Miranda v. Arizona requires police warn suspects they have the right to remain silent and the right to counsel. It also requires that if a suspect invokes his right to remain silent or his right to counsel, the police must terminate the interrogation. But the warnings do not tell the suspect he has the right to end the questioning, or how he may end it. Worse, despite a failure to explain the right, the Court in 2010 in Berghuis v. Thompkins, required that suspects invoke the right “unambiguously.”

This requirement—that suspects invoke unambiguously a right they do not know exists—has created tremendous uncertainty in lower courts. These courts have no concrete standard against which to measure whether an assertion of the right was unambiguous. This article surveys the recent case law to show how a test that was supposed to simplify whether suspects had invoked their right by imposing an objective, plain meaning test has simply shifted the debate and confusion to what counts as “unambiguous.”

I. INTRODUCTION

The Court in Miranda v. Arizona required police warn suspects they have the right to remain silent and the right to counsel during any interrogation. But Miranda also created an important new right for suspects that scholars rarely discuss expressly: the right to cut off police questioning. Indeed, the Court in Miranda identified lengthy questioning as a chief culprit in creating a potentially coercive atmosphere, compounded by a suspect’s belief that the police will interrogate until he talks. Cases of course report instances of interrogations lasting hours or days. The Court therefore gave suspects the right the end the interrogation at any time they wished.

But in 2010, the Court in Berghuis v. Thompkins made clear that suspects must invoke this right. They must express to the police that they wish to end the interrogation. Merely remaining silent will not, in itself, indicate to the police...
that they should stop the interrogation. Moreover, the Court required that suspects invoke this right to cut off police questioning unambiguously.

The Court’s requirement, that suspects invoke the right to cut off questioning and do so unambiguously, seems sensible but becomes unfair when we consider that the police never tell suspects they have the right to cut off questioning. Rather, the *Miranda* warnings merely tell the suspect she has the “right to remain silent.” This warning about remaining silent does not alert the ordinary person that they may also cut off the questioning.

The Court has thus played a strange linguistic trick on suspects: to end the questioning, to assert one right, you must unambiguously invoke another right. You, lay person, must understand that the law has created a strange legal fiction in which the words “remain silent” actually mean “police must stop questioning.”

Under the earlier case of *Davis v. United States*, the same principles apply to the right to counsel during interrogation. If the suspect invokes the right to counsel, the police must end the questioning. But nothing about the warnings tells suspects that they may end the interrogation by asserting a different right, the right to counsel.

This article shows how the Court’s failure in *Berghuis* to warn suspects that they have a separate right to cut off questioning and how to invoke it, coupled with the requirement that those same suspects invoke the right unambiguously, has created needless confusion for police and litigation in the courts. This article surveys the recent lower court case law. It shows that the goal of *Berghuis* and *Davis*, to create a bright-line, objective test, has failed to come to fruition. The test has shifted the uncertainty from whether the suspect has invoked to whether he has done so unambiguously.

More troubling, the case law often reveals courts uncommonly eager to find that suspects have failed to invoke—even when their statement literally invokes. Courts will point to context, or a suspect’s subjective motivation for invoking, or claim the suspect merely wishes to stop discussing a particular topic, to find that he or she has not invoked.

In Part I, this article first summarizes *Miranda*’s new right—the right to cut off police questioning—before considering the more recent Court requirement that suspects invoke the right to cut off police questioning unambiguously. Part II then surveys the lower court cases applying this test.

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5. *Id.* Technically, if a suspect requests a lawyer, the police may supply one and then continue the questioning; of course, the police almost never do, because a lawyer will simply tell his client to remain silent. As a result, when a suspect requests counsel, they effectively invoke the right to end questioning.
II. PART ONE

The Court in *Miranda* created numerous new rights that we must disentangle before we can explore that particular right at issue in this article: the right to cut off police questioning.

First, in *Miranda* and the cases immediately preceding it, the Court began to apply the Fifth Amendment right against self-incrimination to the states and the police stationhouse. But this shift alone did not make much difference because the Court had already used the Due Process Clause of the 14th Amendment to regulate police interrogations.

Rather, the big step in *Miranda* was to create a set of additional protective rights that would help protect the central Fifth Amendment right to remain silent as against government coercion. The first of these rights, of course were the warnings themselves. The Court held that before the police interrogate a suspect who is in custody, they must provide the four familiar warnings.

But it is important to understand that these warnings, and the requirement that they be read, are contingent upon several facts. First, the suspect must be in custody. Second, the police must be questioning the suspect. In other words, the police may question a suspect on the street during a traffic stop without reading the *Miranda* warnings, and the police may arrest a suspect without the warnings as long as they do not question him.

There remains a third, often ignored contingency, however: the police only have to warn the suspect if they are going to use his statements at trial. This is not a test but a consequence. In other words, there is no test that tries to determine at the time whether the police intend to use the suspect’s words against him. Rather, as a later rule of evidence, a suspect’s statements will not be admissible at trial if they were obtained in violation of *Miranda*.

But conversely, if the police question a suspect without providing the warnings, or continue to question a suspect after she has invoked the right to remain silent, the police have not actually “violated” any right yet. The violation of the right only becomes complete upon introducing the statement at trial.

Put another way, if the police purportedly violate *Miranda* but then never prosecute the suspect, that suspect has no right of action against the state for a violation of any right. For example, in *Chavez v Martinez*, the police questioned the suspect without warnings and in violation of *Miranda*. He was never actually charged or brought to trial. He sued, and the Court held that the police conduct

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12. Though splintered, a majority agreed that the Fifth Amendment provided no standalone Section 1983 claim.
did violate Miranda but that this violation did not give rise to a claim or cause of action. The police did not violate any right of the defendant by questioning him in violation of Miranda since they did not subsequently attempt to use those statements. (The police did violate due process, possibly, for other reasons).

The Ninth Circuit\textsuperscript{13} has similarly held that the violation of the Fifth Amendment becomes ripe when the government introduces a person’s statement at some later criminal proceeding such as a grand jury or a hearing; it need not necessarily be a formal trial.

This contingency will become relevant below when we discuss suspects who invoke the Miranda right to counsel contingent on them being charged. Thus, when a suspect says, “I want a lawyer if you’re going to charge me,” this contingency merely reflects the contingency built into the right itself. A suspect does not have a standalone right to counsel during questioning if the state does not use her statements against her.

With these contingencies in mind, we can now turn to the warnings themselves. The Court in Miranda required police to tell suspects they have four basic rights when in custody and subject to interrogation. First, they have the “right to remain silent.” Second, they are warned that if they speak, what they say can be used against them. Third, they have the right to counsel. And fourth, if they cannot afford counsel, the state will provide it.

Again, it is important to emphasize that this “right to counsel” is contingent on questioning and on later use of any statement. In other words, if, after the warnings, the police simply put the suspect in a cell without questioning him, and the suspect says, “Hey, where’s my lawyer,” the police do not actually have any duty to supply a lawyer. Only if they question him must they supply a lawyer, and, again, only if the state uses any statements at trial does the failure to provide a lawyer violate any actual right of the defendant.

We can contrast this Miranda right to a lawyer, a Fifth Amendment right to counsel if you will, with the true, Sixth Amendment right to counsel that arises later, once the state has formally charged a defendant by way of indictment, criminal information, or some other means. At that point, a defendant truly can demand a lawyer, at least at critical phases such as a suppression hearing, a lineup, a plea negotiation or, of course, trial.

\textbf{A. The Missing Right}

Perhaps one of the most important rights the Court created in Miranda was the right of a suspect to terminate the interrogation. As the Court made clear, if a suspect invokes his right to remain silent, the police must end the questioning. If the suspect requests a lawyer, the police must either provide a lawyer, or cease the questioning. In nearly all cases, the police will not supply a lawyer but rather cease questioning.

\textsuperscript{13} Crowe v. County of San Diego, 608 F.3d 406 (9th Cir. 2010).
As a result, the right to counsel, in practice, operates almost exactly like the right to remain silent: as a trigger to ending the interrogation. That is, if a suspect wishes to end the interrogation, she must either say, “I wish to remain silent,” or “I want a lawyer.” Either incantation will require that the police stop questioning.

The Court in *Miranda* considered this right to cut off questioning to be essential to the collection of rights it was creating to address the inherently coercive atmosphere of police stationhouse questioning. One of the chief problems it identified was the practice of police in indefinite questioning. A typical suspect will believe that the police will continue to interrogate him until she talks, and so she might as well give in and talk.

The Court sought to address this coercive effect of endless questioning by supplying suspects with this powerful new tool: the power to end the interrogation. Before *Miranda*, a suspect always had the inherent and Fifth Amendment right to remain silent in the sense that he did not need to speak. He could simply remain silent.

But this right of a suspect to literally not speak did not mean that the police had any obligation to cease questioning, and of course they often would continue to question a suspect who remained silent, or spoke only sporadically. Again, the Court in *Miranda* worried that these lengthy interrogations would wear down suspects who in theory wished to remain silent.

The new right to cut off questioning thus came as a revolution. Now, the suspect need merely recite the magic words and the police must stop questioning. The suspect can invoke this right immediately, with the result that the police cannot question him at all, or the suspect can invoke the right at any time during the interrogation. This latter rule also changed existing Fifth Amendment case law.

This new right to *selectively* speak or end questioning represented a new rule as well. Before *Miranda*, if a person began to testify, say on direct examination at trial or in testimony before Congress, that person could not then selectively invoke the Fifth Amendment right to remain silent as against even incriminating questions on cross examination. A person who testifies on a given subject usually waives their Fifth Amendment right to remain silent.

But *Miranda* said this rule does not apply to police interrogations. A suspect can selectively invoke the right to remain silent and the right to cut off questioning. A suspect can say self-serving, positive things, and then refuse to answer follow up questions designed to test the truth of his assertions. Again, *Miranda* gave suspects this new, powerful tool to help dispel the coercive atmosphere of in custody police interrogations.

Indeed, at the time of the writing of *Miranda*, Chief Justice Earl Warren recognized he was creating a new right in suspects not only to remain silent but...
also to end the interrogation with a few magic words. We know this because Warren circulated a draft of his *Miranda* opinion to Justice Brennan only, seeking comments. In a letter back to the Chief Justice, Brennan noted that the *Miranda* opinion creates this new right to cut off questioning.

Another problem which appears for the first time in this summary paragraph is whether “right to silence” means merely a right not to answer questions or, additionally, a right to control the course of questioning, to the extent of being able to enforce a wish that interrogation cease.

Perhaps the chief flaw in the *Miranda* case, however, is that the opinion creates this new, powerful right for suspects to end questioning, but never requires that police warn suspects they have this right. The warnings tell suspects they have the right “to remain silent,” but nothing about that right tells them they have the additional, perhaps more powerful right to end the questioning. Indeed, after having been warned they have the right to remain silent, if the police nevertheless continue to question them (as they may), a reasonable suspect would likely not realize that she need merely say, “I wish to remain silent,” to end the questioning.

Again, Justice Brennan in his letter to the Chief Justice made precisely this point. He noted that the opinion created a right to terminate questioning but did not tell suspects they have this right. He wondered whether it would not be better to warn suspects they have this right so they can employ it when necessary.

The accused must be told only that he need not answer . . . Should he not be told of his full power?

The Chief Justice’s clerks, in their memo to the Chief Justice, summarized Brennan’s suggestion but wrote that it would be better not to include such an additional warning informing suspects they could cut off questioning. They did so not because they disagreed with the suggestion on its own terms, but to ensure the opinion was internally consistent with other sections. In particular, in an earlier section, the opinion pointed to the long-standing FBI warnings as justification for requiring the *Miranda* warnings, and those FBI warnings did not warn of any right to cut off questioning. The clerks worried that their reliance on

18. Id.
the FBI practice would be undermined if they deviated from the warnings the FBI supplied suspects.\(^{19}\)

As a result, the final opinion in *Miranda* mirrored the draft; it created and emphasized a new, powerful right for suspects—the right to cut off questioning—but deliberately did not provide suspects with a warning that they had such a right.

A corollary follows: by failing to inform suspects they have the right to end questioning, the police also fail to give suspects the language with which to invoke this right. This matters because the Supreme Court has more recently required that suspect invoke the right to cut off questioning *unambiguously*:\(^{20}\) That means they must invoke the right to remain silent or the right to a lawyer unambiguously before police must cease questioning.

The problem, of course, is how can we expect a suspect to invoke a right unambiguously when we neither tell her she has such a right or name it in a way that she has the language to invoke it. After all, the actual right at issue is the right to cut off questioning. But the words needed to invoke it, because of a legal fiction, are either “I wish to remain silent,” or “I want a lawyer,” neither of which, on their face, actually relate to the more specific right of cutting off questioning.

Finally, as a practical matter, police have largely followed *Miranda* by limiting their warnings to those required. According to one study surveying *Miranda* warnings actually given in 560 jurisdictions, nearly all—98.2%—failed to warn suspects they enjoy a right to end the interrogation.\(^{21}\)

I will elaborate upon this standard of unambiguous invocation further in the next two subsections.

1. Right to Counsel

The unambiguous invocation rule started first with invoking the right to counsel before it migrated to the right to remain silent. In *Davis v. United States*,\(^{22}\) the defendant said, “Maybe I should talk to a lawyer.” The Court held this was not an unambiguous request for counsel and therefore did not trigger the right to counsel (meaning the right to cut off questioning). As a consequence, the police were free to continue questioning despite this purported invocation.

Justice Souter, in concurrence, would have required a rule that if a suspect makes an ambiguous request, the police must seek clarification on the lawyer question before continuing with substantive interrogation about the crime. He

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also said that in this case the police had sought clarification, and the defendant clarified that he did not require a lawyer before he would answer questions. Since the police satisfied Justice Souter’s rule, he concurred in the judgment.

But the majority rejected Justice Souter’s rule and held that the police do not need to seek clarification. If the suspect makes an ambiguous invocation only, the police can simply continue substantive questioning about the crime, though the Court indicated it might be better practice to seek clarification.

The Court justified the rule on several grounds. First, the right to a lawyer during interrogation, and the right to end questioning upon invocation, is essentially a right invented by the Supreme Court in *Miranda* and *Edwards*. After all, the Court wrote, the true Sixth Amendment right to counsel does not attach until later, after the state has commenced a case against the defendant. Suspects in police custody have no constitutional right to a lawyer. The *Miranda* right to counsel, or to cut off questions without counsel, is a prophylactic protection not required by the constitution directly.

The Court did not quite expressly make the logical link, but it suggested that this sub-constitutional status of the *Miranda* right to counsel means that it should apply only if the suspect unambiguously invokes. Whether this is simply politics, a result-oriented way to narrow the right, or something else remains elusive.

But the Court also adduced a more practical reason for its rule. A rule requiring an unambiguous invocation will provide easier guidance to law enforcement in determining whether they can continue to question. It will also make matters of proof easier, presumably at a later trial. As we will see below, the rule has itself spawned uncertainty in the case law, merely shifting the uncertainty from an ambiguous statement to an inquiry into what counts as an unambiguous assertion.

In other words, the Court confidently proclaims: “a statement either is such an assertion of the right to counsel or it is not.” This statement of course betrays a serious misunderstanding of language, law, and life. Few statements are unambiguous once lawyers start arguing over them; indeed, few statements are truly unambiguous even in ordinary life. Language simply does not work that way. Again, the cases discussed below makes this clear.

But what the cases below make even more clear is this: the *Davis* case insists suspects invoke their right to counsel unambiguously when this is not even really the right they are invoking. As *Davis* itself recognizes, suspects do not really enjoy a standalone right to counsel before arraignment. Rather, they enjoy a right to *not be questioned* without a lawyer if they ask for one. But in reality, as noted above, law enforcement almost never supplies a lawyer.

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23. *Id.* (“The Sixth Amendment right to counsel attached only at the initiation of adversary criminal proceedings . . .”).
24. *Id.* (“To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry.”).
25. *Id.*
As a consequence, the real right a person invokes when she says she wants a lawyer is simply the right to cut off questioning. To say a person must unambiguously invoke the right to cut off questioning by saying the magic but different phrase, “I want a lawyer,” simply creates unnecessary confusion. In fact, it borders on Orwellian to require a suspect to invoke one right with the words of another right.

2. Right to Remain Silent

In 2010 in *Berghuis v. Thompkins*, the Court extended the *Davis* rule to the “right to remain silent.” In that case, the police read the defendant his *Miranda* warnings and then questioned him for nearly three hours while he remained almost entirely silent. Only at the end, after the police invoked God, did the suspect confess.

The defendant argued that remaining silent for nearly three hours itself invoked the right to remain silent. How else can one invoke the right to remain silent by remaining silent? The Court disagreed. It agreed that one can certainly simply remain silent, but to invoke the right to cut off police questioning, a suspect must expressly invoke the “right to remain silent,” and do so unambiguously.

In *Berghuis*, even more than in *Davis*, the Court’s failure to identify the actual right at issue confused the issue, both analytically for courts and practically for suspects and police. As discussed above, *Miranda* and the Fifth Amendment itself afforded the defendant the right to literally not say anything in the face of police questioning. But *Miranda* did more: it created the powerful right of a defendant to end the questioning.

The *Berghuis* case involved the strange situation of a suspect who did not waive his right to remain silent by talking but also who did not expressly *invoke* his right to remain silent by saying he wished to remain silent. Instead, he merely remained silent.

In many ways, *Berghuis* makes sense. If a person wants to take advantage of his right to remain silent, he can simply remain silent. If he wants to assert the separate right to cut off police questioning, he must invoke that right in some way. Indeed, it appears both the majority and the dissent agreed that a suspect must invoke the right to cut off police questioning; they merely disagreed over whether one must do so unambiguously. The majority, of course, held that one must.

So far so good. The problem with *Berghuis* arises when we realize that the police do not warn suspects that they enjoy this separate right to cut off police questioning. As a consequence, suspects do not realize that by stating the words, “I wish to remain silent,” they also will cut off police questioning. Indeed, an

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ordinary person would probably assume that if they want to remain silent, they need do nothing more than remain silent.

As in Davis, only worse, suspects do not have the language to invoke the right to cut off questioning, both because they do not realize they have the right and the only cognate right they’ve been given, the right to remain silent, does not by its own terms relate to cutting off questioning.

To put it another way, the Court in Berghuis says that to invoke the right to cut off questioning unambiguously, the suspect need only say he wishes “to remain silent.” But even those words, the very words the Court approves, do not unambiguously invoke the right to cut off questioning. An officer unfamiliar with the legal fictions created by Miranda would be entitled to say, “okay, you wish to remain silent. I will continue to question you, however.” Outside Miranda’s strange logic, such conduct would be consistent.

As with Davis, the Court’s holding in Berghuis has led to great uncertainty in lower courts. Suspects, unwarned that they have the right to cut off police questioning or how to do so, fumble toward invoking the right. Similarly, courts, without a clear statement of the right actually being invoked, likewise stumble toward a standard of what even counts as invoking the right unambiguously.

B. An Objective Test

Finally, both Davis and Berghuis created an objective test. Rather than inquire into the subjective motivations of suspect or officer, the Court tried to fashion a test analogous to the plain meaning rule for contract interpretation. What would a reasonable officer understand the literal words to mean, in context. The goal, the Court insisted, was to create an easy to apply test in which officers will immediately know whether a suspect has invoked or not.

Conversely, one assumes that if a suspect utters the magic words, like any incantation, they should take effect without considering his or her subjective motivation.

To briefly elaborate, one can think of a suspect’s invocation of the right to cut off questioning under Davis and Berghuis as an invocation by way of special words that have legally operative effect, much as saying “I accept” to a contract offer has the legal effect of creating a contract. In the contract context, courts do not inquire into the subjective motivation leading a person to form a contract, at least in determining whether there is a contract.27 If the person utters the magic words, I accept, and does so with apparent sincerity, the courts will find a contract. If the person forms the contract for good reasons or bad, from careful thought or upon mere impulse, the person has nevertheless formed a contract.28

28. Lucy v. Zehmer, 84 S.E.2d 516 (Va. 1954) (“We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention”).
Indeed, even if the person secretly has no intention of fulfilling his end of the bargain,\textsuperscript{29} if a reasonable person would understand his words to be those of acceptance, he has formed a contract.

So it goes in many areas of the law that involve legally operative words. Wills,\textsuperscript{30} gifts,\textsuperscript{31} and consent\textsuperscript{32} all arise from the plain meaning of the words themselves without inquiry into whether the person acted impulsively or with care. Of course, if the conduct veers into the irrational\textsuperscript{33} and the person making the statement is legally incompetent because of mental illness, then we will inquire into his mental state. But courts require a person to “show that his mind was ‘so affected as to render him wholly and absolutely incompetent to comprehend and understand the nature of the transaction.’”\textsuperscript{34} But short of such incompetence, courts will recognize the legally operative effect of the incantation of words such as “acceptance” if made.

The Court in \textit{Davis} and \textit{Berghuis} appear to have established a similar framework for invoking the right to cut off police questioning. They insist upon an objective, unambiguous assertion. But they say a person has either invoked or not. Such language, such formalism, seems to mean that if a defendant does not use the magic words, or expresses hesitancy, she is lost; conversely, however, if she states the words in the appropriate form, courts ought not to defeat the invocation by considering other factors such as subjective motivation. We will consider these questions more carefully below.

We now turn to the recent case law to explore how these tests play out.

\section*{III. CATEGORIES OF AMBIGUITY}

The lower courts on both the state and federal level have created a bewildering array of ambiguity-categories. In some cases, I have found categories for the cases, but in many, the courts themselves have essentially created categories, such as the “mere frustration” category, in which a court ignores a suspect’s plain language invoking of the right to remain silent by pointing to his subjective motivation in making the invocation.

Some categories make sense as categories, though their results often deviate from the rules in \textit{Berghuis} and \textit{Davis}. Other categories, such as the “mere frustration” category, seem illegitimate across the board. Again, both \textit{Berghuis} and \textit{Davis} make clear the inquiry should be objective based upon the language

\textsuperscript{29} Id.
\textsuperscript{30} Linton v. United States, 630 F.3d 1211, 1218 (9th Cir. 2011) (“Washington probate law similarly follows an ‘objective manifestation’ method of interpretation in the exegesis of will, donative documents that are close cousins of gift documents”).
\textsuperscript{31} Id.
\textsuperscript{32} Florida v. Jimeno, 500 U.S. 248, 251 (1991) (“The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of ‘objective’ reasonableness—what would the typical reasonable person have understood by the exchange.”).
the suspect uses and not based upon a subjective inquiry into the suspect’s motives.

The section will start with cases in which the suspect’s plain words invoke the right to a lawyer, but in which the court uses various techniques to avoid the plain import of those words to find ambiguity. These techniques are not always without merit; after all, they do look at the larger context. But they often appear to be results oriented, choosing or sometimes cherry-picking the broader context to avoid the plain meaning of the more narrow sentence or two invoking the right.

This section will then address other categories relating more directly to the specific language used by the suspect. Do words such as “maybe,” or “mind if I don’t say anything” represent equivocation or mere figures of speech? Courts often divide on this issue. Do requests for a lawyer become equivocal when phrased as a question, even though the very concept “request” implies a question? Again, courts divide on the issue.

A. Context Cases

One of the more general techniques courts use to discern whether a reasonable officer would understand a suspect’s statement to be an unambiguous invocation of the right to cut off questioning, whether by invoking the right to remain silent or the right to counsel, involves examining the context of the statement. In theory, of course, the literal language of any statement must be addressed in context. Unfortunately, courts often use the banner of context to render an unambiguous assertion ambiguous.

They will point to context to say the suspect was not invoking a right to remain silent in general but merely wanted to stop talking about a particular topic. They will find in the clearest words such as “I plead the Fifth,” some kind of ambiguity. They will find in statements such as, “I’m through, I wanna be taken into custody,” an ambiguity.

Perhaps the most extreme example comes from *Anderson v. Terhune*.\(^\text{35}\) I consider this case in some depth because it shows how willing courts and police can be to use various techniques to waive away an assertion. In *Anderson*, the police detectives suspected Anderson of murder. The victim had been found with a drug pipe near him. The detective was therefore asking the defendant whether he smoked dope and, if so, whether he smoked with a pipe. The detective asked numerous times, “what kind of pipe.” At this point, the defendant sought to end the interview:

Anderson: “Uh! I’m through with this. I’m through. I wanna be taken into custody, with my parole….”

\(^{35}\) 516 F.3d 781 (9th Cir. 2008).
Officer: “Well, you already are. I wanna know what kinda pipes you have.”

Anderson: “I plead the [F]ifth.”

Officer: Plead the [F]ifth. What’s that?”

As hinted above, the officers began the game by pretending to find the term “the Fifth,” in this context, ambiguous. True, a hyper literal adolescent might argue that the “Fifth” is ambiguous and require one to say, “The Fifth Amendment to the United States Constitution,” or, “The Fifth Amendment as applied to the states by the Fourteenth Amendment,” etc. This behavior illustrates that any statement can be rendered ambiguous if one is so determined.

Second, the suspect said he was “through,” and wanted to be taken into custody. These words surely must invoke the right to cut off questioning even if they do not use the precise language, “I wish to remain silent.” Again, this echoes the original problem with Berghuis, requiring suspects invoke the right to cut off questioning unambiguously and yet failing to warn or expressly provide language for that invocation. Consequently, an officer can claim that “I’m through, I wanna be taken into custody,” is not sufficient to invoke. The officer can further claim that since the person is already in custody, the request is essentially meaningless.

The lower California appellate court held that the suspect had not invoked by pointing to the larger context. It held that the suspect’s invocation of language as unambiguous as saying “I plead the [F]ifth,” merely meant, or could have been understood by a reasonable officer as having meant, “I no longer wish to speak on this particular subject, but I’m happy to continue the questioning in general.” Again, any statement can be rendered ambiguous by one determined to do so.

The Ninth Circuit reversed, even on the highly deferential AEDPA habeas standard. It held that Anderson’s statement, “I plead the [F]ifth,” particularly in context, invoked unambiguously. It chastised the lower court for “manufacturing” an ambiguity where none existed, and held that the lower court had made an “unreasonable determination of the facts.”

And yet the lower court determination comes from a Supreme Court standard that is unclear because the right has not been identified and at least hostile in tone to defendant’s assertions of Miranda rights to begin with. Courts take up the test of “unambiguous invocation” to insert any context they choose. Again, context matters, and many can differ about the meaning of words in context; the Supreme Court’s confident prediction that a person “either invokes or does not” itself makes no sense. But as the Ninth Circuit in Anderson said:

It is not that context is unimportant, but it simply cannot be manufactured by straining to raise a question regarding the intended scope of a facially unambiguous invocation of the right to silence.

Despite this observation, the courts below routinely do precisely that: find reasons to transform a facially unambiguous assertion into an ambiguous one.
B. Subjective Motive

Many courts will avoid the plain meaning of the suspect’s words by pointing to what the suspect subjectively wanted, or what was subjectively motivating him or her to make the invocation. These cases seem to violate the plain direction of Berghuis and Davis. Those cases told us to look at the words of the suspect objectively to determine whether they unambiguously invoked. Why a suspect chooses to invoke should not matter.

Similarly, Berghuis and Davis create a framework in which invoking the right to cut off questioning has become a legally operative incantation. Say the magic words and you have invoked. The price, however, for this bright line rule and this per se prophylactic protection is that you must do so unambiguously. Again, as a magic incantation based on legally operative words, subjective motivation should not matter. Yet for many courts, it does.

1. Momentary Frustration Test

The California “momentary frustration” test best illustrates how courts will use a defendant’s subjective motive to wipe away the plain meaning of his objective words invoking the right.

For example, in People v. Musselwhite, the suspect said, “I don’t want to talk about this.” The California Supreme Court essentially conceded that the plain meaning invoked a right to remain silent and cut off police questioning, but nevertheless held his invocation was ambiguous and therefore not effective because the defendant had spoken in “momentary frustration.”

The Court did not explain why subjective motivation mattered as long as the suspect’s language invoked the right, but seemed to target what the defendant really wanted, and by really it meant what the defendant would have wanted if he had not been momentarily frustrated. Thus, the Court seemed not even to be inquiring into the defendant’s actual subjective motive only, frustration, but also inferring that absent that unfortunate emotion to which humans are prone, the defendant would have rationally not wanted to invoke. This is a strange conclusion because almost all suspects, if acting rationally, would invoke. Invoking silence is almost always the better and more rational course.

Perhaps worse, even if the defendant’s subjective motivation for invoking mattered, the defendant in Musselwhite did not invoke out of frustration anyway. Rather, he said he was invoking because the police were getting him “confused” and “nervous.” Those reasons are precisely the types of reasons Miranda created a right to cut off questioning.

Similarly, the same court in People v. Jennings sidestepped a clear invocation by asserting the defendant was frustrated. The defendant said both

37. 760 P.2d 963 (Cal. 1988).
“I’m not saying shit to you no more man,” and “That’s it. I shut up.” The Court concluded, despite his plain language, that the suspect was speaking merely out of “momentary frustration and animosity” toward one of the officers.

And as in Musselwhite, the defendant here in Jennings also gave his reasons for invoking, and again they were not frustration. Rather, the defendant said he was invoking because he was scared. “You’re scaring the living shit out of me. I’m not going to talk. You have got the shit scared out of me.” As in Musselwhite, fear of being exposed in a contradiction matches the precise reasons underlying the Miranda warnings—to give suspects the tools to avoid the coercive atmosphere of the interrogation room.

These relatively early, 1988, California Supreme Court cases set the stage for later cases, including those as recent as 2016, in which courts have continued to rely on the “momentary frustration” rationale. Thus, in People v. Harper, the suspect said, “I don’t want to be here and I don’t want to talk with you guys.” He then continued, “I don’t want to talk to nobody.” The trial court held that he had not invoked the right to remain silent. He was upset and his outburst should be seen as merely a reflection of his frustration. Moreover, it wasn’t the police in particular he didn’t want to talk to; he didn’t want to talk to anybody. Somehow, in the court’s view, one invokes only if one particularly wants to remain silent with respect to the police. (Even though he also said he didn’t want to speak with them).

This case went far enough that the court reversed on appeal, holding that his words were an unambiguous invocation, and he did not lose his right simply because he did not wish to speak to anyone including the police.

The defendant in People v. Martinez, on the other hand, did not fare so well. He told the police, “I don’t want to continue with all this. I want to go to rest.” These words, though unambiguous on their face, were transformed into an ambiguous statement by the court’s observation that the suspect said them motivated, subjectively, by “momentary frustration” or “animosity.” (It apparently could not decide which). Again, the whole point of the Berghuis and Davis cases emphasis on an objective test was to avoid precisely this type of inquiry into subjective motives. Those courts sought a test police could clearly apply without resorting to psychology.

Other cases ignore the nature of the right to cut off questioning by failing to understand language that should invoke the right. In Powers v. Davey, for example, the defendant said three times that he did not “wanna hear it.” These words should invoke the right not to be questioned because the defendant is almost literally saying he does not want to be questioned. To say three times that “I don’t wanna hear it,” surely invokes the right more than the formal phrase, “I

wish to remain silent.” Nevertheless, the lower court held the statement was ambiguous, not so much because it was in the wrong form as because it was the product of momentary frustration, and the federal court upheld this holding on the deferential AEDPA standard.

Finally, courts have employed the same “momentary frustration” standard in wiping away a plain invocation of the right to counsel. In People v. Williams, the defendant said, “I want to see my attorney cause you’re all bullshitting now.”42 The police continued the questioning. The California Supreme Court held the defendant had not invoked because his statement was “an expression of frustration.” It reached this conclusion because it came during a particularly heated back and forth with the police, who had accused the defendant of murder.

Again, the very point of the right to end questioning, whether by invoking the right to silence or the right to counsel, is to avoid the emotional distress caused by interrogation over serious crimes such as murder.

2. Other Motives

Courts often look to other subjective motives to avoid the plain meaning of a suspect’s invocation, such as taunts, game-playing, or even discomfort.

In United States v. Sherrod,43 for example, during the Miranda warnings, the defendant asked what he was charged with. The detective refused to tell him, insisting they finish the warnings, even though of course Miranda does not preclude the police from giving the suspect information prior to warnings.

In response, the suspect said, “‘I’m not going to talk about nothin’.’” The Seventh Circuit seemed to concede the words themselves invoked, but that he had not unambiguously invoked because his assertion was really “a taunt—even a provocation.” Oddly the Seventh Circuit seemed to say it was both an invocation and a taunt, but that the taunt aspect somehow superseded the invocation aspect. It “is as much a taunt—even a provocation—as it is an invocation.” This concession, that the statement was both taunt and invocation, shows how much reliance the Seventh Circuit placed not on construing the meaning of the words, or even their intended meaning, but on determining whether the anterior motivation for the invocation was the correct one. For unknown reasons, taunting or provoking are, for the Seventh Circuit, illegitimate reasons for invoking.

In People v. Davis,44 the detectives accused him of the murder; he stood up and said, “Well then book me and let’s get a lawyer and let’s go for it, man, you know.” The court conceded the words invoked a lawyer but held that the defendant had failed to invoke unambiguously because we should see the

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42. People v. Williams, 233 P.3d 1000 (Cal. 2010).
43. 445 F.3d 980 (7th Cir. 2006).
44. 208 P.3d 78 (Cal. 2009).
statement as a “challenge.” The court wrote that the “defendant was using as much technique as the people who were questioning him.”

As above, the court confuses subjective motive with invocation. Even if the defendant wanted to invoke as a challenge rather than for some other reason, he still invoked. Moreover, one wonders why the court interpreted this invocation as a challenge; after all, it was only when the officers directly accused him of the murder that he invoked. The timing suggests not a challenge but a pretty good time for a suspect to invoke under any theory that a suspect has the right to.

Finally, in Williams, discussed above, the court held that the suspect’s invocation was invalid not only because of “momentary frustration,” but also because he was “game playing.”

3. Summary: The Right Reasons

The conclusion we can draw from the above cases are two-fold. First, the courts ignore the requirement in Berghuis and Davis to focus on the objective meaning of the words in determining invocation. They are not looking beyond the words to context to determine the meaning of those words. The meaning is clear, as the courts concede. Rather, they are looking at the emotions that motivated the invocation. If those emotions are of the wrong kind, then the invocation does not count.

Of course, the first answer, as discussed above, to this inquiry into subjective motivation is that it is simply out of bounds. If the suspect invokes, it does not matter why.

Moreover, the court often attributes the wrong reason anyway. In almost all these cases, the person invokes exactly when the detectives have shifted gears from friendlier, more general questions to direct accusations of the crime, or far more pointed questions about contradictions in the story. The courts point to precisely this escalation as evidence that the suspect’s invocation is brought on by frustration or other emotion and therefore not real. But the sudden move toward direct accusation or other more serious interrogation techniques seems precisely the time when a suspect should invoke, at least from his own point of view.

But the second observation reveals a deeper distrust the courts have of defendants and suspects. To these courts, suspects are experience criminals constantly gaming the system, or emotional children who don’t know what they are really doing. When frustrated, the invocations don’t count because they don’t know what’s best for them when they are frustrated, and we should discount their invocation. Also as noted above, this is strange since invocation is almost always in the suspect’s best interests.

45. Williams, 233 P.3 1000 (“When the officers began directly accusing him of having abducted the victim, however, he stood up” and made his ambiguous invocation).
On the other hand, many of these cases discussed above involve very serious, brutal, and at times incomprehensible crimes—brutality that might help explain the outcomes. In Sherrod, discussed above, the defendant was a 24-year-old who had had 29 prior arrests and 8 convictions. He randomly car jacked a Cadillac escalade, murdering the driver for no apparent reason. In this context one understands the Seventh Circuit’s desire to find that he was playing games or taunting when he invoked his right to remain silent; nevertheless, invoke he did.

The Davis case involved Richard Allen Davis, who kidnapped and murdered 12-year-old Polly Klaas. Davis too had a very long criminal record, as well as a history of mental illness. When the jury convicted him to death, he gestured obscenely in the courtroom; during sentencing, he read a statement that that claimed Polly Klass had said, “Just don’t do me like my dad,” before he killed her—provoking Klaas’ father, who was in the courtroom, to yell, “Oh, burn in hell, Davis! Fuck you!”

Given Davis’s history and courtroom outbursts, one can easily see why the California Supreme Court would want to denominate his statement to detectives that he was done talking as a taunt and provocation rather than as an invocation.

The Williams case involved a murderer who kidnapped and robbed a woman, shot her in the hand, ordered her to get into the trunk of her car, locked her there, doused the car with gasoline, and then burned her to death. The judge sentenced him to death in 1992. Again, one cannot entirely blame the Ninth Circuit for finding a reason to hold that the invocation was invalid for some reason, even if that reason rests upon an illegitimate look at subjective motivation, momentary frustration, and game-playing.

Musselwhite, meanwhile, was convicted and sentenced to death for murder during a crime spree involving multiple robberies and rapes, and culminating in the murder in Musselwhite with a venetian blind cord.

These serious death penalty cases help explain why courts might stretch the test; it also illustrates why brutal criminal cases make bad law.

A second reason explaining these “momentary frustration” cases, and other subjective motivation cases, lies in the timing. In some of these cases, the defendant does not assert immediately after the warnings, but rather during an ongoing interrogation. In the rough and tumble, back and forth of an ongoing interrogation, as tempers flare, it is far more understandable that a reasonable officer would not really pause to consider the literal words of the defendant, or not really want to. That is, the officers, and the court, want to think that the technical plain language invocation does not really count as invocation once they’ve built up some momentum in the interrogation, just as they are getting somewhere.

But of course the moment when tempers flare and the police are just getting somewhere is precisely when Miranda guarantees suspects the right to end the interrogation. Moreover, Davis and Berghuis created a literal, technical invocation rule; courts cannot use the plain meaning rule against defendants when it suits them, but then ignore the technical aspect of invocation when a suspects has successfully incanted the magic words.

C. Conditional Cases

In many cases the suspect will make his request in a form that appears conditional. These cases primarily arise on the context of a request for counsel rather than an assertion of the right to remain silent. A suspect may say that if the police are going to charge him, he would like a lawyer. Courts struggle with these scenarios, again in part because they do not understand the underlying right to begin with. The right itself is conditional, so any assertion of the right is likely to be in a conditional form in any event.

As noted above, Miranda does not afford suspects a generalized right to remain silent. Rather, it only applies if the suspect has been arrested and if the police question him. Thus, if the police arrest a suspect but do not question him, Miranda does not apply. But more important, with respect to the right to a lawyer, if the police arrest a suspect who asserts his right to a lawyer, the police do not have to give him a lawyer. They only have to stop questioning him. In other words, even if he asks for a lawyer, the police have not violated his right to counsel by failing to provide him a lawyer as long as they cease the interrogation. His right to a lawyer only applies now if they do question him. In other words, his right to a lawyer, the right he asserts, is conditional on their continued questioning.

Finally, and perhaps most importantly, Miranda has another contingency relevant here. It also only applies if the government actually charges him and brings him to trial. The Supreme Court has made clear Miranda is a rule of evidence. That is, the police do not violate Miranda, or likely any other right, if they question an unwarned suspect in custody whom they had probable cause to arrest. Rather, they violate Miranda only if and when they attempt to introduce that evidence at trial.

This second if looms large in the invocation cases, or would if courts properly understood the right. That is, the Miranda right to remain silent, right to counsel, and right to cut off questioning are all provisional and ultimately contingent on the government charging the defendant and bringing him to trial. Thus when suspects say they want a lawyer if they’re going to be charge, they are asserting precisely the correct contours of the Miranda right, which itself is contingent on the defendant being charged.

The foregoing represents a more theoretical framework, but the conditional cases also reflect courts finding yet another way to avoid a finding of invocation.
The conditions the suspect posed seem technicalities at best, and a fair reading of the statement seems to be a request for a lawyer. For example, in State v. Effler, immediately upon receiving the Miranda warnings, the defendant said, “I do want a court-appointed lawyer.” The detective responded with, “okay.” The defendant then added, “if I go to jail.” The detective ultimately continued questioning and the defendant confessed.

The Iowa Supreme Court affirmed (by an equally divided court) the trial court’s determination that the defendant had failed to invoke. The phrase, “if I go to jail,” created an ambiguity. Even though there was no opinion for the court on this issue, one of the Justices voting to affirm so vaunted form over substance that it is worth exploring in detail.

The plain import of the defendant’s statement that he wants a lawyer if he goes to jail is that if the police intend to hold him on charges. If the police are going to release him, he obviously won’t need a lawyer. Indeed, the condition the defendant has placed parallels the right itself: a defendant has the right to counsel only if he is questioned in custody. If the police determine that they will release him, the suspect no longer has the right to counsel (provided by the government). Or, if the police hold him but do not question him, the suspect has no right to a lawyer. Only if they hold him and question him—which is almost precisely the condition the suspect himself asserted.

But Justice Streit’s opinion ignores both the common sense meaning of the suspect’s statement as well as the nature of the underlying right. Justice Streit writes that the suspect might have meant that he wants a lawyer when he goes to jail, but not now. That defies common sense but more important, a suspect does not have the right to a lawyer “when” he goes to jail. He only has a right to lawyer when the police question him in the interrogation room before they sent him to jail.

In addition, Justice Streit writes that the police do not charge a defendant or know whether he will be charge, prosecutors do. Therefore, the police do not know whether the condition the suspect has created—essentially, he wants a lawyer if he ends up being charged—will come true.

But no reasonable police officer would believe that the defendant was drawing a distinction between formal charges and the charges upon which the police are holding the defendant. After all, even before the prosecutors file an indictment or criminal information commencing the case under Rothgery, the police may only hold a defendant on some charge. The Fourth Amendment prohibits seizing and detaining a person without probable cause to believe they have committed a crime. Justice Streit is simply wrong to assert that the police do not “charge” a defendant with a crime, even if that only means holding him on suspicion of some crime pending a formal charging instrument.

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48. 769 N.W.2d 880 (Iowa 2009).
49. Id. (Streit, J. opinion).
Justice Streit’s opinion veered into scholasticism when he began to parse the difference between the statement, “I want a lawyer if I go to jail,” and “if I am going to jail”—as if these differences affected the plain meaning of the defendant’s clear request. Unless you are releasing me now, give me a lawyer. What could be more clear?

But Justice Streit is not alone. Numerous courts have pulled the same stunt, taking a defendant’s condition that the police know perfectly well and transforming it by some improper use of words like “charge” into something entirely different.

For example, in State v. Spears,50 There, the defendant said, “You want to arrest me for stealing, then let me call a lawyer and I’ll have a lawyer appointed to me an, because this is going no where.” The Court held he had not invoked because the police “responded that they were not going to arrest [the] defendant.” The problem with this explanation, as the court itself concedes, is that the suspect was in custody. In other words, they had arrested him and the very condition that the suspect asserted had already come true.

D. Form of a Question

The Court in Davis v. United States51 required that the defendant “request” counsel, not that the defendant “demand” counsel.52 A request, by its very nature, will often come in the form of a question. And many courts recognize that a suspect does invoke the right to counsel even though his request comes in the form of a question.

For example, the statements, “Can I get a lawyer in here?”53 or “Can I get an attorney right now, man?”54 were both held to invoke unambiguously.

But many courts come to the opposite conclusion, holding that a suspect who asks for counsel with a question have failed to invoke unambiguously. These holdings again ignore the nature of the underlying right, which by its nature can be invoked by a statement in the form of a question.

For example, in Commonwealth v. Hilliard,55 immediately after receiving his Miranda warnings, including the right to counsel, the defendant “asked, ‘Can I have someone else present too, I mean just for my safety, like a lawyer like y’all just said?”

The Court held the defendant had failed to unambiguously invoke. He was merely seeking clarification of his right, the court held, without any explanation of how the context could possibly lead to such a conclusion. The defendant had just been told he has the right to counsel. He asked if he could therefore have

52. Id. (“the suspect must unambiguously request counsel.”).
54. Alvarez v. Gomez, 185 F.3d 995, 998 (9th Cir. 1999).
55. 613 S.E.2d 579 (Va. 2005).
counsel, as he was just told he could. Nothing in the context suggest he was seeking clarification, other than the fact that his request came in the form of a question. But again, that’s how requests are made.

Making matters worse, the suspect expressly said he wanted a lawyer for his safety. A chief purpose of the Miranda right to counsel is to ameliorate the coercive and threatening atmosphere of custodial interrogation. Hilliard was thus requesting counsel for the precise reason that Miranda envisioned, using the precise words of a request, even referring to the officer’s statement that he could have a lawyer.

On the other hand, the same court recognized that the defendant did invoke successfully later in the dialogue when he said, “Can I get a lawyer in here?” The statement was in the form of a question but for some reason that does not clearly emerge from the opinion, the court deemed this question to be an unambiguous request.

I do not mean to argue that the form of a question can never render a request ambiguous. If the defendant asks the detectives whether he needs a lawyer, such a request does raise an ambiguity. For example, in State v. Harris, the defendant stated, “If I need a lawyer, tell me now.” Though not in the form of a question, this statement reads like a question, a request not for a lawyer but for additional information. But this question stands in stark contrast, in my view, to the simply request, “Can I have a lawyer?”

E. Subsequent Words

Courts will sometimes use a suspect’s subsequent statements or even his later willingness to answer questions to show that his earlier, plain-meaning invocation did not really mean to invoke. This violates the clear dictates of Supreme Court precedent. After all, the whole point is that once a defendant invokes counsel, we become concerned that the police will try to get him to change his mind through questioning; the court has clearly ruled that out. A defendant’s willingness to later answer questions therefore cannot transform an earlier invocation into something else.

Courts nevertheless find a suspect’s “no” ambiguous based upon later equivocation or merely answering questions.

Perhaps the most extreme case arose in Garcia v. Long. There, the detective asked the defendant, “now, having that [i.e., your Miranda rights] in mind, do you wish to talk to me?” Answer: “no.” The lower California appellate court held this “no” was ambiguous because the suspect later equivocated about talking to the detective when the detective persisted. The Ninth Circuit reversed, even under the deferential AEDPA standard, holding that the “no” was unambiguous.

56. 741 N.W.2d 1, 6 (Iowa 2007).
58. 808 F.3d 771 (9th Cir. 2015).
and could not be overridden by any later equivocation. Once the suspect invokes, the questioning must stop, and the detective should never have arrived at that later equivocation.

Similarly, in *United States v. Hawk*, the defendant clearly says “no,” in response to whether he wants to answer questions without a lawyer present. The court nevertheless held his later words in response to further questions made this unambiguous assertion ambiguous.

The particular dialogue bears repeating since it illustrates a typical case. Thus, the detective in *Hawk* asked the defendant himself to read aloud the waiver form, which ends with the sentence: “At this time, I am willing to answer questions without a lawyer present.” The following dialogue ensued:

Sergeant: You agree with that?
Hawk: Not really
Segeant: Not really?
Hawk: *No.* (emphasis added)
Sergeant: So, I mean, do you not want to talk to us?
Hawk: I don’t agree with it, but…

The sergeant then made a long speech about how it’s his choice, etc. but ends up persuading him to talk.

The court found the defendant’s statement ambiguous via a few methods. First, it simply ignored the defendant’s “no,” pointing to the “not really” as ambiguous. Second, it pointed to the defendant’s later statement, “I don’t agree with it, but…” as demonstrating that his earlier statements were ambiguous.

In *Powers v. Daveys*, the court similarly pointed to the fact that the defendant answered questions to show that his earlier invocation did not really count.60

**IV. CONCLUSION**

The Court in *Berghuis* and *Davis* sought to establish a clear, bright-line rule for when suspects invoke the right to cut off questioning. It hoped this rule would make it clear to police when suspects were invoking. It similarly envisioned that the rule would obviate the need for litigation over whether suspects had invoked.

In reality, the rule has merely shifted the inquiry from whether the suspect invoked to whether she did so unambiguously. This problem arises, I have argued, in part because of a mismatch between the right and the warnings. The right the suspect seeks to invoke is really the right to cut off police questioning. But the *Miranda* warnings only tell suspects they have the “right to remain

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silent,” and “the right to counsel.” These latter two rights say nothing about cutting off questioning.

Worse, the existing rights fail to give suspects the language with which to invoke the right unambiguously. The warnings similarly fail to give courts a standard against which to measure the suspect’s purported invocation.

Not surprisingly, in light of this mismatch, lower courts have struggled to determine whether a suspect has invoked in a given case. When in doubt, court have often ignored the plain meaning words of the suspect, using dubious context arguments such as the suspect’s subjective motivation, to find that the suspect did not really intend to invoke. She was merely frustrated, for example.

Finally, we see in some lower court cases a determination to find that a suspect has not invoked, despite clear language invoking, because of an overall hostility to the Miranda rights, a hostility present in the leading Supreme Court cases such as Berghuis and Davis. Unfortunately, this hostility has turned the ambiguity test upside down, ignoring plain meaning in favor of a more subjective inquiry.