[t]he warnings implicitly suggest to the suspect that the police are not only law-abiding, but that they are also fair and objective. If delivered in the proper tone, the warnings could even suggest to the suspect that the investigators are sympathetic, naive, or gullible."[214] A skilled investigator could easily adjust her tone to minimize the significance of the warnings. For example, the police could tell the suspect that they are "required" to give the warnings—implying that the particular suspect need not worry too much about them. In fact, there is nothing preventing police from doing so because it is true that police are required to read suspects their rights.

Thus, it is unsurprising that studies find that about eighty percent of suspects waive their rights after hearing *Miranda* warnings, despite the fact that it is typically not in their best interest to do so.[215]

It is also unsurprising that most suspects waive their rights given that the warnings themselves are confusing. A study analyzing the Flesch-Kincaid readability grade level of the standardized *Miranda* warnings given by Milwaukee police found that the warnings were difficult to fully understand.[216] The standardized warnings in Milwaukee include five separate parts:

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to consult with a lawyer before questioning and to have a lawyer present with you during questioning.

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[213] Steven B. Duke, *Does* Miranda *Protect the Innocent or Guilty?*, 10 CHAPMAN L. REV. 551, 558–60 (2007); Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-Frist Century*, 99 MICH. L. REV. 1000, 1003 (2001) ("[D]espite the fourfold warnings, suspects frequently waived their *Miranda* rights and chose, instead, to speak to their interrogators. Some researchers attributed this largely unexpected finding to the manner in which the detectives delivered the *Miranda* warnings, while others attributed it to the failure of suspects to understand the meaning or significance of their *Miranda* rights.").

[214] Duke, *supra* note 213, at 558.

[215] Anthony J. Domanico et al., *Overcoming* Miranda*: A Content Analysis of the* Miranda *Portion of Police Interrogations*, 49 IDAHO L. REV. 1, 13 (2012) (discussing studies by Paul Softley, Richard A. Leo, Paul G. Cassell, and Bret S. Hayman, which found that 80% of suspects waive their rights). In a different study, Domanico found that twenty-seven of twenty-nine suspects waived their *Miranda* rights. *Id.*

[216] *Id.* at 14 ("Given its Flesch-Kincaid readability scores, we can say with confidence that the *Miranda* warning used in Milwaukee is difficult to understand fully . . . .").

> 4. If you cannot afford to hire a lawyer, one will be appointed to represent you at public expense before or during any questioning, if you so wish.
> 5. If you decide to answer questions now without a lawyer present, you have the right to stop the questioning and remain silent at any time you wish, and the right to ask for and have a lawyer at any time you wish, including during the questioning.[217]

The study found that the first part of the warnings is easiest to understand—the Flesch-Kincaid readability score indicated that most second-graders would be able to understand that they have the right to remain silent.[218] The second part requires a reading level of 4.4, or that of most fourth graders.[219] From there, the warnings become much more difficult to understand. Part three and four require a reading level of 10.0 and 13.0.[220] Significantly, part five, which informs suspects that they may invoke their rights even after an initial waiver, was the most difficult to understand. Part five received a score of 18.7—meaning that in order to understand that a suspect is allowed to invoke his or her rights requires a reading comprehension level that some college students may not have.[221]

The Milwaukee warnings are better than others. In Oregon, for example, the warnings must "accurately and effectively" convey the information necessary to allow a suspect to knowingly and voluntarily waive his rights.[222] In one case, the officer told the suspect:

> It's my duty as a police officer to advise you of your rights. You have the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to an attorney. If you can't afford to hire an attorney, one will be appointed to represent you. If you do give a statement at any time, you can stop at any time you wish. Do you understand these rights?[223]

Even though the above warnings do not contain any information informing the suspect that he may invoke his right to an attorney at any time during questioning, the Oregon Court of Appeals found that the above warnings were adequate under article I, section 12.[224]

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217 *Id.*
218 *Id.*
219 *Id.*
220 *Id.*
221 *Id.*
222 State v. Vondehn, 348 Or. 462, 481, 236 P.3d 691, 703 (2010).
223 State v. Quinn, 112 Or. App. 608, 610–11, 831 P.2d 48, 50 (1992).
224 *Id.* at 616, 831 P.2d at 53.

The Milwaukee standard warnings analyzed in this study include more information than is constitutionally necessary in Oregon, but even the Milwaukee warnings tell the suspect only of the substance of his rights. In other words, the Milwaukee warnings fail to inform the suspect of how, exactly, to assert his rights. Thus, it is no surprise that the same study that showed eighty percent of suspects waive their rights at the outset of interrogation also showed that "almost no suspects [invoke] their rights after a valid waiver."[225] Additionally, suspects who are "better-educated and more affluent" may "have a clearer understanding of their rights" and therefore "will be inclined to assert them more directly."[226] Suspects who are familiar with the criminal justice process, perhaps because they have already been through the system, may also have a better understanding of their rights and therefore be better able to invoke them after an initial waiver.[227]

The Supreme Court recognized in *Berghuis* that a suspect who knows that he may invoke his rights at any time "has the opportunity to reassess his . . . immediate and long-term interests."[228] It is therefore important that a suspect knows he can initially waive his rights but then later on can change his mind and invoke them. The Oregon Supreme Court, in interpreting article I, section 12, of the Oregon Constitution, has decided that requiring officers to clarify equivocal invocations is the best way to protect that right. However, after *Meade*, not every suspect will benefit from the duty to clarify.

C. The Solution: "Mirandizing" Article I, Section 12

Every criminal suspect should have the opportunity to benefit from clarification under article I, section 12. *Meade* shows that is not the case. Take, for instance, the fact that Oregon courts treat some questions regarding a suspect's right to counsel as equivocal invocations. In *Charboneau*, for example, the court held that police were permitted to continue interrogation even though the suspect asked, "Will I have an opportunity to call an attorney tonight?"[229]

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225 Strauss, *supra* note 17, at 774.

226 LAWRENCE M. SOLAN & PETER M. TIERSMA, SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE 60 (2005).

227 Strauss, *supra* note 17, at 806.

228 Berghuis v. Thompkins, 560 U.S. 370, 388 (2010).

229 *Compare* State v. Charboneau, 323 Or. 38, 52, 55, 913 P.2d 308, 316, 318 (1996) (holding that the suspect's question, "Will I have an opportunity to call an attorney tonight?" was an equivocal invocation), *with* State v. Dahlen, 209 Or. App. 110, 117–18, 146 P.3d 359, 364 (2006) (finding the defendant's statement, "When can I call an attorney?" was an

Similarly, in *State v. Sanelle*, the suspect asked "Where's the lawyer?" immediately after police read him his *Miranda* rights.[230] The court in *Sanelle* found that the suspect's question was an equivocal invocation of the suspect's rights.[231] However, unlike the suspect's statements in *Charboneau*, the suspect's statements in *Sanelle* were suppressed. The different result in *Sanelle* appeared to turn on the fact that the suspect in that case did not reinitiate conversation with police. However, the court in *Sanelle* was likely reluctant to apply the rule announced in *Meade* to the case because the suspect's question indicated that the suspect likely did not understand the *Miranda* warnings in the first place.

Under the rule announced in *Meade*, if the suspect in *Sanelle* had initiated conversation with police, the police would have had no duty to ask clarifying questions. The suspect, even though he asked a question about his rights, would not have been entitled to any of the assurances contemplated by the dissent in *Meade* reminding him that he had the right to counsel during interrogation.

In *Sanelle*, immediately after the officers read the suspect his *Miranda* warnings, the suspect asked, "Where's the lawyer?"[232] The detective answered the question by saying that the suspect had not yet retained a lawyer and informed him that "he would receive court-appointed counsel in two days at defendant's arraignment hearing."[233] Then the detectives asked if the suspect was willing to talk to the detectives.[234] The suspect responded, "Yes, absolutely" and the officers began the interrogation.[235]

Even though the suspect's question "Where's the lawyer?" came in response to hearing his *Miranda* rights and before the officers obtained a waiver, the Oregon Court of Appeals held that the statement was an equivocal invocation of the suspect's article I, section 12, rights.[236] And, because the suspect made an equivocal invocation, under article

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unequivocal invocation). Thus, a question by a suspect asking about the nature of the rights themselves, such as in *Charboneau*, is an equivocal invocation, whereas a question indicating a "present desire to do something" indicates that a suspect unequivocally is invoking his rights. *Dahlen*, 209 Or. App. at 118, 146 P.3d at 364.

230 State v. Sanelle, 287 Or. App. 611, 625, 404 P.3d 992, 1001 (2017), *review denied*, 362 Or. 482, 412 P.3d 199 (2018).

231 *Id.*

232 *Id.* at 613, 404 P.3d at 994.

233 *Id.* at 627, 404 P.3d at 1002.

234 *Id.* at 614, 404 P.3d at 995.

235 *Id.*

236 *Id.* at 625–26, 404 P.3d at 1001.

I, section 12, the officers were required to clarify the suspect's statement.[237] However, the detective's response to "where's the lawyer"—that the defendant had yet to retain counsel and that he would get one at arraignment—did not satisfy the clarification requirement.[238] The court reasoned that the detective's response clarified the defendant's right to court-appointed counsel under article I, section 11, of the Oregon Constitution.[239] Of course, the right to counsel under article I, section 11, is different from the right to counsel under section 12. A suspect's right to counsel under article I, section 11, only guarantees the right to an attorney at trial and during preparation for trial after formal charges have been made.[240] Here, the state had not yet charged the defendant, so only his right against self-incrimination under article I, section 12, applied.[241] Because the officer answered the suspect's question regarding his rights under article I, section 11, it may have misled the suspect into believing he did not have the right to an attorney during questioning.[242]

At first glance, the court's holding in *Sanelle* seems odd. The detective's response to the suspect's question was, after all, a truthful answer to the suspect's question. However, conflating the two rights may also have misled the suspect into thinking that he did not have the right to end interrogation until the officers provided him with an attorney. Therefore, the court's holding in *Sanelle* could mean that a true statement regarding a closely related, yet different, right was enough to mislead the suspect so that there could no longer be a presumption that he understood the warnings.

Furthermore, if the officer in *Sanelle* had instead asked a clarifying question, the question may have confused the suspect even further. As the Oregon Supreme Court explained in *Meade*, to clarify whether a suspect intended to invoke his *Miranda* rights, an interrogating officer may only ask "neutral questions . . . directed solely at determining whether the suspect was or was not invoking the right to counsel."[243]

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237 *Id.* at 627, 404 P.3d at 1002.

238 *Id.* at 627, 404 P.3d at 1002.

239 *Id.* at 628, 404 P.3d at 1002. Article I, section 11, of the Oregon Constitution states: "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel . . . ."

240 State v. Davis, 350 Or. 440, 472, 256 P.3d 1075, 1093 (2011).

241 *Sanelle*, 287 Or. App. at 627–28, 404 P.3d at 1002.

242 *Id.* at 628, 404 P.3d at 1002.

243 State v. Meade, 327 Or. 335, 340, 963 P.2d 656, 659 (1998).

Asking a suspect whether he or she intended to invoke the right to counsel may be a useless endeavor if the suspect does not understand what that right means.

At the same time, there may be situations where an officer's *failure* to clarify an equivocal invocation confuses the suspect. Failing to clarify a suspect's attempt at invoking his right to counsel may lead the suspect to believe that he cannot invoke the right during interrogation. And, after *Meade*, the chances of such a situation occurring are real.[244] To avoid this problem, the Oregon Supreme Court should require that officers inform suspects how to invoke their rights as part of the warnings themselves. Adding clarifying language to the current warnings ensures every suspect will benefit from the duty to clarify, avoiding the problem created by the exception to the duty set forth in *Meade*.

The Oregon Supreme Court has been asked to improve on the warnings before, but it has declined to do so.[245] In *State v. Sparklin*, the court declined to add language to the current warnings because "the convenience of a single text exceeds any gain from improving that text."[246] At the time *Sparklin* was decided, however, the Oregon Supreme Court had not yet decided whether article I, section 12, required warnings at all. In fact, three years after *Sparklin* was decided, the Oregon Supreme Court noted in a plurality opinion that article I, section 12, did *not* require warnings.[247] In subsequent cases, the Oregon Supreme Court seemingly backtracked the plurality opinion in *Smith*.[248] Eventually, the Oregon Supreme Court decided that article I, section 12, provides an independent basis for providing warnings.[249]

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244 *See, e.g.*, State v. Field, 231 Or. App. 115, 124, 218 P.3d 551, 557 (2009) ("Based on all the circumstances, we conclude defendant did not unequivocally invoke his right to counsel at that time. Although, as part of his statements to Harvey, defendant observed that the situation was one where a lawyer would be needed, he continued talking to the officer, discussing the substantive issues of the investigation before the officer could ask any clarifying questions."); State v. Kramyer, 222 Or. App. 193, 198–99, 194 P.3d 156, 159 (2008) (finding suspect requested a lawyer but then reinitiated conversation with police). In the most recent case on the issue, *State v. Wirkkala*, 290 Or. App. 263, 269–70, 414 P.3d 421, 425 (2018), the state unsuccessfully compared defendant's conduct to that evaluated in *Kramyer*.

245 State v. Sparklin, 296 Or. 85, 89, 672 P.2d 1182, 1184 (1983).

246 *Id.*

247 State v. Smith, 301 Or. 681, 683, 725 P.2d 894, 895 (1986).

248 *See* State v. Brown, 100 Or. App. 204, 212–15, 785 P.2d 790, 795–96 (1990) (en banc) (Richardson, J., concurring) (discussing the "Mirandization" of article I, section 12).

249 *E.g.*, State v. Roble-Baker, 340 Or. 631, 638, 136 P.3d 22, 27 (2006).

Case law surrounding article I, section 12, indicates that the Oregon Supreme Court's statement in *Sparklin*—that a single set of warnings is more convenient than any benefit gained from improving the warnings—is no longer applicable. The Oregon Supreme Court has indicated it is willing to provide more protection for criminal suspects under article I, section 12, than the United States Supreme Court provides under the Fifth Amendment. Requiring police officers to clarify ambiguous invocations of the right to have an attorney present during police questioning is just one example. Article I, section 12, requires police to provide a suspect with *Miranda* warnings when a suspect is in custody or in compelling circumstances, as opposed to the Fifth Amendment, which only requires warnings when a suspect is in custody.[250] Additionally, the voluntariness test is very much alive and well in Oregon.[251] Under the Fifth Amendment, "giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation tends to end with the finding of valid waiver."[252]

Furthermore, improved warnings may be more consistent with *Miranda* itself. It honors the principle that a suspect must be given his rights and understand them before police can obtain a waiver. Because waiver must be both "knowing" and "voluntary," police should be required to clarify the words needed to invoke a suspect's rights under article I, section 12, in order to obtain a valid waiver. Otherwise, a suspect may not be as fully informed of his constitutional rights as other suspects who equivocally invoke. Additionally, if the warnings themselves were improved, perhaps there would be less reason for courts to decide issues of voluntariness. If suspects were more fully informed of their rights, and had the opportunity for those rights to be "clarified" to them if they failed to unequivocally invoke, there would be less reason to conduct *post hoc* inquiries into the circumstances of an interrogation.

The additional language should clarify that if a suspect wishes to end interrogation, he must tell the officer that he no longer wants to answer

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250 *Id.*

251 *See, e.g.*, State v. Powell, 352 Or. 210, 230, 282 P.3d 845, 856 (2012); State v. Ely, 237 Or. 329, 332, 390 P.2d 348, 349 (1964) ("In this state, confessions and admissions are initially deemed to be involuntary. Before either can be received into evidence, the state has the burden of showing that it was voluntarily made, without the inducement of either fear or hope.").

252 Missouri v. Seibert, 542 U.S. 600, 608–09 (2004).

questions. The language should also clarify that if a suspect does not want to be interrogated without a lawyer present, she must tell the interrogating officers that she wants a lawyer. Such language should be short, straightforward, and easy to understand. For example, the added language could be: *"If you'd like to end this interview at any time, or to consult an attorney during this interview, you should say, 'I want an attorney' or 'I'm done talking.'"*

Requiring officers to tell suspects how to invoke their rights is consistent with constitutional principles already established. Article I, section 12, of the Oregon Constitution likely requires officers to clarify equivocal invocations.[253] Telling suspects the exact words they must use to invoke their rights at the beginning of interrogation is consistent with the purposes of that requirement. Instead of waiting until the suspect makes an ambiguous statement, it makes sense to give the suspect all the information he or she needs at the outset of interrogation in order to "make a more informed decision, either to insist on silence or to cooperate. When the suspect knows that *Miranda* rights can be invoked at any time, he or she has the opportunity to reassess his or her immediate and long-term interests."[254] Thus, the duty to clarify is still present, and officers still must clarify ambiguous invocations made during interrogation. But, to ensure that every suspect enjoys the protections afforded by the duty to clarify, the warnings themselves should clarify how to invoke at the outset of interrogation.

CONCLUSION

The measure of validity for any constitutional rule is whether such a rule is applied equally in similar cases. Because *Meade* created an exception to the duty to clarify, not all suspects receive the benefits of clarification. Under *Meade*, some suspects may receive less information about their *Miranda* rights than others, even though each may have made equivocal requests for counsel. Thus, courts must not ask only "what the state's guarantee means and how it applies to the case at hand."[255] Courts are also tasked with the duty to effectuate the purpose of constitutional rules—and by doing so, constantly improve constitutional rights. In adopting the duty to clarify, Oregon has decided to provide more protection for its citizens under article I,

253 *See* discussion *supra* Part II.

254 Berghuis v. Thompkins, 560 U.S. 370, 388 (2010).

255 Linde, *supra* note 136, at 179.

section 12. Adding clarifying language to *Miranda* warnings simply ensures that (1) suspects have the tools they need to control interrogation if they wish, and (2) every person who—for whatever reason—does not clearly invoke his or her rights nevertheless receives the benefits of clarification.