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Davis v. Israel: When Miranda Warnings Do Not Warn

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In *Miranda v. Arizona*,[1] the United States Supreme Court prohibited the prosecution from introducing at trial statements made by an accused during a custodial[2] interrogation,[3] unless the prosecution demonstrated that, in obtaining such statements,[4] procedural safeguards deemed necessary to protect the Fifth Amendment privilege against self-incrimination had been employed.[5] In *Davis v. Israel*,[6] a federal district court held for the first time that the usual *Miranda* warnings,[7] although properly given, do not protect a defendant's Fifth Amendment right against self-incrimination if the warnings do not inform him that his right to remain silent includes the right to refuse to comply with a police request to produce incriminating evidence.[8]

The defendant in *Davis* was charged with murder. The morning after the crime had been committed, police officers

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1. 384 U.S. 436 (1966).

2. Custodial situations include those in which an individual is "deprived of his freedom by the authorities in any significant way . . . ." *Id.* at 478. *See* note 19 and accompanying text *infra*.

3. Recently, the Supreme Court has stated that "the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." Rhode Island v. Innis, 48 U.S.L.W. 4506, 4509 (1980) (emphasis in original). *See* notes 23-26 and accompanying text *infra*.

4. Specifically, the person must be warned that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to consult with an attorney, and to have an attorney present during interrogation and that, if he desires but cannot afford an attorney, one will be appointed for him prior to any questioning. Miranda v. Arizona, 384 U.S. 436, 479 (1966).

Subsequent Supreme Court decisions have held that this prohibition against the use of statements made without the benefit of the *Miranda* warnings extends only to the prosecution's use of such statements in the case-in-chief and does not limit their use for impeachment purposes. *See* notes 48-52 and accompanying text *infra*.

5. Miranda v. Arizona, 384 U.S. 436, 444 (1966). *See* notes 18-45 and accompanying text *infra*.

6. 453 F. Supp. 1316 (E.D. Wis. 1978), *aff'd*, 601 F.2d 594 (7th Cir. 1979). Except as otherwise noted, the facts of *Davis* are drawn from the district court opinion.

7. *See* note 4 *supra*.

8. 453 F. Supp. at 1326.

went to Davis's apartment to arrest him. After informing him that he was under arrest and advising him of his *Miranda* rights, the arresting officer, according to his own testimony, told Davis, who was not dressed at the time, to put on the clothes he had worn the previous night. Davis received no warning that he need not comply with this order. The trousers that he put on were bloodstained, and the blood type matched that of the victim but not that of the defendant. The manner in which these pants were obtained formed the basis of the defendant's post-conviction claim[9] that his Fifth Amendment right against self-incrimination had been violated.[10]

The United States District Court for the Eastern District of Wisconsin, in granting Davis a writ of habeas corpus, held that Davis's production of the clothing at the request of the police[11]

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9. At a pretrial hearing, the defendant's motion to suppress the pants as evidence at trial was denied. The district court opinion indicates that Davis sought suppression on three theories: the seizure of the pants required a search warrant under the Fourth Amendment; since the prosecution could not show that the pants had been worn on the night of the murder, introduction of the pants into evidence would be both immaterial to the trial and prejudicial to the defendant; and, the manner in which the defendant's identification of the pants was obtained violated the Fifth Amendment. *Id.* at 1318, 1323.

10. Davis was convicted of first degree murder and sentenced to life imprisonment. After his conviction, Davis appealed to the Wisconsin Supreme Court, asserting that the evidence should have been suppressed on either Fourth or Fifth Amendment grounds. The Wisconsin Supreme Court affirmed his conviction. State v. Davis, 66 Wis. 2d 636, 225 N.W.2d 505 (1975). It did not, however, deal with the Fifth Amendment claim; instead, it considered only the Fourth Amendment grounds raised in his suppression motion. *Id.* at 657, 225 N.W.2d at 515.

Davis then petitioned the federal district court for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241 (1976), claiming that admission of his pants into evidence constituted a violation of his Fifth Amendment privilege against self-incrimination.

11. Davis's claim was based on the arresting officer's testimony that he had ordered Davis to put on the clothing that Davis had worn the previous evening. Brief for Petitioner at 5, Davis v. Israel, 453 F. Supp. 1316 (E.D. Wis. 1978). Davis, however, had testified both at the pre-trial suppression hearing and at trial that the police officer did not so direct him. Brief for Respondent at 5-6, Davis v. Israel, 453 F. Supp. 1316 (E.D. Wis. 1978). The state contended that, since the state courts had failed to resolve the conflicting testimony, an evidentiary hearing should be held to resolve the factual dispute over the manner in which the clothing was obtained. *Id.* at 6-7.

The district court did not find it necessary to hold an evidentiary hearing. 453 F. Supp. at 1323. Instead, it determined that the trial court, in its denial of Davis's motion to suppress, had implicitly found that the testimony of the officers was to be believed and that Davis had heard and complied with an order to put on the clothing he had been wearing on the previous evening. *Id.* The district court also found that Davis had not been warned specifically that he need not comply with such an order. In accordance with these findings, the district court granted the petition for a writ of habeas corpus on the

constituted a self-incriminating statement and that, although Davis had been given the standard *Miranda* warnings,[12] such warnings did not adequately apprise him of his right to refuse to produce the clothing. The court reasoned that since, under the circumstances of the case, the right to remain silent included the right not to put on the clothing, Davis's waiver of the right to remain silent was unknowing and, therefore, involuntary.[13] Thus, the prosecution's introduction of the pants into evidence at trial violated Davis's Fifth Amendment right against self-incrimination.[14]

Part I of this note explores both the scope and operation of *Miranda*'s protection of a defendant's Fifth Amendment right against self-incrimination and the distinctions between production of testimonial evidence, which is protected by the Fifth Amendment, and production of nontestimonial evidence, which is not so protected. Part II details the *Davis* decision. Part III first examines the basis of the court's holding that the defendant's production of his clothing was a testimonial response protected by the Fifth Amendment and concludes that the court's determination was correct. Part III considers the court's holding that, notwithstanding that the defendant was properly advised

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basis of the Fifth Amendment violation. *Id.* at 1327. The district court reasoned that, if the trial court had found otherwise, it would have prohibited the state from introducing the pants as evidence at trial, since the materiality of this evidence depended on Davis's identifying them as the pants worn on the night of the murder. In addition, the district court reasoned that the trial court had based its decision denying the motion to suppress on the ground that Davis had made no oral or written testimonial communication in reference to the pants and that therefore, no Fifth Amendment violation had occurred. *Id.* at 1323.

12. 384 U.S. 436 (1966). *See* note 4 *supra*.

13. 453 F. Supp. at 1326.

14. The court also determined that the error was not harmless beyond a reasonable doubt. *Id.* at 1327. *See* Chapman v. California, 386 U.S. 18 (1967). According to the *Davis* opinion, the clothing was the only piece of physical evidence which in any way implicated the defendant in the murder. Without the pants, the conviction would have rested on the confused testimony of the victim's eight-year-old child and a chain of circumstantial evidence which did not implicate the defendant directly in the murder. 453 F. Supp. at 1327.

The United States Court of Appeals for the Seventh Circuit affirmed this decision in an unpublished opinion. Davis v. Israel, No. 78-2143 (7th Cir. Mar. 23, 1979). The only issue on appeal was whether the district court was required to hold an evidentiary hearing to determine the circumstances surrounding Davis's arrest. *Id.* at 5. The court of appeals held that such a hearing was not necessary and agreed with the district court's ruling that Davis's nonverbal identification of the pants was testimonial. *Id.* at 7.

of his *Miranda* rights before being ordered to put on the clothing, his Fifth Amendment privilege against self-incrimination was violated. This note agrees that, in the circumstances of this case, the standard *Miranda* warnings were insufficient to inform the defendant of the potential waiver of his Fifth Amendment rights. Part IV concludes that *Davis* is consistent with the *Miranda* requirements of adequate warning and effective waiver and that the *Davis* court correctly held that the Fifth Amendment was violated.

I. Background

A. *Scope and Function of* Miranda

The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[15] A defendant in a criminal case, therefore, may refuse to testify at trial,[16] and the prosecution may not comment on his failure to take the stand.[17]

In *Miranda v. Arizona*,[18] the Supreme Court extended the protection of the Fifth Amendment privilege against self-incrimination to statements made by an accused during custodial interrogation,[19] directing that before the prosecution may use any

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15. U.S. CONST. amend. V. This provision was made applicable to the states in Malloy v. Hogan, 378 U.S. 1 (1964).

16. The privilege against self-incrimination originated from a belief that it was inappropriate to use legal process to extract from a person's own lips an admission of guilt which would take the place of other evidence. 8 WIGMORE ON EVIDENCE § 2263 (McNaughton rev. 1961).

17. Griffin v. California, 380 U.S. 609, 615 (1965). Further, if the government compels a witness to testify in a grand jury proceeding, he must be granted immunity from the use of this testimony against him. Kastigar v. United States, 406 U.S. 441, 453 (1972).

18. 384 U.S. 436 (1966).

19. "[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Id.* at 467.

The question of what constitutes a curtailment of freedom continues to be litigated. In Orozco v. Texas, 394 U.S. 324 (1969), the Supreme Court held that when the defendant was questioned by four police officers in his bedroom, he was "in custody" and the *Miranda* requirements applied. The police officers had testified that the defendant was under arrest and was not free to leave.

In Oregon v. Mathiason, 429 U.S. 492 (1977), the Supreme Court held that the defendant was not in custody at the time he made his initial confession. The police had

such statements, it must demonstrate that procedural safeguards effective to secure the privilege had been employed.[20] The safeguards combat the inherent pressures of interrogation which might compel a person to speak who otherwise might not do so freely.[21] The warnings are intended to inform the detained individual of his privilege so that he can exercise it, or waive it, intelligently, and to notify him that, if he chooses to exercise this privilege,[22] his interrogators will cease their questioning.

Recently, in *Rhode Island v. Innis*,[23] the Supreme Court for the first time addressed the issue of the meaning of "interrogation" under *Miranda*. The police arrested the defendant on the street after a taxi-cab driver had identified the defendant's photograph as that of the man who had just robbed the driver after threatening him with a sawed-off shotgun. The defendant was unarmed at the time of his arrest. The police advised him of his *Miranda* rights, and the defendant responded that he understood his rights and wanted to speak with a lawyer. He was then placed in a police car to be driven to the police station. The police officers assigned to accompany him were instructed not to question, intimidate, or coerce him in any way.

While en route to the police station, two of the officers conversed about the missing shotgun. One officer expressed concern that a handicapped child, from a nearby school for the

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attempted to find Mathiason in order to question him about a burglary. After trying unsuccessfully to reach him, the police officer left a card at Mathiason's apartment asking him to call. Mathiason, who was on parole, called the officer and agreed to meet him at the State Parole Office. Upon his arrival, Mathiason was taken to an office, advised that the police believed he was involved in the burglary, and falsely told that his fingerprints had been found at the scene. He was also told that his truthfulness might be considered by the district attorney and the judge. Mathiason confessed to the crime. The officer then advised him of his rights under *Miranda* and took a taped confession. In deciding that Mathiason was not in custody at the time of his confession, the Court stressed that Mathiason voluntarily went to the police station, was told that he was not under arrest, and left the police station after confession. *Id.* at 495.

See generally Smith, *The Threshold Question in Applying* Miranda*: What Constitutes Custodial Interrogation?*, 25 S.C.L. REV. 699, 707-10 (1974); Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 147-54 [hereinafter cited as *The* Miranda *Doctrine*].

20. Miranda v. Arizona, 384 U.S. 436, 444 (1966). *See* note 4 *supra*.

21. 384 U.S. at 467.

22. *Id.* at 468.

23. 100 S.Ct. 1682 (1980). Prior decisions had focused on the "custodial" element of "custodial interrogation." *See* note 19 and accompanying text *supra*.

handicapped, might find the gun and injure himself. The defendant interrupted the conversation at this point and asked the officers to turn the car around so that he could show them where the gun was located. The police car returned to the scene, and the defendant was again advised of his *Miranda* rights. He replied that he understood his rights but that he "wanted to get the gun out of the way because of the kids in the area in the school." He then led the police to a nearby field and pointed out the location of the shotgun.

Before his trial on charges of the kidnapping, robbery and murder of another taxi-cab driver, the defendant moved to suppress both the shotgun and the statements regarding it that he had made to the police. The trial court denied this motion, and the defendant was subsequently convicted on all counts. The Rhode Island Supreme Court set aside the conviction, holding that the defendant was entitled to a new trial since, contrary to *Miranda*, the police officers had interrogated him without obtaining a valid waiver of his right to counsel.[24]

The United States Supreme Court vacated the judgment of the Rhode Island Supreme Court, holding that the defendant had not been interrogated in violation of *Miranda* and setting out a test for determining whether interrogation has occurred. According to the Court, interrogation includes not only express questioning, but also any words or actions on the part of the police, other than those normally attendant to arrest and custody, that the police should know are reasonably likely to elicit an incriminating response from the suspect.[25] The Court stated that the latter portion of this definition focuses primarily on the perceptions of the suspect, rather than on the intent of the police, since *Miranda* was designed to provide protection to an accused without regard to objective proof of the underlying intent of the police.[26]

Several courts have considered whether particular warnings, as given, were adequate to inform defendants of their rights, either because the warnings were incomplete or because the language used departed in some way from that set out in *Mi-*

24. State v. Innis, ___R.I.___, 391 A.2d 1158 (1978).
25. 100 S. Ct. at 1690-91.
26. *Id.*

randa.[27] In *Coyote v. United States*,[28] the United States Court of Appeals for the Tenth Circuit set out a test for determining the adequacy of any particular warning: "The crucial test is whether the words in the context used, considering the age, background and intelligence of the individual being interrogated, impart a clear, understandable warning of all of his rights."[29] Other courts have adopted this test.[30]

After a defendant has been advised of his rights, he may choose to waive them and agree to make a statement or answer questions. Such statements or answers, however, are admissible at trial only if the waiver was made intelligently and knowingly.[31] Thus, the *Miranda* Court applied the standard generally used for the waiver of consitutional rights,[32] that standard set out by the Court in *Johnson v. Zerbst.*[33] Therein, the Court had described a waiver as the "intentional relinquishment . . . of a known right or privilege" and had determined that any question of whether there has been an intelligent waiver must be determined on the particular facts of each case, including the back-

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27. *E.g.*, South Dakota v. Long, 465 F.2d 65 (8th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973) (statement inadmissible since the defendant was not advised of his rights to appointed counsel and to stop talking any time he wished); United States v. Lamia, 429 F.2d 373 (2d Cir.), *cert. denied*, 400 U.S. 907 (1970) (statement admissible although the defendant was not told that he had the "right to remain silent," but rather that he "need not make any statement . . . at this time"). These decisions stressed that, in determining the adequacy of *Miranda* warnings, priority must be given to substance, not form.

28. 380 F.2d 305 (10th Cir.), *cert. denied*, 389 U.S. 992 (1967). The defendant had argued that his written statement of his understanding of his right—"I can talk to a lawyer or anyone before saying anything, and . . . the judge will get me a lawyer if I am broke"—reflected that he was not clearly informed of his right to appointed counsel at the time of questioning. *Id.* at 307. The court found the warnings to be adequate. *Id.* at 308.

29. *Id.* at 308.

30. *See, e.g.*, Sotelo v. State, 264 Ind. 298, 342 N.E.2d 844 (1976); State v. Maluia, 56 Haw. 428, 539 P.2d 1200 (1975).

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

32. The *Miranda* opinion stated: "This Court has always set high standards of proof for the waiver of constitutional rights . . . and we re-assert these standards as applied to in-custody interrogation." *Id.* at 475. For a discussion of the constitutional basis of the *Miranda* holding, see Schrock, Welsh, & Collins, *Interrogational Rights: Reflections on* Miranda v. Arizona, 52 S. CAL. L. REV. 1 (1978) [hereinafter cited as *Interrogational Rights*].

33. 304 U.S. 458 (1938). The decision dealt with the waiver of the Sixth Amendment right to have counsel present at trial.

ground, experience and conduct of the accused.[34]

Neither *Miranda*, nor any of the Supreme Court decisions construing *Miranda*, has precisely defined the degree of knowledge necessary to satisfy the "knowing and intelligent" standard in the context of the waiver of the Fifth Amendment right. It appears that the requisite knowledge does not require that the individual understand his personal jeopardy. Thus, in *United States v. Washington*,[35] the Supreme Court indicated that an individual's lack of knowledge that, at the time of questioning, the police considered him to be a suspect, and not just a witness, would not have affected the validity of his waiver.[36] Lower courts have held that a defendant's ignorance of the nature of the crime charged,[37] or the degree of punishment permitted,[38] does not preclude a finding of knowing waiver. Rather, what is required is merely that the defendant understand that he has the right to remain silent, to consult with an attorney, to have an attorney present during interrogation, and to have an attorney appointed for him if he cannot afford to retain one and that, if he waives these rights, anything he says can be used against him at trial.[39]

Miranda requires that the defendant indicate that he wishes to waive any or all of his rights.[40] The *Miranda* Court stated that, if an interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.[41] The decision thus strongly suggests that, in order to introduce at trial a defendant's statements made during pre-trial detention, the gov-

34. *Id.* at 464.

35. 431 U.S. 181 (1977).

36. *Id.* at 188.

37. *E.g.*, Harris v. Riddle, 551 F.2d 936 (4th Cir.), *cert. denied*, 434 U.S. 849 (1977) (defendant unaware of felony murder doctrine and rules of evidence); United States v. Anderson, 533 F.2d 1210 (D.C. Cir. 1976) (defendant not told the nature of the charge for which he was arrested). *See* note 164 *infra*.

38. United States v. Hall, 396 F.2d 841 (4th Cir.), *cert. denied*, 393 U.S. 918 (1968). *See* note 165 *infra*.

39. *See* notes 164-65 and accompanying text *infra*.

40. *See* notes 42-45 and accompanying text *infra*.

41. Miranda v. Arizona, 384 U.S. 436, 475 (1966).

ernment must show an explicit waiver by the defendant of his rights. In a more recent decision, *North Carolina v. Butler*,[42] however, which clarified this issue, the Supreme Court held that an express statement of waiver by the defendant is not invariably necessary to support a finding that he waived his Fifth Amendment right. The decision reversed a North Carolina Supreme Court decision[43] reversing the defendant's conviction and ordering a new trial. The North Carolina Supreme Court had found that the pre-trial statements of the defendant, who had neither signed a written waiver of the right to counsel nor made a specific oral waiver, were inadmissible under *Miranda*.[44] In rejecting the North Carolina determination, the Supreme Court indicated that a waiver can be inferred from the actions and words of the person interrogated; the question is not whether the alleged waiver was of a particular form, but, rather, whether the defendant knowingly and voluntarily relinquished his *Miranda* rights.[45]

The Supreme Court, in decisions following *Miranda*, has limited *Miranda*'s protections in various ways.[46] The decisions have viewed the *Miranda* requirements as a means of deterring unlawful police conduct, rather than as a means of informing the defendant of his constitutional right against self-incrimination.[47]

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42. 441 U.S. 369 (1979).

43. State v. Butler, 295 N.C. 250, 244 S.E.2d 410 (1978).

44. *Id.*

45. North Carolina v. Butler, 441 U.S. 369, 373 (1979). Justice Blackmun concurred on the assumption that the Court's citation to *Johnson v. Zerbst* did not suggest that the *Zerbst* formula for determining a waiver of fundamental constitutional rights had any relevance in determining whether a defendant had waived his right to a lawyer under *Miranda*'s prophylactic rule. 441 U.S. at 376 (Blackmun, J., concurring). *See* notes 53-56 and accompanying text *infra*.

46. One commentator notes that the Burger Court's constriction of *Miranda* is evidenced not only in its substantive decisions, but also in the manner in which the Court has exercised its power to decide which cases to review. *The* Miranda *Doctrine*, *supra* note 19, at 100. His data reveal that during the 1973-1976 Terms, the Court granted certiorari in only one of the thirty-five cases in which a defendant sought review of a lower court decision holding evidence admissible over a claimed *Miranda* violation. During the same period, the Court granted certiorari in thirteen of the twenty-five cases in which the government sought review of a lower court decision excluding evidence on the authority of *Miranda*. *Id.*

47. *See* Chase, *The Burger Court, the Individual, and the Criminal Process: Directions and Misdirections*, 52 N.Y.U.L. REV. 518, 531 (1977); *Interrogational Rights*, *supra* note 28.

In *Harris v. New York*,[48] the Court held that pre-trial statements obtained from a defendant who had not been informed of his right to appointed counsel could be used to impeach his testimony.[49] According to the Court, the necessity of affording the jury a means by which to test the defendant's credibility outweighed any possible deterrent effect that total exclusion of the statements might have had on future police conduct. This deterrent effect was adequately assured, the Court noted, by excluding the evidence from the prosecution's case-in-chief.[50] Four years later, in *Oregon v. Hass*,[51] the Court permitted the prosecution to impeach a defendant's testimony through the use of statements which the defendant had made in response to police questioning and without the presence of an attorney after he had been fully advised of his rights and had requested that an attorney be present.[52]

In *Michigan v. Tucker*,[53] the Court permitted the prosecution to present at trial a witness whose existence had been discovered only through statements made by the defendant while he was in police custody, but had not been apprised of his right to appointed counsel.[54] The Court began its analysis of Tucker's Fifth Amendment claim by noting a distinction between police conduct which infringes the right against self-incrimination and that which violates only *Miranda*'s prophylactic rules.[55] The

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48. 401 U.S. 222 (1971).

49. The *Miranda* opinion had indicated that any use of a defendant's statements, including use for impeachment purposes, was impermissible without full warnings to, and an effective waiver by, the defendant. 384 U.S. 436, 476-77 (1966). The *Harris* Court dismissed this language as dictum. 401 U.S. 222, 224 (1971).

50. 401 U.S. at 225.

51. 420 U.S. 714 (1975).

52. *Id.* at 723-24.

53. 417 U.S. 433 (1974).

54. *Id.* at 436.

55. *Id.* at 439. Justice Douglas did not agree with this distinction:

> The Court is not free to prescribe preferred modes of interrogation absent a constitutional basis. We held the "requirement of warnings and waiver of rights [to be] fundamental with respect to the Fifth Amendment privilege," 384 U.S. at 476, and without so holding we would have been powerless to reverse Miranda's conviction. While *Miranda* recognized that police need not mouth the precise words contained in the Court's opinion, such warnings were held necessary "unless other fully effective means are adopted to notify the person" of his rights.

Id. at 462-63 (Douglas, J., dissenting) (quoting Miranda v. Arizona, 384 U.S. 436, 479 (1966)).

Court stated that *Miranda* itself had recognized that the procedural safeguards were not themselves rights protected by the Constitution.[56] Thus, the Court found that although one of the required warnings had not been administered to Tucker, his statements were not involuntary[57] and therefore had not been taken in violation of the Fifth Amendment.[58] The Court emphasized that use of Tucker's statements by the prosecution to identify a potential witness could not encourage police misconduct since the police had acted in good faith and the interrogation had occurred prior to the *Miranda* decision.[59]

Harris, *Hass*, and *Tucker* evidence the Court's narrowing both of the purpose of the *Miranda* warnings and of the exclusionary effect of failure to observe the *Miranda* requirements. Still, however, these violations of *Miranda* barred the prosecutions' uses of the defendants' statements in their cases-in-chief; the Court weighed the deterrent effect of excluding the statements only in connection with a collateral use of the statements. Thus, *Miranda*'s prohibition of the use by the prosecution in its case-in-chief of statements taken from a defendant without proper warnings and waiver has not been altered.[60]

B. *Testimonial and Physical Evidence*

Testimonial evidence which is protected by the Fifth Amendment generally includes all forms of communications by the accused.[61] In contrast, evidence of a nontestimonial nature,

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56. *Id.* at 444. Justice Rehnquist was referring to the following language in *Miranda*: "[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted." 384 U.S. 436, 467 (1966). The *Miranda* Court added, however, "[U]nless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed." *Id.*

57. In *Miranda*, however, the Court had noted that the statements of the *Miranda* defendants might not have been found involuntary in traditional terms. Nonetheless, the statements were suppressed. 384 U.S. 436, 457 (1966).

58. Michigan v. Tucker, 417 U.S. 433, 444-45 (1974).

59. *Id.* at 447.

60. For a review of the Burger Court decisions interpreting *Miranda*, see *The* Miranda *Doctrine*, *supra* note 19.

61. Schmerber v. California, 384 U.S. 757, 763-64 (1966). A nod or a headshake may be a testimonial communication. *Id.* at 761 n. 5. For a discussion of the treatment, by the military courts, of non-verbal conduct, see Reilly, *Non-verbal Statements: Observations*

however incriminating, is generally not protected by the Fifth Amendment. In *Holt v. United States*,[62] the Supreme Court held that compelling a defendant to try on a certain shirt to determine whether it fit him did not violate the Fifth Amendment. In the words of Justice Holmes, "[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."[63] In *Schmerber v. California*,[64] the Supreme Court held that a physician's drawing of blood from the defendant over his objection, and the subjection of the sample to blood analysis, was not testimonial compulsion, and, therefore, admission of the evidence was not barred as violative of the defendant's Fifth Amendment right.[65] The Court reasoned that, although the evidence was incriminating and had been forcibly compelled, it was not the result of any communication or writing by the defendant, who participated merely as a donor.[66]

Later decisions, employing the *Schmerber* analysis, have held that the Fifth Amendment does not protect an accused from being forced to appear in a line-up,[67] or to furnish voice exemplars,[68] handwriting exemplars,[69] or fingernail scrapings.[70] Although compulsion may be present in these cases, the accused is merely compelled to exhibit his physical characteristics; he is not compelled to disclose any knowledge he may have.[71] *Miranda* warnings need not be administered to a defendant from

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On a Unique Concept Employed by Military Courts, 25 JAG J. 24 (1970-71).

62. 218 U.S. 245 (1910).

63. *Id.* at 252-53.

64. 384 U.S. 757 (1966).

65. *Id.* at 772.

66. *Id.* at 765.

67. United States v. Wade, 388 U.S. 218 (1967). Absent an intelligent waiver, the Sixth Amendment requires the presence of counsel at post-indictment line-ups. *Id.* at 237.

68. United States v. Dionisio, 410 U.S. 1 (1973).

69. United States v. Mara, 410 U.S. 19 (1973).

70. Cupp v. Murphy, 412 U.S. 291 (1973).

71. United States v. Wade, 388 U.S. 218, 225 (1967). *But see* Dann, *The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence From A Suspect*, 43 S. CAL. L. REV. 597 (1970) (illustrating some of the difficulties inherent in the testimonial/physical distinction).

whom such physical evidence is sought.[72]

Recently, however, some state courts have, in certain circumstances, construed a defendant's production of physical evidence as testimony within the protection of the Fifth Amendment,[73] thus making the *Miranda* requirements applicable and mandating suppression of the evidence if the warnings have not been given.[74] In each of these cases, the police had no constitutional basis for seizing the evidence; the defendant produced it in response to police questioning.

Certain physical evidence can also be constitutionally obtained by means of a search warrant,[75] or through one of the exceptions the Supreme Court has made to the warrant requirement.[76] A seizure of items obtained during a search incident to a lawful arrest is permitted,[77] regardless of whether the items seized are contraband, instrumentalities, or mere evidence.[78] An individual's consent to a search will also vitiate the need for a search warrant, and, generally, the individual need not be told that he has the right to refuse consent.[79]

Cases involving the production of documents have been given separate treatment by the Supreme Court.[80] In an early decision,[81] the Court indicated that, because of the contents of private papers, their compelled production warranted the Fifth Amendment protection afforded to testimonial communications.[82] More recent decisions discussed below, however, have

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72. *E.g.*, People v. Mouton, 94 Cal. App. 3d 994, 156 Cal. Rptr. 706 (1979) (trying on clothing); State v. Boley, 565 S.W.2d 828 (Mo. App. 1978) (handwriting exemplar).

73. State v. Mason, 164 N.J. Super. 1, 395 A.2d 536 (1979); State v. Dennis, 16 Wash. App. 417, 558 P.2d 297 (1976); State v. Moreno, 21 Wash. App. 430, 585 P.2d 481 (1978).

74. *See* notes 132-35 and accompanying text *infra*.

75. *See* United States v. Ventresca, 380 U.S. 102 (1965).

76. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364 (1976) (inventory search); Carroll v. United States, 267 U.S. 132 (1925) (warrantless search for contraband in a vehicle upheld because based on probable cause).

77. Chimel v. California, 395 U.S. 752 (1969).

78. Warden v. Hayden, 387 U.S. 294, 309-10 (1967).

79. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (non-custodial search).

80. For a general discussion of the protection of private papers, see Fisher v. United States, 425 U.S. 391, 414 (1976) (Brennan, J., concurring).

81. Boyd v. United States, 116 U.S. 616 (1886).

82. "[A] compulsory production of the private books and papers of the owner of goods sought to be forfeited . . . is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution. . . ." *Id.* at 634-35.

emphasized the nature of the compulsion rather than the contents of the documents[83] and have concluded that the Fifth Amendment privilege is only violated when the defendant is compelled to "authenticate" the documents.

In *Bellis v. United States*,[84] the Court refused to extend a partner's personal Fifth Amendment privilege to the partnership records of a small law firm.[85] The Court described the privilege as designed to "prevent the use of legal process . . . to force [the accused] to produce and authenticate any personal documents or effects that might incriminate him."[86] In *Fisher v. United States*,[87] the Supreme Court held that the Fifth Amendment did not preclude the Internal Revenue Service from requiring the taxpayer to produce documents prepared by the taxpayer's accountants.[88] The Court reasoned that, since the existence and location of the papers were already known, the taxpayer's implicit admission of their existence was not constitutionally protected.[89] Further, his response to the subpoena would not authenticate the contents of the papers, since he had not prepared them and could not vouch for their accuracy.[90] In a footnote, the Court cited the "implicit authentication" rationale as the prevailing justification for the Fifth Amendment's application to documentary subpoenas.[91] The *Fisher* case was relied on in *Andresen v. Maryland*,[92] in which the Court held that the search, pursuant to a search warrant, of an individual's office for busi-

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83. *See* Andresen v. Maryland, 427 U.S. 463 (1976); Fisher v. United States, 425 U.S. 391 (1976); Bellis v. United States, 417 U.S. 85 (1974).

According to Justice Marshall, "This technical and somewhat esoteric focus on the testimonial elements of production rather than on the contents of the evidence the investigator seeks is . . . contrary to the history and traditions of the privilege. . . ." Fisher v. United States, 425 U.S. 391, 431 (1976) (Marshall, J., concurring).

84. 417 U.S. 85 (1974).

85. *Id.* at 101.

86. *Id.* at 88 (quoting United States v. White, 322 U.S. 694 (1944)).

87. 425 U.S. 391 (1976).

88. *Id.* at 411-14.

89. *Id.* at 411.

90. *Id.* at 413.

91. *Id.* at 412 n. 12. A witness implicitly authenticates a document when his very act of producing it provides his assurance that the article produced is the one demanded. The taxpayer in *Fisher* could not implicitly authenticate the documents that he was required to produce since he had not prepared them. *Id.* at 413.

92. 427 U.S. 463 (1976).

ness records, the seizure of those records, and the subsequent introduction of those records into evidence, did not violate the Fifth Amendment.[93] The Court again noted that the individual was neither asked to do or say anything nor to authenticate the records.[94] These cases indicate that, in the context of the compelled production of documents, the application of the Fifth Amendment privilege does not depend on whether the documents themselves are incriminating, but, rather, on whether the accused himself has been required to authenticate them either explicitly or implicitly.

II. The District Court's Decision in *Davis v. Israel*

The District Court began its analysis of the Fifth Amendment issue in *Davis* by determining that the pants had been admitted into evidence by the trial court judge on the implicit finding that they were indeed the pants that Davis had worn at the time of the murder.[95] It further determined that Davis was in police custody at the time he produced the clothing he had worn the night before,[96] and that he had been given the *Miranda* warnings before being told to put on the clothes.[97] Thus, the issue presented by these facts, according to the court, was whether Davis

> was required to give evidence against himself in violation of his Fifth Amendment privilege against self-incrimination when, following his arrest, he was ordered to put on the clothing which he had worn at the time of the murder, without having been warned specifically that he need not comply with such an order.[98]

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93. *Id.* at 472-73.

94. *Id.* at 473-74. For analysis of the Burger Court's application of the Fifth Amendment privilege to cases involving private papers, see Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383 (1977); Berger, *The Unprivileged Status of the Fifth Amendment Privilege*, 15 AM. CRIM. L. REV. 191 (1978).

95. Davis v. Israel, 453 F. Supp. 1316, 1323 (E.D. Wis. 1978). *See* note 11 and accompanying text *supra*.

96. 453 F. Supp. at 1323. The officers testified that they had gone to the defendant's apartment to arrest him and that at least one officer had drawn his gun. *See* note 19 *supra*.

97. 453 F. Supp. at 1323-24.

98. *Id.* at 1324.

The *Davis* court first considered whether Davis's action in putting on the clothing was testimonial and, thus, protected by the Fifth Amendment. It found that the trial court had been incorrect in equating Davis's actions in response to the police order with the actions of a suspect who submits to fingerprinting or other physical tests and, therefore, that the trial court's reliance on *Schmerber v. California*[99] was misplaced.[100] According to *Davis*, although clothing per se is physical evidence and non-testimonial,[101] Davis's act in putting on certain clothing, and thereby identifying it for the police, was testimonial.[102] In support of this conclusion, the *Davis* opinion quoted from a California Supreme Court opinion, *People v. Ellis*,[103] in which Chief Justice Traynor explained the distinction between acts which are testimonial and those which are not.[104] It also discussed three United States Supreme Court cases involving the production of documents: *Bellis v. United States*,[105] *Fisher v. United States*,[106] and *Andresen v. Maryland*.[107] In these cases, according to the *Davis* court, the Supreme Court had recognized that the protections of the Fifth Amendment are not limited to oral communications but also include privileges against performing acts which are substitutes for words.[108]

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99. 384 U.S. 757 (1966). *See* notes 64-66 and accompanying text *supra*.

100. 453 F. Supp. at 1324.

101. *Id.* (citing United States v. King, 433 F.2d 937 (9th Cir. 1970), *cert. denied*, 402 U.S. 976 (1971); McClard v. United States, 386 F.2d 495 (8th Cir. 1967), *cert. denied*, 393 U.S. 866 (1968)).

102. 453 F. Supp. at 1324.

103. 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966).

104. 453 F. Supp. at 1324. The court quoted the following language from *Ellis*:

> In such a test [voice identification], the speaker is asked, not to communicate ideas or knowledge of facts, but to engage in the physiological processes necessary to produce a series of articulated sounds, the verbal meanings of which are unimportant. . . .
>
> Voice identification testimony is the product of an observable physical characteristic made by an independent witness. It is the very type of objective factual evidence, independent of information communicated by the accused, that the privilege encourages police to seek. Moreover, independent identification testimony, unlike testimonial evidence derived from the accused, raises no question of reliance on the veracity of the accused.

People v. Ellis, 65 Cal. 2d at 531, 421 P.2d at 395, 55 Cal. Rptr. at 387.

105. 417 U.S. 85 (1974). *See* notes 84-86 and accompanying text *supra*.

106. 425 U.S. 391 (1976). *See* notes 87-91 and accompanying text *supra*.

107. 427 U.S. 463 (1976). *See* notes 92-94 and accompanying text *supra*.

108. 453 F. Supp. at 1324.

The court then stated that while the police could have seized Davis's clothing during a search incident to a lawful arrest, such seizure would not have provided them with evidence that these clothes were, in fact, those worn by Davis the previous night, the night when the murder was committed.[109] This information could only have been provided by Davis himself or by some other person who had seen him at that time; the prosecution, however, presented no such witness at trial.[110]

In concluding its analysis of whether Davis's acts were testimonial, the court found no difference between a suspect's statement that he wore certain clothes at a certain time and his admission, by putting them on in response to a direct order to do so, of the fact that he had worn the clothing.[111] In this context, the court referred to *Null v. Wainwright*,[112] in which the United States Court of Appeals for the Fifth Circuit held that a defendant's statement, in response to a police officer's request for certain clothes, that the clothes were the ones he had worn at a specified time, should be suppressed at trial because, at the time the statement was made, the defendant had been in custody and had not been given the proper *Miranda* warnings.[113]

The court next addressed the question of whether the *Miranda* warnings which Davis had been given were sufficient to apprise him of his right not to provide the police with the clothes that he had been wearing on the previous night.[114] The court reasoned that no person would infer, from a police warning that he had the right to remain silent, the further right to defy a direct police order by refusing to produce the physical evidence sought by the police.[115] To support the proposition that "[a] layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege,"[116] the court quoted the Supreme Court decision in *Maness v. Meyers*,[117]

109. *Id.* at 1325.
110. *Id.* at 1325-26.
111. *Id.* at 1326.
112. 508 F.2d 340 (5th Cir.), *cert. denied*, 421 U.S. 970 (1975).
113. *Id.* at 345.
114. 453 F. Supp. at 1326.
115. *Id.*
116. 453 F. Supp. at 1326 (quoting Maness v. Meyers, 419 U.S. 449, 466 (1975)).
117. 419 U.S. 449 (1975).

which upheld, as non-contumacious conduct, the acts of an attorney in advising his client not to produce material which the lawyer believed would incriminate the client. Accordingly, the court held that the mandate of the Fifth Amendment had been violated, not because the *Miranda* warnings as given deviated from the language required by that opinion, but, rather, because, under the circumstances of this case, the defendant's waiver of his Fifth Amendment right against self-incrimination was unknowing and, therefore, involuntary.[118]

III. Analysis

The facts of *Davis* raise issues involving two separate lines of decisions: those determining what constitutes testimonial communication and those determining the scope and function of the *Miranda* warnings. The *Davis* holding appears to be contrary to both of these lines of decision. First, an order to put on clothing does not usually involve any Fifth Amendment rights.[119] In *Davis*, however, the defendant's acquiescence was held to be testimonial evidence within the protection of the Fifth Amendment. Second, when an intelligent person makes an incriminating statement after receiving *Miranda* warnings in the manner prescribed by the Supreme Court, use of those statements at trial generally violates no constitutional right.[120] In *Davis*, however, the court found a violation of the Fifth Amendment. Despite these apparent contradictions, close analysis reveals that *Davis* is, in fact, consistent with the Supreme Court's rationale for distinguishing physical from testimonial evidence.[121] Further, in requiring something in addition to the usual *Miranda* warnings to protect the defendant's Fifth Amendment privilege, *Davis* is actually consistent with the Supreme Court's rationale for the *Miranda* requirements.[122]

A. *The Testimonial Question*

The evidence at issue in *Davis*, a pair of pants, is physical

118. 453 F. Supp. at 1326.
119. *See* notes 61-71 and accompanying text *supra*.
120. *See* notes 18-45 and accompanying text *supra*.
121. *See* notes 123-53 and accompanying text *infra*.
122. *See* notes 154-81 and accompanying text *infra*.

evidence. Since a defendant may be constitutionally compelled to provide physical evidence,[123] in order to find that Davis had a claim to Fifth Amendment protection, it was necessary for the court to determine that the production of clothing was something more.

Physical evidence is most frequently obtained through a valid search,[124] and the state argued that the pants were physical evidence properly seized in a search incident to a lawful arrest.[125] Depending on the circumstances, if Davis had been wearing the pants at the time of his arrest, or if the pants had been within his arms' reach, the police might have seized them in accordance with this exception to the requirement of a search warrant.[126] Under those circumstances, the police would have obtained the clothing and nothing more. What made the pants a critical piece of evidence in this case, however, was Davis's admission, through his conduct, that he had worn them on the night of the murder. Without this information, which Davis provided by complying with the police order to put on the clothing he had worn the previous evening, the evidentiary value of the pants probably would have been less significant.[127] Thus, the court rejected a search and seizure analysis, the analysis that had been the basis for admitting the clothing in the state courts.[128]

The *Davis* court also found that the *Schmerber*[129] rationale was not controlling. Although the court did not analyze the facts to draw the distinction between the *Davis* case and those in which a defendant is compelled to exhibit his physical characteristics, its conclusion is clearly correct. Davis was not merely the source of physical evidence the relevance of which could be established by independent witnesses.[130] The state had produced

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123. *See* notes 61-71 and accompanying text *supra*.

124. *See* notes 74-79 and accompanying text *supra*.

125. The state argued that Davis's arrest was lawful since it was supported by probable cause. Brief for Respondent at 13, Davis v. Israel, 453 F. Supp. 1316 (E.D. Wis. 1978). *See* note 77 and accompanying text *supra*.

126. *See* Chimel v. California, 395 U.S. 752 (1969).

127. *See* note 14 *supra* and note 110 and accompanying text *supra*.

128. State v. Davis, 66 Wis. 2d 636, 225 N.W.2d 505 (1975).

129. Schmerber v. California, 384 U.S. 757 (1966). *See* notes 64-71 and accompanying text *supra*.

130. *See* People v. Ellis, 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966).

no witnesses who had seen Davis wearing the clothing at the time of the crime.[131] Davis's very act of producing the clothing was a communication to the police, a communication by which he himself established that he had been wearing them on the previous evening, the evening when the murder had been committed.

Since *Davis* presented issues of first impression, the authority available to the court to support the testimonial aspect of Davis's production of the clothing was limited. The *Davis* court cited, but did not discuss, the decision of the Washington appellate court in *State v. Dennis*,[132] which also held a defendant's production of physical evidence to be a testimonial response. The defendant in *Dennis* had been in police custody at his home when the police, in order to avoid the necessity of a search warrant, requested him to produce drugs which the officer believed were in the apartment.[133] The *Dennis* court reasoned that the defendant's subsequent acts of removing the cocaine from its hiding place and putting it on the table in front of the police were admissions which conveyed more graphically than words that he knew of the presence and precise location of the contraband in his home.[134] Consequently, the court in *Dennis* suppressed the evidence because the officers had not advised the defendant of his *Miranda* rights.[135] The *Davis* court might have

131. Davis v. Israel, 453 F. Supp. 1316, 1325-26 (E.D. Wis. 1978).

132. 16 Wash. App. 417, 558 P.2d 297 (1976).

133. According to the opinion, another officer had gone to get a proper search warrant. *Id.* at 418, 558 P.2d at 299.

134. *Id.* at 423, 558 P.2d at 301. The court noted that although the drugs might have been obtained by a search warrant, or with the defendant's consent, the defendant's response added the ingredient of guilty knowledge, all but negating any possible defense of unknowing possession. *Id.* at 423-24, 558 P.2d at 301.

135. Subsequent to *Davis*, two other courts have found defendants' productions of evidence at the request of the police to be testimonial, and, in both cases, the evidence was suppressed because the defendants had not been given their *Miranda* warnings. In State v. Moreno, 21 Wash. App. 430, 585 P.2d 481 (1978), the court, relying on the *Dennis* decision, held a defendant's production of cocaine during an airport interrogation to be testimonial. The prosecution argued, *inter alia*, that if the court found that the defendant was in custody at the time the police officer asked, "Do you have something you shouldn't?" the arrest was supported by probable cause, and the cocaine, which would have been discovered in a valid search incident to arrest, should be admissible. The court, however, found that no probable cause supported the arrest. *Id.* at 436, 585 P.2d at 485.

In State v. Mason, 164 N.J. Super. 1, 395 A.2d 536 (1979), the court suppressed, on

omitted any discussion of the *Dennis* decision because the holding in *Dennis* was based on the defendant's failure to receive *Miranda* warnings.

The *Davis* court focused on cases in which the crucial element was the the defendant's identification of the evidence. In *Null v. Wainwright*, [136] the defendant was arrested at his home and told by the arresting officers that they would need the clothes he had been wearing the night before. He replied, "Well, these are the same clothes I had on yesterday."[137] The court suppressed Null's statement because he had not been given his *Miranda* warnings.[138] The state argued that, even if the statement should be suppressed, the tangible fruits of the statement, the clothing, should be admissible. The *Null* court further assumed, without deciding, that the fruits of statements taken in violation of *Miranda* generally should be inadmissible.[139] The *Davis* court compared its facts with those in *Null* and correctly recognized that no real difference existed between what Null said and what Davis did. Davis's non-verbal response provided the same kind of incriminating information that Null provided by his oral statement; each identified the evidence by linking it to the time of the crime.

In addition, the *Davis* court sought support in Supreme Court cases dealing with the production of documents.[140] The *Davis* court, however, never rationalized its analogy to these cases, but merely introduced them by stating that "the United States Supreme Court has recognized that the protections of the Fifth Amendment are not limited to oral communications but also include privileges against performing acts which are merely

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Fifth Amendment grounds, the contraband which the defendant had produced after being asked by a police officer if she had any drugs. The court construed her action as a non-verbal response which should be treated in the same way as a verbal response. Since the police did not arrest the defendant, but instead chose to interrogate her, the court rejected the argument that a search incident to a lawful arrest had occurred. *Id.* at 4, 395 A.2d at 538.

136. 508 F.2d 340 (5th Cir.), *cert. denied*, 421 U.S. 970 (1975).

137. *Id.* at 341.

138. *Id.* at 342.

139. *Id.* at 343. In the circumstances of the case, however, the error was found to be harmless. *Id.* at 345.

140. Andresen v. Maryland, 427 U.S. 463 (1976); Fisher v. United States, 425 U.S. 391 (1976); Bellis v. United States, 417 U.S. 85 (1974). *See* notes 84-94 and accompanying text *supra*.

a substitute for words."[141] The *Davis* court's reliance on these cases is soundly based; the opinions stressed the importance, for Fifth Amendment purposes, of whether the defendant was asked to do or say anything to authenticate the materials produced.[142]

An examination of the language which the *Davis* court quoted from the document-production cases reveals that its emphasis was on the concept of authentication.[143] The Supreme Court indicated in these cases that the applicability of the privilege against self-incrimination depended on whether the defendant had been compelled to vouch for the authenticity of the materials that the government had sought to have produced.[144] If an individual is compelled to state implicitly, by producing a document, that the document is in fact the one demanded, the Fifth Amendment privilege may apply.[145] If, on the other hand,

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141. Davis v. Israel, 453 F. Supp. 1316, 1324 (E.D. Wis. 1978).

142. *See* notes 136-37 and accompanying text *supra*.

143. The *Davis* court quoted the following passages:

As the Court explained in *United States v. White*, supra, 322 U.S. at 698, 64 S.Ct. 1248, "[t]he constitutional privilege against self-incrimination . . . is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him." Bellis v. United States, 417 U.S. 85, 88, 94 S.Ct. 2179, 2183, 40 L.Ed.2d 678 (1974).

We have recognized that the Fifth Amendment "respects a private inner sanctum of individual feeling and thought"—an inner sanctum which necessarily includes an individual's papers and effects to the extent that the privilege bars their compulsory production and authentication—and "proscribes state intrusion to extract self-condemnation." Id. at 91, 94 S.Ct. at 2184.

. . . .

This case thus falls within the principle stated by Mr. Justice Holmes: "A party is privileged from producing the evidence but not from its production." Johnson v. United States, 228 U.S. 457, 458, 33 S.Ct. 572, 57 L.Ed. 919 (1913). This principle recognizes that the protection afforded by the Self-Incrimination Clause of the Fifth Amendment "adheres basically to the person, not to information that may incriminate him." Couch v. United States, 409 U.S. [322] at 328, 93 S.Ct. 611, [34 L.Ed.2d 548]. Thus, although the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information, see Fisher v. United States, supra, a seizure of the same materials by law enforcement officers differs in a crucial respect—the individual against whom the search is directed is not required to aid in the discovery, production, or authentication of incriminating evidence. [Andresen v. Maryland, 427 U.S. 463 at 473-74 (1976)].

Davis v. Israel, 453 F. Supp. 1316, 1324-25 (E.D. Wis. 1978).

144. *See* notes 84-94 and accompanying text *supra*.

145. *See* Fisher v. United States, 425 U.S. 391, 412 n. 12 (1976).

the defendant is not compelled to produce the document, and if its authenticity can be established by a third party, the privilege is inapplicable.[146]

The *Davis* court implied an analogy between Davis's act of identification and acts of authentication of a document. Davis was compelled to produce the clothing, and by producing them he implicitly authenticated them as those worn on the previous evening since implicit in his response was his assurance that the clothing produced was the clothing demanded. His action announced: "This is what I was wearing last night." Even if the clothing could have been obtained by another method, such as a search incident to a lawful arrest,[147] the state would have had to establish, through an independent witness, that Davis had been wearing it at the time of the murder. The prosecution presented no such evidence at trial. The authentication of the clothing was supplied by Davis, who provided this testimony when he produced the clothing. This act of identification should be protected, therefore, by the Fifth Amendment as testimonial conduct.

Since the *Davis* court reached its decision before the United States Supreme Court decided *Rhode Island v. Innis*,[148] the *Davis* court did not apply the *Innis* test to determine whether an interrogation had occurred.[149] As noted above, according to *Innis*, interrogation includes any words or actions on the part of the police, other than those normally attendant to arrest and custody, that the police should know are reasonably likely to elicit an incriminating response from the suspect.[150] The defendant in *Davis* was not merely told to get dressed, which would have been a normal request on the part of the police. Instead, he was told to get dressed in the clothing he had worn on the previous night, the night of the murder. The only possible reason for such an order was to obtain evidence linking Davis to the crime.[151] Indeed, the police order was the same as a police interrogatory: "What clothing did you wear last night?" Under the

146. *See* Andresen v. Maryland, 427 U.S. 463 (1976).
147. *See* notes 77-78 and accompanying text *supra*.
148. 100 S. Ct. 1682 (1980). *See* notes 23-26 and accompanying text *supra*.
149. The court did determine that Davis was in custody. *See* note 96 *supra*.
150. 100 S. Ct. at 1690-91.
151. *See* note 173 and accompanying text *infra*.

Innis test, the police should have known that such an order was likely to produce an incriminating response. It was, therefore, an interrogation under *Miranda*.

In sum, the *Davis* court correctly found support for its holding in a decision of the United States Court of Appeals for the Fifth Circuit involving a defendant's identification, by his oral testimony, of incriminating evidence and in Supreme Court cases involving production of documents. Davis's production of the clothing may be analyzed as a nonverbal statement which was made in response to police interrogation and which served as an acknowledgment that he had worn the clothing on the night of the murder.[152] Alternatively, the situation might be analyzed as a compulsion to authenticate the clothing by responding to the order to produce it.[153]

B. Miranda *Analysis*

After finding that the production of the clothing was testimonial conduct, the *Davis* court addressed the issue of whether the defendant's Fifth Amendment privilege against compulsory self-incrimination had been properly protected. This issue, however, did not fit easily into the established framework for analysis of *Miranda* questions. Davis had not made an oral or written statement, yet the court determined that his actions were within the protection of the Fifth Amendment.[154] *Davis* was also not the typical case in which a defendant claims that the *Miranda* warnings given were incorrect or incomplete; no contention was made that the warnings Davis received had departed in any way from those prescribed by *Miranda*. The question presented was whether, as also required by *Miranda*, Davis had understood his rights. The effect of the court's analysis of the *Miranda* question was to invalidate a facially sufficient warning because it did not adequately protect the defendant against self-incrimination.

This determination suggests that the court was examining the substance of the warnings rather than their form. The court, however, did not cite available case law ruling that, in assessing the adequacy of the *Miranda* warnings, substance should take

152. *See* notes 140-42 and accompanying text *supra*.
153. *See* notes 73-94 and accompanying text *supra*.
154. *See* notes 95-113 and accompanying text *supra*.

priority over form.[155] These cases could have been marshalled to support the position that the defendant's subjective understanding of the warnings he had been given was of primary importance, even though these decisions dealt with technical deficiencies in the warnings given, and the question they addressed was whether the warnings, as given, were substantially the same as those prescribed by *Miranda*. In *Davis*, on the other hand, the form of the warnings was in full conformity with *Miranda*. Nonetheless, the *Davis* court looked beyond the form of the warnings to the substance of what Davis had been told—and what he impliedly had not been told.

The court in *Davis* also did not discuss or rely on any test, such as that set out in *Coyote v. United States*,[156] for determining the adequacy of the warnings. Its holding that the warnings given *Davis* were insufficient under the circumstances was based on a practical assessment of the effectiveness of the words in informing Davis of his rights.[157] The court employed a common sense analysis: a layman would not have known that the right to remain silent included the right to refuse to produce his clothing. The court's reasoning that the average person would fail to appreciate the testimonial implications of his actions is further strengthened by the fact that the Wisconsin Supreme Court failed to recognize Davis's Fifth Amendment claim as meritorious.[158]

The only authority cited by the *Davis* court in connection with its *Miranda* analysis was the Supreme Court decision in *Maness v. Meyers*.[159] *Davis* used the language of *Maness* to support the position that sometimes the privilege cannot be completely understood by a layman. It quoted the language of Chief Justice Burger in *Maness:*

> The assertion of a testimonial privilege, as of many other rights, often depends upon legal advice from someone who is trained and

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155. *See* note 27 and accompanying text *supra*.

156. 380 F.2d 305 (10th Cir.), *cert. denied*, 389 U.S. 992 (1967). *See* notes 28-29 and accompanying text *supra*.

157. Davis v. Israel, 453 F. Supp. 1316, 1326 (E.D. Wis. 1978).

158. The Wisconsin court reviewed Davis's suppression motion only on Fourth Amendment grounds, noting that the defendant had raised other claims which were without merit. State v. Davis, 66 Wis. 2d 636, 225 N.W.2d 505 (1975). *See* note 181 *infra*.

159. 419 U.S. 449 (1975).

> skilled in the subject matter, and who may offer a more objective opinion. A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege.[160]

Maness, however, did not address the issue of whether an attorney might be required to explain the meaning of the privilege so that an individual could effectively waive it, but merely dealt with the right of an attorney to advise his client on the scope of the privilege without being held in contempt.[161]

The use of *Maness* in the context of a *Miranda* question confuses more than clarifies what *Davis* held. *Maness* does not change the fact that under *Miranda* a person can waive his privilege without having consulted with an attorney.[162] *Miranda* only requires that a defendant be made aware of his right to have counsel present,[163] not that an attorney be made available immediately to explain the defendant's rights. A defendant who waives his rights and makes a statement is not protected from the consequences of his decision, even though an attorney would presumbly have advised him to say nothing.[164] Thus, the fact that Davis made a "statement" without consulting an attorney would not by itself make his waiver involuntary.

When an accused waives his rights by choosing to make a statement without the advice of counsel, however, he has at least understood that he has the right to say nothing.[165] The *Davis*

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160. *Id.* at 466.

161. *Id.* at 468. The decision held that a lawyer may not be held in contempt for advising his client, during the trial of a civil case, to refuse to produce material demanded by a subpoena duces tecum when the lawyer believes in good faith that the material may tend to incriminate his client. *Id.*

162. *See* notes 31-45 and accompanying text *supra*. It has been suggested that the *Miranda* opinion involves a basic ambiguity with respect to the question of waiver: Can a suspect make a voluntary and knowledgeable choice whether to waive certain fundamental rights without the presence and advice of counsel in the first instance? See A.L.I. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Draft No. 1 1968).

163. Miranda v. Arizona, 384 U.S. 436, 466 (1966).

164. In United States v. Anderson, 533 F.2d 1210 (D.C. Cir. 1976), the defendant challenged the district court's refusal to suppress statements he had made concerning the ownership of a sawed-off shotgun. He argued that, although he had acknowledged that he understood his rights, his waiver was not knowing since he had not been told the precise nature of the charge on which he had been arrested. *Id.* at 1212 n. 3. The circuit court stated that even though the defendant's decision was based on less information than a qualified attorney might have demanded before he offered a legal opinion, the waiver was still knowing and voluntary. *Id.*

165. In United States v. Hall, 396 F.2d 841 (4th Cir.), *cert. denied*, 393 U.S. 918

court recognized that Davis did not have such an understanding with respect to the act he was ordered to perform; he did not recognize that his right to remain silent included the right not to comply with the police order to put on the pants.[166] Thus, it was not Davis's failure to consult with an attorney that made his waiver unknowing; it was the failure of the words of the warning themselves to convey that more than speech was protected by the Fifth Amendment privilege.[167] Because Davis did not know what his rights were, he could not knowingly and intelligently waive them.

IV. Impact

The *Davis* decision was based on the premise, stated in *Miranda,* that before the prosecution can introduce into evidence statements obtained from a defendant during a custodial interrogation, it must demonstrate that the requirements of adequate warnings and effective waiver have been met.[168] The *Davis* court reasoned that Davis, in effect, did not receive a warning, since the warning given did not specifically encompass the kind of statement he was told to make. Since he did not receive an appropriate warning, he was unable to make an effective waiver.[169]

At first glance, *Davis* appears to be an unwarranted extension of *Miranda* at a time when the Supreme Court decisions have constricted, or at least constrained, the decision.[170] The Burger Court's emphasis on the deterrent purpose of the *Miranda* warnings presupposes that the police have engaged in unlawful conduct. When the police act in good faith, no need exists

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(1968), the court rejected the defendant's claim that his ignorance of the high degree of punishment allowable for the crime charged prevented a "knowing and intelligent waiver." The court stated:

> [T]he test is not whether [the defendant] made an intelligent decision in the sense that it was wise or smart to admit his participation in the crime, but whether his decision was made with the full understanding that he need say nothing at all and that he might then consult with a lawyer if he so desired.

Id. at 846.

166. Davis v. Israel, 453 F. Supp. 1316, 1326 (E.D. Wis. 1978).

167. *Id.* at 1326.

168. *See* notes 15-47 and accompanying text *supra.*

169. Davis v. Israel, 453 F. Supp. 1316, 1326 (E.D. Wis. 1978).

170. *See* notes 46-59 and accompanying text *supra.*

to deter future misconduct.[171]

In *Davis*, the police appear to have complied fully with *Miranda*; they gave Davis his warnings exactly as *Miranda* requires. The *Davis* decision, then, seems to put a burden on police officers to be aware of those subtleties of the Fifth Amendment protection which *Davis* holds to be beyond a layman's grasp.[172]

While the police did not question Davis after giving him the *Miranda* warnings, it is clear from that portion of the transcript quoted in the *Davis* opinion that the police continued to seek incriminating evidence from him.[173] The factors which, according to *Innis*, constitute an interrogation were present in *Davis*.[174] The police did not simply ask for Davis's clothing; they told him to indicate the clothing that he had worn on the night of the murder so that the clothing could be examined and Davis could

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171. *See* notes 53-59 and accompanying text *supra*.

172. *See* notes 112-18 and accompanying text *supra*.

173. "Q Now, prior to telling him that, why did you want him to put on the clothes he had on the night before?
"A Because he was a suspect.
"Q Well, in other words he was suspected of the crime?
"A Yes.
"Q And you wanted him to put on the clothes he had on at the time the crime was committed?
"A Right.
"Q That was in the hopes of possibly solving the crime?
"A Possibly, sure.
"Q Possibly to find any stains or fibers or hairs that might assist? It's possible, is that correct?
"A Well, I don't remember, Sir.
"Q Well, that is why you would want him to put on the clothes from the night before?
"A Well, probably for identification.
"Q Identification and any other incriminating evidence that might be found on the pants or jacket?
"A Sure.
"Q Now, prior to telling him to put on the clothing that he was wearing at the time of the crime did anybody bother to tell him that that might be tending to incriminate himself?
"A No, Sir.
"Q Did anybody bother to tell him that he did not have to give evidence against himself, that he did not have to bring spotted or bloody pants, either?
"A He was not advised of anything except his constitutional rights."
Davis v. Israel, 453 F. Supp. at 1318-19. *See* notes 6-10 and accompanying text *supra*.

174. *See* notes 23-26 and accompanying text *supra*.

be linked to the crime. If the officers were unaware of the testimonial implications of any responses to their order, the order was made in good faith. If, on the other hand, they were sophisticated enough to appreciate that they were asking Davis to make a self-incriminating statement, their failure to inform Davis that he need not comply would indicate bad faith. If good faith were found, the Burger Court might see this decision as an unwarranted extension of *Miranda*. On the other hand, if it were found that the police acted in bad faith, the deterrent effect of the exclusionary rule, which the Burger Court decisions emphasize, is served by the *Davis* decision.

The good faith or bad faith of the police, however, should not be determinative of the constitutional question. The Fifth Amendment forbids the prosecution from compelling an individual to incriminate himself. In the view of the *Miranda* Court, the custodial setting itself provides the compulsion to speak.[175] Thus, unless *Miranda* is overruled, the police cannot seek self-incriminating evidence from a defendant in custody without telling him that he has a right not to answer. In *Davis*, the police elicited incriminating evidence from the defendant which, the court determined, he was constitutionally entitled to withhold. Although the *Miranda* requirement may not have been intentionally circumvented, Davis was nevertheless compelled to give self-incriminating evidence without being told that he had the right not to comply with the police order.

The *Davis* decision does not suggest the need for an addition to the warnings already prescribed by *Miranda*. In fact, it would be inaccurate to warn a defendant in custody that, in addition to the right to remain silent, he has the right to refuse to do anything. Often the cooperation of an accused can be obtained without violating constitutional rights.[176] A defendant who has been arrested is required to submit to a search of his

175. In *Miranda*, the Court saw as inherently coercive any police custodial interrogation conducted by isolating the suspect with police officers; therefore, the Court established a *per se* rule that all incriminating statements made during such interrogation are barred as "compelled." All *Miranda*'s safeguards, which are designed to avoid the coercive atmosphere, rest on the overbearing compulsion which the Court thought was caused by isolation of a suspect in police custody. United States v. Washington, 431 U.S. 181, 187 n. 5 (1977).

176. *See generally* 8 WIGMORE ON EVIDENCE § 2265 (McNaughton rev. 1961).

person and of the area within his immediate control.[177] He may also be required to try on items of clothing,[178] appear in a line-up for visual identification,[179] or submit to various physical tests.[180]

What the decision does indicate, however, is that *Miranda* did not foresee every possible situation. A defendant may, as in *Davis*, make a self-incriminating statement through conduct rather than through words.[181] In such a case, the privilege against self-incrimination is broader than the words of the *Miranda* warnings indicate, and the standard *Miranda* warnings, which are addressed to oral statements, cannot serve the purpose of truly informing the accused of his rights. The only realistic approach to this type of case is an *ad hoc* determination of whether, under the circumstances, the defendant was adequately notified of his rights under the Fifth Amendment.

V. Conclusion

In the circumstances presented in *Davis*, the police required and received not only the bloodstained pants, but also the defendant's indispensable identification of them as the clothing worn on the night of the murder. Davis was in the very situation to which the *Miranda* Court had responded. He was in the custody of the police whose guns were drawn. He was told to reveal what he had worn the previous evening. Such an order was an interrogation since the police should have known that it was rea-

177. Chimel v. California, 395 U.S. 752 (1969).

178. Holt v. United States, 218 U.S. 245 (1910).

179. United States v. Wade, 388 U.S. 218 (1967).

180. *E.g.*, Schmerber v. California, 384 U.S. 757 (1966) (blood test).

181. It is not clear whether the dearth of cases dealing with a self-incrimination based on facts such as those in *Davis* is the result of the rarity of such factual situations or of a general failure to appreciate the Fifth Amendment issue in those circumstances. In State v. Ege, 274 N.W.2d 350 (Iowa 1979), the court was presented with facts remarkably similar to those in *Davis*. The defendant, who was later convicted of rape, was arrested by the police and given his *Miranda* warnings. He then, at the request of the police, went into his house and obtained the clothing he was wearing the previous night, the night of the rape. The defendant moved unsuccessfully to suppress the clothing on Fourth Amendment grounds, but apparently did not raise a Fifth Amendment claim. On appeal, the Iowa Supreme Court, which described the legal principles involved as relatively simple, found a valid consent search. *Id.* at 353. The opinion did not indicate whether the police had an independent description of the clothing prior to requesting its production by the defendant.

sonably likely to produce an incriminating response. By interposing a warning that he had a right to remain silent, *Miranda* attempted to protect the defendant's privilege not to incriminate himself. In *Davis*, the police gave this *Miranda* warning. Under these circumstances, however, the warning could not accomplish its purpose: telling Davis that he had the right to remain silent did not impart clear, understandable information that the order to produce the clothing could be ignored. As a result, Davis gave his "statement" without the requisite awareness of his Fifth Amendment privilege. Accordingly, admission at trial of the evidence acquired by the police was correctly held to violate the Fifth Amendment.