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Articles

In a Different Register:  
The Pragmatics of Powerlessness  
in Police Interrogation

Janet E. Ainsworth<sup>†</sup>

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## I. INTRODUCTION

Imagine that you are in police custody, about to be interrogated concerning a crime. Before the questioning begins, the interrogating officer tells you that you have the right to remain silent and to have an attorney present during questioning. If you decide to invoke your right to the presence of an attorney, you must be very careful about how you phrase your request. Make your request in the wrong way, and you may lose legal protection for your constitutional rights.

The Supreme Court has yet to resolve the question of what legal effect, if any, should be accorded to an arrestee's use of equivocal or ambiguous language in invoking *Miranda*<sup>1</sup> rights during police interrogation. Three different approaches have emerged in the state and lower federal courts. Some jurisdictions have adopted a rule requiring invocations of the right to counsel to be direct and unambiguous before they are given any legal effect. Other jurisdictions allow the police to continue questioning a suspect whose invocation is ambiguous or equivocal, but only to determine the suspect's intent with respect to the exercise of the right to counsel. Still others treat any

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1. *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that suspect in police custody undergoing interrogation has right to remain silent and right to presence of attorney).

recognizable invocation as legally sufficient to bar any further police interrogation.

The first two doctrinal approaches, which are observed in the majority of jurisdictions, provide enhanced constitutional protection from further police interrogation for those who use direct and assertive modes of expression, and penalize those who adopt indirect or qualified ways of speaking. The legal distinctions in the degree of protection accorded to arrestees rest on implicit and unexamined norms about how people express themselves—namely, that people naturally do and should use direct and unqualified ways of speaking.

Invocation doctrines that favor direct speech operate to the detriment of certain groups within society. Sociolinguistic research has demonstrated that discrete segments of the population—particularly women and ethnic minorities—are far more likely than others to adopt indirect speech patterns. An indirect mode of expression is characteristic of the language used by powerless persons, both those who are members of certain groups that have historically been powerless within society as well as those who are powerless because of the particular situation in which they find themselves. Because criminal suspects confronted with police interrogation may feel powerless, they will often attempt to invoke their rights by using speech patterns that the law currently refuses to recognize. Ironically, invocation standards used in a majority of jurisdictions, although intended to protect the individual from abuses of power by the police, in practice provide systematically inferior protection to the least powerful in society.

The inadequacy of the majority legal approach to the invocation of *Miranda* rights is symptomatic of a more general phenomenon within the law: the incorporation of unconscious androcentric assumptions into legal doctrine. Feminist theory has exposed many of these assumptions and thus has had a powerful impact on many aspects of contemporary legal thought.<sup>2</sup> It may not be immediately obvious what relevance feminist theory has for such areas of law as criminal procedure that are, or at least appear to be, gender-neutral. However, recent works in feminist jurisprudence have examined a variety of legal doctrines and practices that seem on the surface to be gender-neutral, and have discovered gender bias<sup>3</sup> through the use of one of the primary

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2. Professor Owen Fiss has suggested that feminism has a transformative potential for the law similar to that of the civil rights movement of the 1960's. Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 15 (1986); see also Owen M. Fiss, *The Law Regained*, 74 CORNELL L. REV. 245, 251-55 (1989). Professor Fiss describes feminist jurisprudence as a "vibrant intellectual movement in the law" that "infuses new life and energy into the notion of law as public ideal[, which] it enjoyed during the sixties but not since." *Id.* at 251, 254.

3. See, e.g., Deborah Maranville, *Feminist Theory and Legal Practice: A Case Study on Unemployment Compensation Benefits and the Male Norm*, 43 HASTINGS L.J. 1081 (1992) (demonstrating that unemployment compensation policy requiring applicants to be available for full-time work is premised on work patterns and lack of care-giving responsibilities more typical of men than of women); see also Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593 (1987) (arguing that certain aspects of Fourth Amendment law reflect male preferences for

methodological tools of feminist theory—asking the “woman question.”<sup>4</sup> As framed in feminist jurisprudence, the “woman question” asks, “What would law be like if women had been considered by the drafters and interpreters of the law?” Asking the “woman question” forces us to imagine a counterfactual world in which women’s experiences, perspectives, and behavior were taken into account in constructing the legal order. By measuring the actual legal order against this imagined world, feminist methodology exposes assumptions that are deeply embedded within the law, assumptions that influence the shape of legal doctrine<sup>5</sup> and the dynamics of legal practice.<sup>6</sup>

In the case of *Miranda* rights, asking the “woman question” means asking whether a legal doctrine preferring direct and unqualified assertions of the right to counsel takes into account the speech patterns of women as well as other powerless groups. As I will detail, sociolinguistic research on typical male and female speech patterns indicates that men tend to use direct and assertive language, whereas women more often adopt indirect and deferential speech patterns. Because majority legal doctrine governing a person’s rights during police interrogation favors linguistic behavior more typical of men than of women, asking the “woman question” reveals a hidden bias in this ostensibly gender-neutral doctrine.

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autonomous individualism over female preferences for connection in relationships).

4. For a consideration of asking the “woman question” as feminist methodology, see Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837-49 (1990). As Professor Bartlett framed it, “The purpose of the woman question is to expose those features [of male bias within the law] and how they operate, and to suggest how they might be corrected.” *Id.* at 837.

5. See, e.g., Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Martha Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981) (focusing on legal treatment of pregnancy).

6. Some feminists have maintained that the professional norms of legal practice, particularly litigation practice, reward persons who display such stereotypical male behavior traits as competition, aggression, and abstract acontextual thinking, and undervalue such purportedly female traits as cooperation, caring, and contextual non-linear thought. See, e.g., Jane M. Cohen, *Feminism and Adaptive Heroism: The Paradigm of Portia as a Means of Introduction*, 25 TULSA L.J. 657 (1990); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women’s Lawyering Process*, 1 BERKELEY WOMEN’S L.J. 39 (1985). Others have made analogous claims that women judges have a distinctive voice in their jurisprudence. See Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1928-33 (1988); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986). This scholarship is based, directly or indirectly, on Carol Gilligan’s influential social psychological work arguing that women tend to eschew the male ethic of abstract justice in favor of a contextual ethic of care. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982); see also MARY F. BELENKY ET AL., WOMEN’S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND (1986) (suggesting, similarly, that women disproportionately assume subjectivist epistemological positions that give them a different learning style from most men). Later psychological research suggests that the two contrasting orientations toward justice posited by Gilligan are not absolutely gender-linked; not all men or women adopt the gender-specific moral reasoning predicted by Gilligan, and both men and women combine aspects of each in their thinking. See Nona P. Lyons, *Two Perspectives: On Self, Relationships, and Morality*, 53 HARV. EDUC. REV. 125, 137-42 (1983); Diana T. Meyers, *The Socialized Individual and Individual Autonomy*, in WOMEN AND MORAL THEORY 139, 144 (Eva F. Kittay & Diana T. Meyers eds., 1987) (“[I]t is important to recognize that feminine socialization is not monolithic.”). This research suggests that it is misleading to interpret Gilligan’s work as supporting a broadly essentialist theory about gendered reasoning.

The sociolinguistic evidence that women disproportionately adopt indirect speech patterns predicts that legal rules requiring the use of direct and unqualified language will adversely affect female defendants more often than male defendants. The real world consequences of such a bias are by no means trivial. If women are indeed disadvantaged by this doctrine, then the law has compromised the ability of millions of women arrestees to exercise their constitutional rights.<sup>7</sup>

The detrimental consequences of interrogation law, however, are not limited to female defendants. Asking the "woman question" provokes related inquiry into whether legal doctrine may similarly fail to incorporate the experiences and perspectives of other marginalized groups. The fact that asking the "woman question" can prompt fruitful inquiry into other missing perspectives is what Katherine Bartlett calls "[c]onverting the [w]oman [q]uestion into the [q]uestion of the [e]xcluded."<sup>8</sup> Although the sociolinguistic research on speech patterns of various ethnic groups in the United States is less extensive than that detailing gender-linked differences in language use, the available evidence demonstrates that there are a number of ethnic speech communities whose members habitually adopt a speech register including indirect and qualified modes of expression very much like those observed in typical female language use.

Even within communities whose speech is not characterized by indirect modes of expression, individual speakers who are socially or situationally powerless frequently adopt an indirect speech register. In fact, several prominent researchers have concluded that the use of this characteristically "female" speech style correlates better with powerlessness than with gender.<sup>9</sup> The psychosocial dynamics of the police interrogation setting inherently involve an imbalance of power between the suspect, who is situationally powerless, and the interrogator, whose role entails the exercise of power. Such asymmetries of power in the interrogation session increase the likelihood that a particular suspect will adopt an indirect, and thus seemingly equivocal, mode

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7. In 1990, more than two million arrestees were women. TIMOTHY J. FLANAGAN & KATHLEEN MAGUIRE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1991, at 443, Table 4.7, Arrests. An obvious question is whether empirical evidence shows that women defendants are harmed by current legal doctrine concerning equivocal invocation of the right to counsel. There are formidable obstacles to obtaining the data for empirical research on this topic. Ideally, a researcher would be able to obtain transcripts of the police interrogation of many suspects of both sexes. Unfortunately, tape-recorded interrogations are the exception rather than the rule in police practice. Even if enough transcripts existed, however, gaining access to the tapes without permission would infringe on the privacy rights of the arrestees, as would the release by the police of names of the arrestees so that permission to use the material could be sought. In any event, obtaining such permission from a captive population raises its own formidable ethical obstacles for the researcher.

8. Bartlett, *supra* note 4, at 847. For a perceptive application of this methodology, exposing the consequences of excluding perspectives of the "other" in a wide variety of legal contexts, see MARTHA MINOW, MAKING ALL THE DIFFERENCE (1990) (exploring impact upon legal doctrine of difference and exclusion based on gender, race, handicap, sexual orientation, etc.).

9. See *infra* text accompanying notes 110-19.

of expression. This study, which begins by focusing on the disadvantages to women defendants of current invocation doctrine, ultimately has far-reaching implications for various other classes of speakers that do not share the linguistic norm of assertive and direct expression.

Because invocation is a special kind of language use, this Article begins with a brief look at pragmatic speech-act theory<sup>10</sup> to demonstrate the general workings of performative language and how conversational implicature is used to accomplish communicative goals. Speech-act theory exposes the failure of current invocation doctrine to recognize the ways in which we ordinarily use nonliteral language to communicate. With this general language theory as background, the Article then examines what has been termed a "female register" of language use, describing its primary characteristics, its communicative functions, and its link to powerlessness regardless of gender. Having established the relationship between powerlessness and the use of this "female register," the Article turns to an analysis of current legal doctrine on ambiguous and equivocal invocations of the right to counsel by arrestees, outlining the different doctrinal approaches taken in various jurisdictions. This analysis shows how current doctrine disadvantages those who speak in the "female register," and suggests that the failure to give legal effect to indirect modes of speaking has negative repercussions for many groups in society who share similar speech characteristics. To correct this unintended and unnecessary bias in the law, the Article argues that courts should adopt a legal standard that would better accommodate the patterns of language usage of all suspects, both men and women, regardless of the conventional modes of expression in their speech communities.

## II. HOW WE DO THINGS WITH WORDS

### A. *Performative Speech Acts*

Philosophers of language have long sought to give an account of the ways in which language is used in ordinary life to convey meaning.<sup>11</sup> J.L. Austin formulated speech-act theory<sup>12</sup> to provide an account of the relationship

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10. Pragmatics is the study of the construction of meaning within its cultural context. Pragmatics explains "how language users apply knowledge of the world to interpret utterances." VICTORIA FROMKIN & ROBERT RODMAN, *AN INTRODUCTION TO LANGUAGE* 189 (3d ed. 1983). Speech-act theory is one aspect of pragmatics. Michael Silverstein, *Shifters, Linguistic Categories, and Cultural Description*, in *MEANING IN ANTHROPOLOGY* 11 (Keith H. Basso & Henry A. Selby eds., 1976). Linguistic pragmatics should be distinguished from philosophical pragmatism, which has had considerable influence in contemporary jurisprudence. See generally *PRAGMATISM IN LAW AND SOCIETY* (Michael Brint & William Weaver eds., 1991); Steven D. Smith, *The Pursuit of Pragmatism*, 100 *YALE L.J.* 409 (1990).

11. See, e.g., ROBERT M. MARTIN, *THE MEANING OF LANGUAGE* (1987); *THE PHILOSOPHY OF LANGUAGE* (A.P. Martinich ed., 1985); *READINGS IN THE PHILOSOPHY OF LANGUAGE* (Jay F. Rosenberg & Charles Travis eds., 1971).

12. Following Austin's groundbreaking work in this area, other philosophers, most notably John Searle

between the words we say and what we actually mean to accomplish by saying them.<sup>13</sup> Austin posited two kinds of utterances: performatives and constatives. Performative utterances are speech acts that, by being uttered, accomplish the state of affairs to which they refer; constatives, by contrast, describe something.<sup>14</sup> In uttering the performative statement, "You're out!", the umpire causes the person addressed to *become* out. In uttering the constative sentence, "You're intelligent," on the other hand, the speaker does not cause the addressee to become intelligent, but merely describes her belief about that person. While constatives are commonly classified as true or false,<sup>15</sup> performatives cannot meaningfully be considered to be true or false, only effective or ineffective.<sup>16</sup> Thus, performative utterances such as, "I bet you ten dollars that the Red Sox will win," "I accept your offer to sell 1000 widgets at \$500," or "You're fired!" are neither true nor false, but instead are effective or ineffective, dependent upon certain specific conditions.<sup>17</sup>

Paradigmatic performative speech acts are those that are phrased as direct speech acts.<sup>18</sup> Consider these examples:

"I dub thee Sir John," by Queen Elizabeth.

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and Paul Grice, have modified and expanded upon speech-act theory. See JOHN R. SEARLE, *SPEECH ACTS* (1969); H.P. GRICE, *STUDIES IN THE WAY OF WORDS* (1989) (collecting most of Grice's essays from the 1960's on speech-act theory).

13. J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (2d ed. 1975).

14. *Id.* at 4-11.

15. Austin initially adopts the intuitively appealing assumption that constative utterances, unlike performatives, are true or false. Having set up these opposing categories of performative and constative utterances, Austin ultimately deconstructs this dichotomy. *Id.* at 133-47. He demonstrates that, for the same reason that performatives cannot be categorized as "true" or "false," constatives, too, are "true" or "false" only relative to context:

It is essential to realize that "true" and "false" . . . do not stand for anything simple at all; but only for a general dimension of being a right or proper thing to say as opposed to a wrong thing, in these circumstances, to this audience, for these purposes and with these intentions. . . . The truth or falsity of a statement depends not merely on the meanings of the words but on what act you were performing in what circumstances.

*Id.* at 145. Nonetheless, for the purposes of this Article, the distinction between constative and performative utterances is analytically useful and will be maintained.

16. Austin suggests that performatives be classified as "happy" or "unhappy" depending on whether they successfully accomplish the state of affairs to which they refer. He lists six conditions for the "happy" functioning of a performative utterance: (i) there must be a socially accepted convention that the utterance has a specified effect; (ii) the participants and the circumstances of the speech act must be appropriate; (iii) the speech act must be correctly executed; (iv) the speech act must be completely executed; (v) the participants must have the thoughts appropriate to the speech act; and (vi) the participants must conduct themselves appropriately after the completion of the speech act. *Id.* at 14-15.

17. For example, "I bet you ten dollars that the Red Sox will win" is an effective performative utterance only if all necessary conditions for a bet occur, including that the Red Sox play a game and that the addressee accept the bet. "I accept your offer to sell 1000 widgets for \$500" will be an effective performative if and only if the predicate niceties of contract doctrine, such as the capacity of the parties to contract, are satisfied. Similarly, "You're fired!" can be effective only if uttered by someone who is entitled to discharge the addressee.

18. Direct performatives are those in which the speaker utters a performative utterance and "means exactly and literally what he says." John R. Searle, *Indirect Speech Acts*, in *THE PHILOSOPHY OF LANGUAGE*, *supra* note 11, at 171, 171.



- "I order you to stay off my property," by a landowner.
- "I promise to repay my student loans," by a student.
- "I invoke my right to counsel," by a suspect being interrogated.

Direct performatives always can be stated with an adverbial "hereby" modifying the performative verb, so that the earlier examples could be phrased as:

- "I hereby dub thee Sir John."
- "I hereby order you to stay off my property."
- "I hereby promise to repay my student loans."
- "I hereby invoke my right to counsel."

The effectiveness of a performative speech act is not diminished by the speaker's uncommunicated insincerity. When the queen says, "I dub thee Sir John," the object of the dubbing actually *becomes* Sir John despite any private reservations on the part of the queen about the merit of the recipient. Similarly, the owner who says, "I order you to stay off my property," has automatically created the legal precondition for a later criminal trespass charge if the warned person returns to the property, even if the owner secretly intends not to call the police after a subsequent trespass. And the student who says "I promise to repay my student loans," has indeed made an effective promise, notwithstanding her private unspoken decision to evade the obligation. Ambivalence or misgivings on the part of the speaker, at least if unexpressed, do not undermine the effectiveness of a direct performative speech act. Hence, from the perspective of speech-act theory, the direct performative utterance, "I invoke my right to counsel," uttered in the appropriate context, is an effective speech act regardless of the speaker's state of mind.

Law abounds with instances in which performative utterances create legally significant consequences. Many familiar situations in everyday life involve performative statements that are made outside formal legal institutions and proceedings but nevertheless bring about binding legal relationships between parties. Common examples include offering and accepting in contractual relations, bequeathing property in a will, and reciting marriage vows. The formal legal process itself is constituted in part by the many performative speech acts occurring within the courtroom—judges issuing rulings, juries pronouncing verdicts, and lawyers making objections. An arrestee's invocation of the right to counsel is yet another example of a performative speech act to which the law accords legally operative meaning.

### B. *Indirect Speech Acts as Performatives*

The functional work of performative speech acts is often accomplished by the use of indirect speech acts, that is, speech acts which do not contain an implicit "hereby."<sup>19</sup> For example, the landowner in the earlier example might accomplish her performative purpose by saying, "Stay off my property!" or even, "If I catch you on my land again, I'll call the cops!", rather than by using the explicit performative, "I order you to stay off my property." Because indirect performatives are less explicit than direct performatives, they entail a greater potential for misinterpretation by the hearer, who must infer the performative effect from an utterance whose literal meaning lacks direct performative denotation.<sup>20</sup>

For this reason, indirect speech acts are less often used in circumstances in which the speaker is consciously enacting a ritualized performative, especially one with a legally operative effect.<sup>21</sup> Using time-honored language to accomplish such weighty purposes has the effect of alerting the parties to the significance of their statements and ensuring that reviewing courts give such statements their intended legal effect. Consequently, the law encourages strict observance of the accepted formulas in uttering these consciously ritualized legal performatives.<sup>22</sup> Thus, a speaker is unlikely to paraphrase as indirect speech acts such performatives as:

"I plead guilty to the amended information."

"I take this man to be my lawful wedded husband."

"We, the jury, find the defendant not guilty."

When such an utterance occurs within a formal legal context, the legal rituals are witnessed and overseen by other actors who expect the appropriate language to be used by the participants. These other participants in the legal process stand ready to correct any deviation from approved legal formulas. Such deviations, if allowed to stand, might threaten the tone of solemnity requisite for the occasion or even the effectiveness of the legal action. In such

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19. John Searle defines indirect speech acts as those in which "the speaker . . . utter[s] a sentence and mean[s] what he says and also mean[s] another illocution with a different propositional content." *Id.* The example Searle uses to explain this concept is the utterance, "Can you reach the salt?", which is meant not as a question about the physical ability of the hearer but as a request to pass the salt. Indirect performatives can take a limitless variety of forms. As J.L. Austin notes, neither grammatical construction nor vocabulary are sufficient to provide a precise way of identifying performatives; instead, one must look to their communicative function in the social context in which they are uttered. AUSTIN, *supra* note 13, at 55-66.

20. See *infra* notes 23-29 and accompanying text on conversational implicature.

21. AUSTIN, *supra* note 13, at 33.

22. In his work on the role of consideration in contract doctrine, Lon Fuller made similar observations on the function of legal formalities. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-04 (1941) (describing three functions of legal formalities: (i) evidentiary, to facilitate proof in court; (ii) cautionary, to cause parties to consider carefully consequences of their actions; and (iii) channeling, to lead courts to predictable conclusions in inferring intentions of parties from their actions).

ceremonial circumstances, the speaker will almost inevitably use direct performative speech acts in an attempt to control the meaning that the law will confer upon his words.

In everyday discourse, however, indirect performatives are far more common than direct performative utterances. For instance, we generally say, "I'll pay you back for lunch when I cash my paycheck" instead of "I (hereby) promise to pay you back for lunch when I cash my paycheck." Both hearer and speaker understand the indirect performative as equivalent in meaning to the direct performative utterance. The lunch-money lender in our example will feel cheated if the borrower fails to repay the debt even though the borrower never used the word "promise." In fact, a third party overhearing the exchange may well characterize it as a promise, and fairly so.

### C. *Conversational Implicature Modifying Literal Meaning*

We come to understand the exchange just described as the functional equivalent of a promise through conversational implicature, the reading into spoken discourse of a meaning beyond the literal meaning of the words used in the utterance.<sup>23</sup> All conversation is heavily laden with implicature; we would feel offended and patronized if a speaker actually spelled out all of the implicatures entailed by her statements. Yet speakers and hearers alike are seldom consciously aware of having made the leaps of meaning that conversational implicature entails.

The philosopher Paul Grice has argued that conversational implicature is neither random nor idiosyncratic, but instead is rule-governed.<sup>24</sup> Grice identifies one basic rule which he calls the Cooperative Principle: "Make your conversational contribution such as is required, at the stage at which it occurs."<sup>25</sup> Thus, in the example we have been considering, the listener

23. J.L. Austin addressed concepts of conversational implicature, including entailment, implication, and presupposition, in the context of speech-act theory. AUSTIN, *supra* note 13, at 47-52. A more thorough consideration of conversational implicature in philosophy of language scholarship can be found in the later work of Paul Grice. See generally PAUL GRICE, *Logic and Conversation*, in STUDIES IN THE WAY OF WORDS 22 (1989) (providing a formalized operational definition of conversational implicature).

24. Grice's philosophical project was to attempt to develop a logically rigorous theory of conversational meaning. His essay, *Logic and Conversation*, originally delivered as one of the William James Lectures at Harvard in 1967, has provoked both supportive and critical response from philosophers and linguists. See, e.g., GERALD GAZDAR, PRAGMATICS: IMPLICATURE, PRESUPPOSITION, AND LOGICAL FORM 37-62 (1979); Laurence R. Horn, *Toward a New Taxonomy for Pragmatic Inference: Q-Based and R-Based Implicature*, in MEANING, FORM, AND USE IN CONTEXT: LINGUISTIC APPLICATIONS 11 (Deborah Schiffrin ed., 1984); Ferenc Kiefer, *What Do Conversational Maxims Mean?*, 3 LINGUISTICAE INVESTIGATIONES 57 (1979); Deirdre Wilson & Daniel Sperber, *On Grice's Theory of Conversation*, in CONVERSATION AND DISCOURSE 155 (Paul Werth ed., 1981). Virtually all commentators, whatever their disagreements with the specifics of Grice's analysis, agree with Grice that much conversational implicature can be explained by a small number of overarching guiding principles.

25. GRICE, *supra* note 23, at 26. Grice breaks down this metarule of conversational implicature into a set of more specific maxims: (1) *Maxim of Quantity*: Be as informative as the situation requires, but not more informative than is required; (2) *Maxim of Quality*: Do not say things that you believe to be false or for which you lack adequate evidence; (3) *Maxim of Relation*: Be relevant; (4) *Maxim of Manner*: Be direct,

interprets “I’ll pay you back” as more than a statement of the speaker’s *belief* about the future.<sup>26</sup> Instead the listener hears it as a statement of *intent* about the speaker’s future behavior, an intent upon which the hearer is entitled to rely. In Gricean terms, the conversational implicature here is governed by the maxim of relation, requiring that statements be interpreted as being relevant. Under this maxim, the hearer assumes that the speaker’s statement is intended to be relevant, and the most obvious relevance of an expression of future behavior by the speaker would be to induce anticipation, if not active reliance, on the part of the hearer. In other words, the implicature leads the hearer to interpret the statement of future behavior as a promise. As a general matter, the *syntactic* meaning ascribed to any future tense is identical regardless of the subject of the future-tense verb—all future-tense verbs literally describe a state of affairs occurring sometime after the present. The *interpreted* meaning of a future-tense statement about a speaker’s *own* future actions, however, is that the speaker has made a promise. Conventions of conversational implicature cause us to draw conclusions about the speaker’s intent even though the literal sense of the speaker’s words, “I’ll pay you back,” are limited to a prediction that the repayment will occur and not, strictly speaking, to a promise to do so.

Conversational implicature likewise enables listeners to interpret indirect language when the literal meaning of the words used would otherwise make little sense in the social context of their utterance. For instance, we usually interpret the question, “Excuse me, but are you wearing a watch?”, not as a question about our sartorial status but, rather, as a request that we tell the speaker the time. Similarly, in the example we have been considering, suppose the speaker had said, “I don’t have enough money for lunch today, but I get my paycheck the day after tomorrow.” The literal meaning of these words is limited to the state of the speaker’s present and anticipated future bank account, but a logical interpretation of this statement is as a promise to repay the loan of lunch money once the speaker receives her paycheck. Here again, the Gricean maxim of relevance provides the necessary conversational implicature. There is no reason why the information about the paycheck is relevant to the addressee unless there is an implied promise to repay the loan when the paycheck arrives.

Grice’s maxims of conversational implicature are stated in universal terms, as applying everywhere and to everyone’s usage. In considering particular utterances in context, however, it becomes obvious that, although the maxims may be universal, the specific ways in which the maxims are used to create inferential meaning vary from culture to culture, and even from subculture to

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unambiguous, and brief. *Id.* at 26-27.

26. Compare this example with a future-tense statement such as, “The train will be here in ten minutes.” Such a statement entails the implicature that the speaker *believes* that the train will arrive in ten minutes, but no implicit *promise* of that occurrence, since the speaker presumably cannot control the arrival or nonarrival of the train.

subculture, according to accepted discourse conventions within those cultures.<sup>27</sup> Thus, specific conversational implicature is culturally contingent, requiring much information about the social norms of behavior of the culture.<sup>28</sup> In our lunch-money example, the normal conversational implicature depends on the speaker and addressee sharing a number of culturally specific understandings: that lunch can be purchased with money, that it is normal for people to lend each other money with the expectation that it later be returned, that a paycheck can be converted into money, that the parties are free to dispose of their money as they see fit, etc.<sup>29</sup>

In practice, the accepted norms of expression in any given speech community determine the application of the rules of conversational implicature. For instance, in many social contexts, conversational implicature permits speakers to use extremely indirect statements to accomplish their communicative goals. Successful communication, however, depends on the listener sharing the speaker's expectations as to the degree of indirectness appropriate for the situation. Consider these snippets of conversation said by one spouse to another at a party:

"What time is it getting to be?"

"Gee, I hadn't realized how late it's getting."

"We have to get up early for work tomorrow."

"I wonder if the baby sitter is still awake."

"How much longer do you want to stay?"

"We should be getting home soon, shouldn't we?"

At no point has the speaker explicitly said, "I want us to leave now," or "Let's go home," although it would be a fairly insensitive partner who did not

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27. The same Gricean maxims may be fulfilled in different cultures by radically differing communicative conventions. See John J. Gumperz & Jenny Cook-Gumperz, *Introduction: Language and the Communication of Social Identity*, in *LANGUAGE AND SOCIAL IDENTITY* 1, 11-14 (John J. Gumperz ed., 1982). "Although the pragmatic conditions of communicative tasks are theoretically taken to be universal, the realizations of these tasks as social practices are culturally variable." *Id.* at 12. See generally RALPH FASOLD, *THE SOCIOLINGUISTICS OF LANGUAGE* 173-75 (1990) (summarizing research on cross-cultural issues in pragmatic analysis). But see Elinor O. Keenan, *The Universality of Conversational Postulates*, 5 *LANGUAGE SOC'Y* 67 (1976) (expressing skepticism as to whether Gricean rules of conversational implicature necessarily are cross-culturally valid, based on her research on Malagasy speech patterns).

28. ROBIN T. LAKOFF, *TALKING POWER: THE POLITICS OF LANGUAGE IN OUR LIVES* 172-78 (1990).

29. The enormous amount of cultural information that is necessary to understand the implicature inherent in even the simplest of narratives is one reason why artificial intelligence experts have such an uphill battle in attempting to devise computer programs that adequately understand ordinary human language. For a review of the current work on artificial intelligence and semantic interpretation, see GRAEME HIRST, *SEMANTIC INTERPRETATION AND THE RESOLUTION OF AMBIGUITY* 33-41, 80-95 (1987). See also ROGER C. SCHANK & ROBERT P. ABELSON, *SCRIPTS, PLANS, GOALS AND UNDERSTANDING: AN INQUIRY INTO HUMAN KNOWLEDGE STRUCTURES* 36-68 (1977) (attempting to use the concept of "scripts" to facilitate computer comprehension of normal discourse); ROGER C. SCHANK & PETER G. CHILDERS, *THE COGNITIVE COMPUTER: ON LANGUAGE, LEARNING, AND ARTIFICIAL INTELLIGENCE* 110-87 (1984) (discussing "scripts" as human knowledge structures). Schank and Childers note that "any kind of general understanding system would require *thousands* of scripts." *Id.* at 153.

interpret these statements in the aggregate as a request that the couple leave the party soon. Had the speaker only made one of these comments, however, there would have been a very real possibility for miscommunication if the listening spouse did not share the speaker's convention that indirect references to lateness are an appropriate way to suggest leaving the party. Such miscommunication might well lead to the reproachful response, "I didn't *realize* you wanted us to go home. Why didn't you *say* you wanted us to leave?"

Note that I have phrased the preceding example without giving the sex of the two participants. Nevertheless, I imagine that most readers assumed that the indirect suggestions to leave the party were made by a woman to her husband, rather than by a man to his wife. If that supposition is accurate, it lends support to the thesis of many linguists and anthropologists that men and women often use language differently to express themselves.

### III. GENDER AND LANGUAGE USAGE: A DIFFERENT REGISTER

In 1975 the linguist Robin Lakoff first made the claim that there is a distinctive "women's language" that differs from typical male speech in both syntactic<sup>30</sup> and paralinguistic<sup>31</sup> features. She argued that women who use this mode of speech appear less assertive and confident than those who use male speech patterns.<sup>32</sup> Lakoff went on to assert that this "women's language" not only reflects women's subordinate position in society, but also reinforces that subordination.<sup>33</sup> Her controversial thesis triggered an explosion of research designed to test her theory,<sup>34</sup> and sparked a renewed interest among anthropological linguists in studying gender as a variable within speech communities.<sup>35</sup>

In what sense, then, can it be said that men and women speak different languages? In a considerable number of tribal languages, the linguistic usages of male and female speakers differ so dramatically that it can be said that

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30. See *infra* notes 57-86 and accompanying text for a discussion of the syntactic features of women's speech.

31. Paralinguistic features of speech are those elements other than the grammatical or lexical aspects of language. Among the paralinguistic characteristics that have been identified as differentially distributed by gender are pitch, breathiness, loudness, and intonation patterns. See Susan U. Philips, *Sex Differences and Language*, 9 ANN. REV. ANTHROPOLOGY 523, 526-28 (1980).

32. ROBIN T. LAKOFF, LANGUAGE AND WOMAN'S PLACE 9-19 (1975).

33. *Id.* at 52.

34. See *infra* notes 67-69 and accompanying text for this research, much of which explicitly states that it is investigating Lakoff's claims.

35. See *infra* notes 36-37 and accompanying text for anthropological scholarship in this field. See generally Susan Gal, *Between Speech and Silence: The Problematics of Research on Language and Gender*, in GENDER AT THE CROSSROADS OF KNOWLEDGE: FEMINIST ANTHROPOLOGY IN THE POSTMODERN ERA 175 (Micaela di Leonardo ed., 1991) (detailing methodological and substantive issues in ethnographic studies of gender and language); Joel Sherzer, *A Diversity of Voices: Men's and Women's Speech in Ethnographic Perspective*, in LANGUAGE, GENDER, AND SEX IN COMPARATIVE PERSPECTIVE 95 (Susan U. Philips et al. eds., 1987) (discussing male and female speech from an ethnographic perspective).

women and men speak distinct variants of the same language.<sup>36</sup> For the languages spoken in most industrialized nations,<sup>37</sup> including English, the gender of the speaker does not invariably require the use of contrasting grammatical forms. Rather, it is more accurate to say that, in these languages, certain syntactic and paralinguistic characteristics are disproportionately distributed in speech on the basis of gender.

Lakoff's term "women's language" exaggerates both the magnitude of gender-based language differences and the degree to which the differences that do exist are invariably correlated with the speaker's sex.<sup>38</sup> Other linguists have suggested instead that gender-based differences constitute a dialect,<sup>39</sup> and they have proposed the term "genderlect" to name the phenomenon.<sup>40</sup> This term,

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36. Dramatic differences in syntax and pronunciation between male and female speakers are frequently seen in languages spoken by preindustrial cultures, where gender-based segregation in social life is greater than it is in industrialized countries. See, e.g., EDWARD SAPIR, *Male and Female Forms of Speech in Yana*, in SELECTED WRITINGS OF EDWARD SAPIR IN LANGUAGE, CULTURE AND PERSONALITY 206, 206 (David G. Mandlebaum ed., 1949); Regina Flannery, *Men's and Women's Speech in Gros Ventre*, 12 INT'L J. AM. LINGUISTICS 133 (1946); Mary R. Haas, *Men's and Women's Speech in Koasati*, in LANGUAGE IN CULTURE AND SOCIETY: A READER IN LINGUISTICS AND ANTHROPOLOGY 228 (Dell Hymes ed., 1964); Elinor O. Keenan, *Norm-makers, Norm-breakers: Uses of Speech by Men and Women in a Malagasy Community*, in EXPLORATIONS IN THE ETHNOGRAPHY OF SPEAKING 125, 137 (Richard Bauman & Joel Sherzer eds., 1974); Douglas Taylor, *Sex Gender in Central American Carib*, 17 INT'L J. AM. LINGUISTICS 102 (1951); cf. Francis Ekka, *Men's and Women's Speech in Kurux*, 81 LINGUISTICS 25, 25-26 (1972) (noting less dramatic differences); Elinor Ochs, *The Impact of Stratification and Socialization of Men's and Women's Speech in Western Samoa*, in LANGUAGE, GENDER, AND SEX IN COMPARATIVE PERSPECTIVE, *supra* note 35, at 50, 59-60 (same).

Ethnographers have suggested that male and female speech patterns reflect the differing roles and life experiences of men and women within a culture. Ruth Borker, *Anthropology: Social and Cultural Perspectives*, in WOMEN AND LANGUAGE IN LITERATURE AND SOCIETY 26, 26-44 (Sally McConnell-Ginet et al. eds., 1980); Patricia C. Nichols, *Women in Their Speech Communities*, in WOMEN AND LANGUAGE IN LITERATURE AND SOCIETY, *supra*, at 140, 140-49. In societies where gender roles are more strongly differentiated, one would expect greater disparity in language use by gender. MURIEL SAVILLE-TROIKE, *THE ETHNOGRAPHY OF COMMUNICATION* 92-93 (2d ed. 1989); RONALD WARDHAUGH, *AN INTRODUCTION TO SOCIOLINGUISTICS* 322-23 (2d ed. 1992). The expectation that the extent of gender differences in language use correlates with the degree of distinction between gender roles within a culture is supported by the research of Timothy Light examining gender differences in particle usage by Chinese speakers. He found that gender-based differences in usage were greater in Hong Kong than in the People's Republic of China, where the socialist government has launched extensive ideological campaigns promoting sexual equality in social roles. Timothy Light, *On Being Déjng: How Women's Language Is Perceived in Chinese*, 19 COMPUTATIONAL ANALYSES ASIAN & AFR. LANGUAGES 21 (1982).

37. Comparatively little research has been done on gender variations in the languages of industrial nations, other than English and Japanese. Results in studies of other such languages have generally been consistent with those analyzing English and Japanese. See, e.g., Lia Brekweg, *Hesitancy in Female and Male Speech*, in WOMEN'S LANGUAGE, SOCIALIZATION AND SELF-IMAGE 176, 184 (Dédé Brouwer & Dorian de Haan eds., 1987) (identifying gender differences in hedges and hesitancy markers in male-female dyadic conversations in Dutch); Suzanne Laberge & Gillian Sankoff, *Anything You Can Do*, in THE SOCIAL LIFE OF LANGUAGE 271, 286-87 (Gillian Sankoff ed., 1980) (identifying gender differences in pronoun use in Canadian French).

38. Lakoff herself has recognized this in her later work, explicitly acknowledging that not all women use this speech register, nor do all men always eschew it. LAKOFF, *supra* note 28, at 204.

39. M.A.K. Halliday and Ruqaiya Hasan define dialect as a variety of language whose use is based on the identity of the user by geography, social class, etc. M.A.K. HALLIDAY & RUQAIYA HASAN, *LANGUAGE, CONTEXT, AND TEXT: ASPECTS OF LANGUAGE IN SOCIAL-SEMIOTIC PERSPECTIVE* 41 (1985).

40. See, e.g., Cheri Kramer, *Women's Speech: Separate but Unequal?*, 60 Q.J. SPEECH 14, 14 n.2 (1974); Barrie Thorne & Nancy Henley, *Difference and Dominance: An Overview of Language, Gender, and Society*, in LANGUAGE AND SEX: DIFFERENCE AND DOMINANCE 5, 11 (Barrie Thorne & Nancy Henley

too, overstates both the extent and the invariability of gender-based differences in language use. Rather than say that women and men speak different languages or dialects, it is preferable to say that gender correlates with the use of different linguistic registers.<sup>41</sup> By register, I mean a characteristic manner of speaking that is adopted by certain members of a speech community under specific circumstances.<sup>42</sup> A speech community may possess multiple registers of the language shared by its members. Use of a particular linguistic register depends on the context of the speech occasion.<sup>43</sup> It may be associated with certain settings or situations, or may be correlated with a social role or relationship.<sup>44</sup>

Here I want to emphasize two important caveats. First, in proposing that gender is correlated with the use of a distinctive linguistic register, I am not claiming that all women share these speech characteristics or that no men do.<sup>45</sup> Some women will never exhibit this register of speech, and some men may sometimes do so.<sup>46</sup> I would like to suggest, however, that this register is *gender-linked*; using the term "gender"<sup>47</sup> to emphasize the socially

eds., 1975); Sally McConnell-Ginet, *Linguistics and the Feminist Challenge*, in *WOMEN AND LANGUAGE IN LITERATURE AND SOCIETY*, *supra* note 36, at 3, 12-17. Robin Lakoff recently suggested the use of "psycholect" to describe these language patterns, emphasizing that these usages arise from psychological factors. Letter from Robin Lakoff, Professor, Department of Linguistics, University of California, Berkeley, to author (May 13, 1993) (on file with author).

41. At least two linguists have categorized gender-based language behavior as a register. See Faye Crosby & Linda Nyquist, *The Female Register: An Empirical Study of Lakoff's Hypothesis*, 6 *LANGUAGE SOC'Y* 313 (1977). Halliday and Hasan suggest that gender differences in language usage constitute an "intermediary case" between a dialect and a register. HALLIDAY & HASAN, *supra* note 39, at 43.

42. Halliday and Hasan define a register as "a configuration of meanings that are typically associated with a particular situational configuration of field, mode, and tenor. . . . [A] register . . . include[s] the expressions, the lexico-grammatical and phonological features, that typically accompany or realise these meanings." HALLIDAY & HASAN, *supra* note 39, at 38-39 (emphasis omitted).

43. In fact, a choice of register may in part define the social context of the conversation. For example, this is often true in informal African-American speech, in which switching from Black vernacular English to so-called "standard" English usage is an important interpretive signal defining the social context of the interchange. Mark Hansell & Cheryl S. Ajirrotutu, *Negotiating Interpretations in Interethnic Settings*, in *LANGUAGE AND SOCIAL IDENTITY*, *supra* note 27, at 85, 89, 92.

44. HALLIDAY & HASAN, *supra* note 39, at 38-43.

45. For instance, neurolinguistic research provides no evidence of any purely biological connection between sex and linguistic development or usage. McConnell-Ginet, *supra* note 40, at 3, 13.

46. Robin T. Lakoff, *Women's Language*, in *WOMEN'S LANGUAGE AND STYLE* 139, 141 (Douglas Butturff & Edmund L. Epstein eds., 1978); Anthony Mulac & Torberg L. Lundell, *Linguistic Contributors to the Gender-Linked Language Effect*, 5 *J. LANGUAGE & SOC. PSYCHOL.* 81, 96 (1986).

47. This usage of the term "gender" to refer to the socially constructed aspects of sexual difference, while reserving the term "sex" for the biologically determined attributes of sexual difference, is consistent with contemporary usage in the social sciences. The rationale for adopting this distinction is well articulated in Joan Scott's influential work in feminist historiography. She sees gender as a collection of culturally appropriated symbols and normative ideologies that constrain the interpretation of those symbols, creating fixed dualities of male/female and masculine/feminine. JOAN W. SCOTT, *Gender: A Useful Category of Historical Analysis*, in *GENDER AND THE POLITICS OF HISTORY* 28 (1988). As Kathleen Jones observed in discussing the distinction between sex and gender,

Gender is not a synonym for women or for men, although it has been used often enough as if it were. Rather . . . it is a linguistic category that refers to social constructions and interpretations. . . . Gender is both a "social category imposed on a sexed body" and a *cultural code of representation*, a way to categorize and control behaviors and practices that are not necessarily the result of sexual differences *in terms of sexual differences*.



constructed aspects of behavioral differences,<sup>48</sup> including differences in linguistic usage, between men and women. Patterns of linguistic usage form part of that complex web of culturally symbolic behaviors through which we come to understand what it means to be male or female. Not surprisingly, then, the sociolinguistic research on gender and language largely supports the disproportionate use of a characteristic speech register by women.<sup>49</sup>

Second, the use of this register is not exclusively a factor of gender but varies according to other factors as well. Women who exhibit these gender-linked characteristics in their language use will do so to a greater or lesser degree depending upon the context of the linguistic usage.<sup>50</sup> Gender differences in language use are magnified in some contexts, particularly when there is a power disparity between the speaker and the hearer,<sup>51</sup> and are minimized in others, particularly when the encounter is an impersonal, formulaic interaction such as making an inquiry at a public information booth.<sup>52</sup> Use of this register may also be affected by such variables as race<sup>53</sup> or class.<sup>54</sup> Since most of the

Kathleen B. Jones, *The Trouble with Authority*, 3 DIFFERENCES 104, 117 (1991) (quoting SCOTT, *supra*, at 32).

48. For scholarship in a variety of disciplines discussing the social construction of gender, see generally CYNTHIA F. EPSTEIN, *DECEPTIVE DISTINCTIONS: SEX, GENDER AND THE SOCIAL ORDER* (1988); SONDRRA FARGANIS, *SOCIAL CONSTRUCTION OF THE FEMININE CHARACTER* (1986); SUZANNE J. KESSLER & WENDY MCKENNA, *GENDER: AN ETHNOMETHODOLOGICAL APPROACH* (1978); *MAKING A DIFFERENCE: PSYCHOLOGY AND THE CONSTRUCTION OF GENDER* (Rachel T. Hare-Mustin & Jeanne Marecek eds., 1990); DENISE RILEY, "AM I THAT NAME?": FEMINISM AND THE CATEGORY OF "WOMEN" IN HISTORY (1988); *SEXUAL MEANINGS: THE CULTURAL CONSTRUCTION OF GENDER AND SEXUALITY* (Sherry B. Ortner & Harriet Whitehead eds., 1981); *THE SOCIAL CONSTRUCTION OF GENDER* (Judith Lorber & Susan A. Farrell eds., 1991). I have written elsewhere on the general phenomenon of the social construction of cultural practice and its impact on the law. Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1085-92 (1991).

49. See *infra* notes 68-69, 81, 87, 91 and accompanying text.

50. The contextual adoption of a particular register of speech is a type of diglossia, or the use of "two or more varieties of the same language . . . under different conditions." Charles A. Ferguson, *Diglossia*, 15 WORD 325, 325 (1959).

51. See *infra* notes 106-27 and accompanying text on powerlessness and the female register.

52. Probably the most sophisticated research examining female register usage in a variety of contexts is that of Faye Crosby and Linda Nyquist. Crosby & Nyquist, *supra* note 41, at 313-22. Crosby and Nyquist analyze language use in three different settings: conversation between college students in a psychology lab, requests for information at a public information booth, and interaction between police personnel and members of the public at a suburban police station. The researchers observed a high degree of use of the female register by women subjects in the psychology lab and at the police station, but not at the information booth. Crosby and Nyquist theorize that the context of the information booth, as an impersonal interaction with a well-established "script," acts to constrain the use of individual variations in linguistic register. *Id.* at 320; see also Mulac & Lundell, *supra* note 46, at 81, 96 (determining that use of gender markers fluctuates according to context of speech situation).

53. Marsha Stanbeck has suggested that black women may not share the speech patterns characteristically used by white women. See Marsha H. Stanbeck, *Language and Black Woman's Place: Evidence from the Black Middle Class*, in FOR ALMA MATER: THEORY AND PRACTICE IN FEMINIST SCHOLARSHIP 177 (Paula A. Treichler et al. eds., 1985). However, the limited research on black women's language use lends support to the conclusion that black women also use the female register originally identified in studying the speech habits of white women. See generally Marjorie H. Goodwin, *Directive-Response Speech Sequences in Girls' and Boys' Task Activities*, in WOMEN AND LANGUAGE IN LITERATURE AND SOCIETY, *supra* note 36, at 157 (studying speech used in play interactions by black children); Patricia C. Nichols, *Linguistic Options and Choices for Black Women in the Rural South*, in LANGUAGE, GENDER AND SOCIETY 54 (Barrie Thorne et al. eds., 1983) (studying language use in an all-black speech community

research in this area has been conducted with white middle-class subjects, it is risky to extrapolate from the results of this research<sup>55</sup> to women who are members of groups whose language usage is known to vary from that of the dominant white social order.<sup>56</sup> Nevertheless, the current state of research in this area justifies speaking of a characteristic female register of speech.

#### A. *Characteristics of the Female Register*

With these important qualifications in mind, we can examine the gender-linked syntactic and paralinguistic characteristics that together constitute a distinctive register of linguistic usage. Five main characteristics of this register have been identified: 1) use of hedges,<sup>57</sup> 2) use of tag questions,<sup>58</sup> 3) use of

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in South Carolina). More research in this area is needed.

54. Much of the relatively sparse sociolinguistic research investigating the language use of working-class women is seriously flawed because it assumes that women share the same social class as their husbands or fathers. Being the daughter or wife of a working-class man is not necessarily the same as being working-class oneself. DAVID GRADDOL & JOAN SWANN, *GENDER VOICES* 51-53 (1989) (criticizing sociolinguistic studies for frequently conflating class status of women with that of their husbands and fathers). Sociologists researching social stratification have had difficulty developing satisfactory means for categorizing the social class status of the women whom they study. *See, e.g.,* Christine Delphy, *Women in Stratification Studies*, in *DOING FEMINIST RESEARCH* 114 (Helen Roberts ed. & trans., 1981) (observing, on the basis of studies in France, that income and education, the usual measures of class status for male subjects, may be misleading in assigning social class to women subjects). Preliminary results of research studying the relationship between class and gender in language use suggest that the gap between male and female linguistic usage is greater among the working class than among upper- and middle-class speakers. FASOLD, *supra* note 27, at 92-102; *see also* GRADDOL & SWANN, *supra*, at 85-88 (discussing research using subjects from three different socioeconomic strata; women in all three groups disproportionately exhibited female register traits in their language use).

55. Commentators have justly criticized feminist scholarship for drawing general conclusions about all women from studies focused upon white, middle-class, heterosexual women. *See, e.g.,* ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 80-113 (1988). This critique is applied to feminist legal theory in Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 585-605 (1990), and Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 *J. LEGAL EDUC.* 47, 47-53 (1988). On the need for legal scholars to consider the issues of class and race, *see generally* Frances Ansley, *Stirring the Ashes: Race, Class, and the Future of Civil Rights Scholarship*, 74 *CORNELL L. REV.* 993 (1989). Sociolinguistic researchers have likewise been taken to task for paying inadequate attention to differences among their female subjects. *See, e.g.,* Nancy M. Henley & Cheris Kramarae, *Gender, Power, and Miscommunication*, in "MISCOMMUNICATION" AND PROBLEMATIC TALK 18, 37-38 (Nikolas Coupland et al. eds., 1991) (urging that researchers consider race, class, and ethnicity in developing their scholarship on gender and language use).

56. Black vernacular speech is one example of a speech register with well-documented distinctive linguistic features. *See infra* notes 312-15 and accompanying text. Although the specific characteristics of Black vernacular English have been extensively studied, nearly all of the work in this area has ignored gender differences. *See generally* JOHN BAUGH, *BLACK STREET SPEECH: ITS HISTORY, STRUCTURE, AND SURVIVAL* (1983); J.L. DILLARD, *BLACK ENGLISH* (1972); WILLIAM LABOV, *LANGUAGE IN THE INNER CITY: STUDIES IN THE BLACK ENGLISH VERNACULAR* (1972) [hereinafter LABOV, *LANGUAGE IN THE INNER CITY*]. Similarly, much research has focused on the correlation between variations in language use and social class. *See generally* WILLIAM LABOV, *THE SOCIAL STRATIFICATION OF ENGLISH IN NEW YORK CITY* (1966); WILLIAM LABOV, *SOCIOLINGUISTIC PATTERNS* (1972); R.K.S. MACAULAY, *LANGUAGE, SOCIAL CLASS, AND EDUCATION* (1977); PETER J. TRUDGILL, *THE SOCIAL DIFFERENTIATION OF ENGLISH IN NORWICH* (1974).

57. LAKOFF, *supra* note 32, at 53-54.

58. *Id.* at 14-18.

modal verbs,<sup>59</sup> 4) avoidance of imperatives and the use of indirect interrogatives as a substitute for the imperative,<sup>60</sup> and 5) rising intonation used in declarative statements.<sup>61</sup> Collectively, the syntactic features of this gender-linked speech register contribute to a distinctive pragmatic<sup>62</sup> effect that must be considered in interpreting the use of this register in social context.

### 1. *Hedges*

Hedges are lexical expressions that function to attenuate the emphasis of a statement, or to make it less precise. For example, "kind of," "sort of," and "to some extent" are hedges that soften an assertion by qualifying the applicability of the modified statements, undercutting their assertiveness. Similarly, such hedges as "about" or "around," when used before a numerical quantity, render the statements they modify less precise and thus less contestable.<sup>63</sup> Other hedges, such as beginning statements with "I think," "I guess," or "I suppose," or using "maybe" or "perhaps," convey the sense either that the speaker is uncertain about the statement or that the speaker prefers not to confront the addressee with a bald assertion. Lakoff argues that women use lexical hedges more often than men do,<sup>64</sup> and that frequent use of lexical hedges "arise[s] out of a fear of seeming too masculine by being assertive and saying things directly."<sup>65</sup>

59. Lakoff, *supra* note 46, at 143.

60. See LAKOFF, *supra* note 32, at 18-19.

61. See Sally McConnell-Ginet, *Intonation in a Man's World*, 3 SIGNS 541, 554 (1978) (citing Connie Eble, *How the Speech of Some Is More Equal than Others*, Paper Presented at the Southeastern Conference of Linguistics in Chapel Hill, N.C. (Oct. 1972)).

62. I use "pragmatic" here in its technical linguistic sense, contrasting pragmatic analysis with syntactic and semantic analyses. Syntax refers to the grammatical form of a sentence. For instance, the question, "John and who were fired by Mary?", although its meaning is reasonably clear, is syntactically faulty in that it violates a structural rule of English grammar—the coordinate structure constraint. FREDERICK J. NEWMAYER, *LINGUISTIC THEORY IN AMERICA* 146-48 (2d ed. 1986). Semantics, on the other hand, involves the *meanings* of units of discourse. The old linguistics chestnut, "Colorless green ideas sleep furiously," is syntactically unobjectionable because its parts of speech are in the appropriate grammatical relationship to one another. Semantically, however, the sentence is nonsense—colorless things cannot also be green, ideas can have no color, ideas cannot sleep, and sleeping cannot be done in a furious manner. Pragmatics, like semantics, addresses questions of linguistic meaning, but pragmatics focuses on the function of units of discourse in social context. For example, a verdict announced in the following manner, "We, the jury, find that the defendant has bats in his belfry," although both syntactically and semantically correct, is pragmatically flawed—the use of a slang term for insanity is inappropriate in a social context requiring the use of a formal legal term of art. On the interrelationship of syntax, semantics, and pragmatics in linguistic theory, see NEWMAYER, *supra*, at 26-28, 131-32, 143-45, 174-79. For an excellent survey of the field of pragmatics, see *PRAGMATICS: A READER* (Steven Davis ed., 1991).

63. Marjorie Swacker's research supports the interpretation of such usage as a lexical hedge. See Marjorie Swacker, *The Sex of the Speaker as a Sociolinguistic Variable*, in *LANGUAGE AND SEX: DIFFERENCE AND DOMINANCE*, *supra* note 40, at 76, 79-82 (observing that women used more lexical hedges in describing a picture than men used: 17 women subjects used "about" or "around" to qualify 50% of their numerals whereas only one of 17 male subjects used these hedges).

64. LAKOFF, *supra* note 32, at 53-54.

65. *Id.* at 54.

Lexical hedges have multiple pragmatic functions, so it is necessary to consider the function as well as the form of the language in question before categorizing any particular usage as a lexical hedge expressing equivocation.<sup>66</sup> Hedges may have various nuances that give them varying pragmatic significance depending upon the context of their use, expressing deference, tact, or politeness as well as equivocation, uncertainty, or unassertiveness.<sup>67</sup> Subsequent sociolinguistic research sensitive to the pragmatic variability of hedges has generally confirmed Lakoff's claim that the prevalence of their use correlates with gender.<sup>68</sup>

## 2. Tag Questions

° A second characteristic of this register is the use of tag questions.<sup>69</sup> Tag

66. Mulac & Lundell, *supra* note 46, at 98-99.

67. See Janet Holmes, *Hedging Your Bets and Sitting on the Fence: Some Evidence for Hedges as Support Structures*, 27 TE REO 47, 47-49 (1984); Mulac & Lundell, *supra* note 46, at 98-99; see also Penelope Brown & Stephen Levinson, *Universals of Language Usage: Politeness Phenomena*, in QUESTIONS AND POLITENESS: STRATEGIES IN SOCIAL INTERACTION 56 (Esther N. Goody ed., 1978) (suggesting that assessing the social communicative processes in speech is more important than assimilating speech elements into a grammatical model).

68. See, e.g., GRADDOL & SWANN, *supra* note 54, at 85-88 (detailing research involving speakers in two age groups and three different socioeconomic strata, in which women in each category used more hedges); BENT PREISLER, LINGUISTIC SEX ROLES IN CONVERSATION: SOCIAL VARIATION IN THE EXPRESSION OF TENTATIVENESS IN ENGLISH 284-92 (1986); Jennifer Coates, *Gossip Revisited: Language in All-Female Groups*, in WOMEN IN THEIR SPEECH COMMUNITIES 94, 113-15 (Jennifer Coates & Deborah Cameron eds., 1988); Pamela M. Fishman, *Conversational Insecurity*, in LANGUAGE: SOCIAL PSYCHOLOGICAL PERSPECTIVES 127, 127-31 (Howard Giles et al. eds., 1980) (analyzing conversation among heterosexual couples, finding that women used more hedges); Maryann Hartman, *A Descriptive Study of the Language of Men and Women Born in Maine Around 1900 as It Reflects the Lakoff Hypotheses in "Language and Women's Place,"* in THE SOCIOLOGY OF THE LANGUAGES OF AMERICAN WOMEN 81-90 (Betty Lou Dubois & Isabel M. Crouch eds., 2d ed. 1979); cf. Brekweg, *supra* note 37, at 184 (finding that Dutch-speaking women used more hedges and other hesitation markers in speech than did Dutch-speaking men in male-female conversations, although not in female-female interactions). But see Judith N. Martin & Robert T. Craig, *Selected Linguistic Sex Differences During Social Interactions of Same-Sex and Mixed-Sex Student Dyads*, 47 W.J. SPEECH COMM. 16, 24-25 (1983) (finding no gender-linked difference in the frequency of use of hesitancy or tentativeness markers in speech).

69. Of all the features Lakoff claims as characteristic of women's language, tag questions have engendered the most controversy. Several researchers have conducted discourse analyses to determine whether women disproportionately use tag questions, with some studies confirming Lakoff's thesis and others contradicting it. Studies corroborating Lakoff's hypothesis include Fishman, *supra* note 68, at 128; Julie R. McMillan et al., *Women's Language: Uncertainty or Interpersonal Sensitivity and Emotionality?*, 3 SEX ROLES 545-59 (1977); Mulac & Lundell, *supra* note 46, at 95-96; Jacqueline Sachs, *Preschool Boys' and Girls' Language Use in Pretend Play*, in LANGUAGE, GENDER, AND SEX IN COMPARATIVE PERSPECTIVE, *supra* note 35, at 178, 182. Studies casting doubt upon the validity of Lakoff's thesis include Marie Baumann, *Two Features of 'Women's Speech'?*, in THE SOCIOLOGY OF THE LANGUAGES OF AMERICAN WOMEN, *supra* note 68, at 33-40; Betty Lou Dubois & Isabel Crouch, *The Question of Tag Questions in Women's Speech: They Don't Really Use More of Them, Do They?*, 4 LANGUAGE SOC'Y 289-94 (1976); Janet L. Johnson, *Questions and Role Responsibility in Four Professional Meetings*, 22 ANTHROPOLOGICAL LINGUISTICS 66 (1980) (noting that in meetings of engineers and designers, male group leader used the most tag questions).

The inconsistent results of these studies can be explained in part by methodological flaws in some of them. For example, the research by Dubois and Crouch, *supra*, is probably the most cited study purporting to disprove Lakoff's thesis on tag questions, yet the study is rife with methodological shortcomings that render its conclusions highly questionable. The discourse sample used by Dubois and

questions are formed by the following syntactic transformation: take a declarative statement, append to it a clause made by reversing the negativity of the tense-bearing verb, and add an appropriate anaphoric pronoun to match the subject.<sup>70</sup> Here are two examples of tag questions:

- (1) (a) "Philadelphia is a large city."
- (b) "Philadelphia is a large city, isn't it?"
- (2) (a) "I should see a lawyer."
- (b) "I should see a lawyer, shouldn't I?"

Like hedges, the illocutionary force<sup>71</sup> of tag questions varies substantially depending upon the context of the utterance. Robin Lakoff ascribed several slightly differing functions to the tag question. She noted that tag questions can be "used when the speaker is stating a claim, but lacks full confidence in the truth of that claim";<sup>72</sup> or when the speaker is seeking to solicit agreement, corroboration, or acquiescence from the addressee;<sup>73</sup> or when the speaker wishes to avoid confronting the addressee with an unqualified assertion.<sup>74</sup> Each of these uses of the tag question reflects the speaker's intent to refrain from

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Crouch consisted of the question-and-answer portion of a daylong professional meeting during which male conferees used a number of tag questions but no female conferees did. Because the study does not indicate how many of the responses were by men and how many by women, the fact that no women used tag questions may simply reflect the infrequency with which they spoke. It is reasonable to suppose that more men than women attended an academic conference held in the mid-1970's, and that the men were of higher seniority and rank than the women who participated, which would doubtless decrease the proportion of responses made by women. Cf. Marjorie Swacker, *Women's Verbal Behavior at Learned and Professional Conferences*, in *THE SOCIOLOGY OF THE LANGUAGES OF AMERICAN WOMEN*, *supra* note 68, at 155-60 (finding, in an unrelated study, that women academic conferees made only one-fourth of the total responses to delivered papers, and that their comments were on average less than half as long as those of male conferees). Further, a question-comment session at an academic conference is far from a typical social situation; it is debatable what generalizable conclusions about female linguistic usage can be drawn from such atypical discourse. Finally, Dubois and Crouch did not classify the tag questions in their sample according to the questions' various pragmatic functions. If the study is to test the accuracy of Lakoff's thesis, then only those tag questions used by speakers to signal tentativeness or diffidence should be counted.

70. For a description of tag question formation according to transformational generative grammatical theory, see ADRIAN AKMAJIAN & FRANK W. HENY, *AN INTRODUCTION TO THE PRINCIPLES OF TRANSFORMATIONAL SYNTAX* 202-19 (1975). Although contemporary generative syntactic theory has largely discarded the multiplicity of highly particular transformational rules described in AKMAJIAN & HENY, *supra*, their account is still valid as a description of tag question syntax even if questionable as an generative explanation of fundamental linguistic structure. A thorough discussion of contemporary theories of syntax is beyond the scope of this Article. A concise introduction to the technical aspects of current competing syntactic theories can be found in NEWMAYER, *supra* note 62, at 197-229.

71. Illocutionary force is that aspect of meaning describing the act that the speaker intends to perform in using an utterance. For example, when our hypothetical lunch partner says, "I'll pay you back," the illocutionary act performed is a promise, and the utterance could be rephrased as, "I hereby promise to pay you back," to make the illocutionary force of the act explicit. Perlocutionary force, in contrast, is that aspect of meaning describing the effect that an utterance has on the listener. In this example, the perlocutionary force could be characterized as the reassurance of the listener that she will be repaid, or the persuasion of the listener to lend money. See AUSTIN, *supra* note 13, at 98-108; SEARLE, *supra* note 12, at 54-64.

72. LAKOFF, *supra* note 32, at 15.

73. *Id.* at 16-18.

74. *Id.* at 16.

assertively imposing her opinions or desires upon the addressee. The speaker thus avoids conflict with the addressee by using a grammatical form that invites the addressee's response, but in doing so undercuts the directness and emphatic power of the original statement.<sup>75</sup>

Tag questions can, however, have a radically different illocutionary force in certain circumstances.<sup>76</sup> When used by a speaker seeking an advantage over an addressee, tag questions can serve to exert power over the addressee by suggesting that taking a position contrary to that of the speaker would be unreasonable.<sup>77</sup> Tag questions used in this way are generally pronounced with a falling intonation,<sup>78</sup> as if to emphasize that the speaker is in no way unsure of the claim being made.<sup>79</sup> Tag questions with this assertive illocutionary power share the syntactic structure of tag questions used to attenuate the force of the discourse, but their pragmatic function differs completely.<sup>80</sup> If, however, we confine our consideration to those tag questions whose pragmatic function is to attenuate the emphatic nature of the statement, the use of such tag questions has been demonstrated to correlate with the gender of the speaker.<sup>81</sup>

75. Janet Holmes, "Women's Language": A Functional Approach, 24 GEN. LINGUISTICS 149, 152-53, 155 (1984).

76. The illocutionary force of tag questions is culturally variable as well. For example, tag questions are often used in a highly aggressive manner in British English, particularly among urban working-class males, in an attempt to force assent when the speaker thinks the addressee may disagree. FASOLD, *supra* note 27, at 105-06; Jenny Cheshire, *Linguistic Variation and Social Function*, in SOCIOLINGUISTIC VARIATION IN SPEECH COMMUNITIES 153, 165 (Suzanne Romaine ed., 1982).

77. See, e.g., NORMAN FAIRCLOUGH, LANGUAGE AND POWER 45-46 (1989). This use may explain the findings of Janet L. Johnson, *supra* note 69, that in meetings of engineers and designers, a male group leader used the most tag questions.

78. For a discussion of the significance of changes in intonation in English usage, see *infra* notes 88-94 and accompanying text.

79. FAIRCLOUGH, *supra* note 77, at 46; Chisato Kitagawa, A Source of Femininity in Japanese: In Defense of Robin Lakoff's 'Language and Women's Place,' 10 PAPERS IN LINGUISTICS 275, 275-80 (1977).

80. Robin Lakoff proposes the term "pragmatic homonymy" to designate instances in which syntactically identical forms differ in pragmatic function depending upon their context. LAKOFF, *supra* note 28, at 217-18. Words are homonyms if they sound alike but have different meanings. Compare, for example, "bank," meaning financial institution with "bank," meaning side of a river. Analogously, grammatical forms are pragmatically homonymous when they have identical syntactic structures but serve different pragmatic functions:

A tag question . . . such as, "This food is delicious, isn't it?" is pragmatically homonymous, as it might be intended in one context as the speaker's way of avoiding an assertive statement as unladylike; in another, as an attempt to elicit a response from a shy person; in still another, a veiled demand from the cook: "Tell me it's good or I'll be terribly hurt."

*Id.* at 218.

81. Because the illocutionary force, and thus the meaning of the tag question form, depends on its context, research testing Lakoff's theory linking tag questions to gender must take into account the contextual variability of the communicative function of this syntactic form. See, e.g., Deborah Cameron et al., *Lakoff in Context: The Social and Linguistic Functions of Tag Questions*, in WOMEN IN THEIR SPEECH COMMUNITIES, *supra* note 68, at 74, 83-84, 85 (urging researchers to be sensitive to the "complex multifunctionality and diversity of meaning" of tag questions, whose communicative function cannot meaningfully be assessed except in the social context of the discourse). Janet Holmes makes a similar point about the contextual interpretation of linguistic hedges and tentativeness markers in general. Holmes, *supra* note 67, at 49-50. Because the essential question is not only how often but in what contexts men and women use tag questions, acontextual research in which the researcher merely counts tag questions in discourse samples is inadequate. Some researchers have been more sensitive to the multifunctionality of tag questions. Mulac and Lundell, for example, specifically limited their investigation to tag questions

### 3. *Modal Verb Usage*

A third gender-linked characteristic observed by sociolinguists is the frequent use of modal verbs such as "may," "might," "could," "ought," "should," and "must."<sup>82</sup> While it is easy to see that modals such as "may" and "might" function similarly to hedges in their pragmatic impact, an example will demonstrate that even strong, assertive-sounding modal verbs can sometimes act to soften the emphasis of the statement, depending upon the context of their use.<sup>83</sup> Consider, for example, the following sentences:

This may be the right house.

This might be the right house.

This could be the right house.

This ought to be the right house.

This should be the right house.

This must be the right house.

This is the right house.

None of the sentences using modal verbs has the same matter-of-fact emphatic character as "This is the right house." Even the example sentences using strong modal verbs such as "should," "ought," or "must" carry the implication that the statement is the product of surmise, deduction, or process of elimination rather than an unmediated statement of fact. Like lexical hedges, modal verbs can undercut the emphatic force of an utterance.

As noted in the discussion of the pragmatic variability of lexical hedges and tag questions, the pragmatic interpretation of modal verbs, too, varies considerably according to context. For instance, the modal verb "must" has a very different meaning in the sentence, "You must leave immediately," than in the sentence, "You must be Terry's friend; we've been expecting you." Only the second example is an instance of the type of modality that Lakoff identifies as a characteristic of women's language.<sup>84</sup>

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expressing a lack of assertion. Mulac & Lundell, *supra* note 46, at 95-96. When researchers have taken into account the variable communicative function of the tag question form and limited their data samples to those tags indicating attenuated illocutionary force, their results have tended to confirm Lakoff's claim that women use such tag questions more often than men. See, e.g., PREISLER, *supra* note 68, at 283-84; Fishman, *supra* note 68, at 128; McMillan et al., *supra* note 69, at 545-59; Mulac & Lundell, *supra* note 46, at 95-96.

82. MARY R. KEY, *MALE/FEMALE LANGUAGE* 75-76 (1975); Lakoff, *supra* note 46, at 143-44.

83. The pragmatic interpretation of modal verbs varies considerably according to context. Lakoff, *supra* note 46, at 143. The pragmatic analysis of modality is extremely complex and still quite controversial. For a useful attempt to classify the diverse uses of modal verbs, see EVE SWEETSER, *FROM ETYMOLOGY TO PRAGMATICS: METAPHORICAL AND CULTURAL ASPECTS OF SEMANTIC STRUCTURE* 49 (1990) (distinguishing root modality, entailing "real-world obligation, permission, or ability," from epistemic modality, denoting "necessity, probability or possibility in reasoning").

84. Lakoff, *supra* note 46, at 143.

#### 4. *Absence of Imperatives*

A fourth characteristic of the female register is that its users avoid using the imperative grammatical mood, substituting interrogative forms for the syntactically indicated imperative form.<sup>85</sup> As Lakoff put it: "An overt order (as in an imperative) expresses the (often impolite) assumption of the speaker's superior position to the addressee, carrying with it the right to enforce compliance, whereas with a request the decision on the face of it is left up to the addressee."<sup>86</sup>

Imperatives, the verbs of command, are the most starkly assertive of all grammatical forms. Phrasing an imperative as a question, however, softens the imperative's aggressive edge. Compare the nuances in the following sentences:

Tell me the time.  
 Could you tell me the time?  
 Sit down.  
 Won't you sit down?  
 Call my lawyer.  
 Would you call my lawyer?

Although each of these utterances makes a demand, those phrased in an interrogative form sound less presumptive and more tactfully deferential than the baldly stated imperatives. When a speaker combines such interrogative forms with other polite qualifiers, the assertiveness of the underlying imperative is further weakened:

If it isn't too much trouble, would you call my lawyer?  
 If you don't mind, could you call me a lawyer?

Because the exercise of power is considered "unfeminine," women are socialized from earliest childhood to avoid directly ordering other people to do things. Not surprisingly, then, studies of children's discourse have shown that young female children characteristically avoid direct imperatives<sup>87</sup> just as adult women do.

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85. LAKOFF, *supra* note 32, at 19; GRADDOL & SWANN, *supra* note 54, at 85-88 (describing an English study showing that men generally used more imperatives than did women across ages and socioeconomic classes); KEY, *supra* note 82, at 75-77 (finding that women generally use fewer imperatives, and those they do use tend to be indirect imperatives).

86. LAKOFF, *supra* note 32, at 18.

87. Goodwin, *supra* note 53, at 157-73 (finding that boys in field study used more imperatives, whereas girls used more suggestions); Sachs, *supra* note 69, at 178-88 (determining that preschool-aged boys used more imperatives and negative imperatives, whereas girls used more "mitigating directives"). The findings in these studies are consistent despite race and class differences in the subject populations: Sachs' subjects were middle-class white children, and Goodwin's subjects were working-class black children.



### 5. *Rising Intonation*

The fifth major feature of the female register is a paralinguistic characteristic: its speakers use rising inflection in making declarative statements.<sup>88</sup> Ordinarily, English speakers use rising intonation to signal a question or for some other special effect.<sup>89</sup> This is especially true for questions that are syntactically identical to declarative statements. For example, each of the following pairs of utterances typically would be distinguished in speech by the use of a high, rising intonation at the end of the second sentence in each pair.<sup>90</sup>

Chris isn't hère.

Chris isn't hère? (expressing uncertainty and request for confirmation or explanation)

I need a lawyèr.

I need a lawyér? (expressing incredulity)

The use of rising intonation in ordinary declaratives that are not intended to express uncertainty or incredulity is a gender-linked paralinguistic trait.<sup>91</sup> In making declarative utterances, American men tend to pronounce their sentence endings, called terminals, at the lowest level of intonation that they customarily use, whereas women often adopt a rising terminal.<sup>92</sup> In addition, women commonly exhibit a much greater dynamic range in their intonation patterns than men do. Whereas men seldom use more than three levels of intonation, women typically use four or more separate levels of intonation, and change levels more frequently and more dramatically than do men.<sup>93</sup> Since changes in intonation level are paralinguistically associated with emotion, those who use a greater range of pitch in their intonations may have their speech interpreted as more highly emotional; others may dismiss these utterances as irrational, because such speech has a dynamic range which would indicate extreme emotion in normal male speech.<sup>94</sup>

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88. LAKOFF, *supra* note 32, at 17.

89. McConnell-Ginet, *supra* note 61, at 554.

90. I use accent marks in the examples that follow as an admittedly crude representation of the rising or falling intonation in each contrasting pair of sentences.

91. McConnell-Ginet, *supra* note 61, at 554; Ruth M. Brend, *Male-Female Intonation Patterns in American English*, in LANGUAGE AND SEX: DIFFERENCE AND DOMINANCE, *supra* note 40, at 84 (finding that women use more hesitation-intonation patterns than men and that women use a final short rising intonation that men use solely in interrogatives).

92. McConnell-Ginet, *supra* note 61, at 554.

93. *Id.* at 551-52 (citing Brend study, *supra* note 91, but criticizing failure to specify data sources).

94. *Id.*

## B. *The Pragmatics of Powerlessness in the Female Register*

The overall pragmatic effect of the female register is the substitution of indirect and tentative locutions for strong and assertive modes of expression.<sup>95</sup> Analogous gender-based linguistic registers can be found in other languages.<sup>96</sup> Despite profound syntactic differences between the Japanese and English languages, the female register in Japanese shares many of the same features that characterize its counterpart in English. In general, the female register in Japanese<sup>97</sup> differs from typical male speech in its greater use of indirect and tentative grammatical forms<sup>98</sup> and its avoidance of assertive and emphatic ones.<sup>99</sup> Specifically, the female register of Japanese includes the frequent use of lexical hedges,<sup>100</sup> the use of a grammatical form equivalent to the tag question,<sup>101</sup> the avoidance of direct imperatives and concomitant substitution of interrogative forms,<sup>102</sup> and the use in declarative sentences of a rising intonation more typical of questions.<sup>103</sup> The remarkable similarity of the female register in languages as syntactically different as English and Japanese suggests

95. "[W]omen's speech is devised to prevent the expression of strong statements." LAKOFF, *supra* note 32, at 19.

96. Lakoff notes that analogous female registers have been observed in every language examined with that possibility in mind. Although the syntactic manifestations of the female register vary from language to language, the same pragmatic functions recur. LAKOFF, *supra* note 28, at 202-03.

97. For a detailed description of the female register in Japanese, see generally JANET S. SHIBAMOTO, *JAPANESE WOMEN'S LANGUAGE* (1985); Sachiko Ide, *Japanese Sociolinguistics: Politeness and Women's Language*, 57 LINGUA 357 (1982); Kitagawa, *supra* note 79. The female register in Japanese is characterized by both lexical and syntactical features, including honorifics, nominal prefixes, verb forms, and terminal sentence particles. Of these, terminal sentence particles deserve special attention because their function is to signal the affective connotations of the sentence. Because they implicitly invite a reaction from the addressee, terminal particles are more frequently used in conversation than in writing.

98. SHIBAMOTO, *supra* note 97, at 68-169 (empirical study of women's speech patterns demonstrating that women use more indirect grammatical forms and particles that express tentativeness and solicit the opinion of the addressee).

99. Japanese possesses several terminal particles intended to express emphasis and assertiveness, including "yo," "zo," "ze," and "ya," but their use by women is considered inappropriate. SAMUEL E. MARTIN, *A REFERENCE GRAMMAR OF JAPANESE* 919, 922, 933 (1975); *see also* Ide, *supra* note 97, at 381 (noting that women use softening particles to soften the illocutionary force of their speech, whereas men use particles of "self-confidence, assertion, or confirmation").

100. Ide, *supra* note 97, at 383. When men and women attempt to express the same idiom, the appropriate women's expression often has a more tentative nuance. For example, the typical women's expression "kasira," meaning "I wonder," is made by combining the question particle "ka" with "sira," meaning "I don't know"; the equivalent phrase in male speech is "kanaa," with "naa" being a confirmation particle. Thus, even when male speech uses hedges, they are less tentative than those used in women's speech. *Id.* at 381-82; *see also* MARTIN, *supra* note 99, at 936-37 (discussing the characteristic female use of "ka sira" as softening a declarative or expressing tentativeness).

101. The terminal particle "nee" often translated as "isn't it?", is used to soften requests, observations, and proposals. Hence it is functionally identical to the tag question in English. MARTIN, *supra* note 99, at 916.

102. Ide, *supra* note 97, at 383.

103. Kitagawa, *supra* note 79, at 282-88. Kitagawa observes that the "wa" particle, infrequently used by male speakers, is always pronounced by men with falling intonation; the characteristic feminine "wa" is used with the high sustained intonation ordinarily used in Japanese to signal a question. The pragmatic effect is to imply that the addressee's approval is being sought. Rising inflection is similarly used when women substitute the particle "no" in place of the more usual interrogative particle "ka" to soften the force of the question. MARTIN, *supra* note 99, at 927.

that this linguistic phenomenon is unlikely to be a random or coincidental grammatical characteristic of English. Rather, as Lakoff and other feminist linguists argue, use of this register appears to be intimately connected to the subordinate position of women within each society.<sup>104</sup>

What all of the syntactic and paralinguistic characteristics of the female register have in common is that they attenuate the illocutionary force of the speech in which they occur.<sup>105</sup> Speakers adopt this register to convey uncertainty, to soften the presumptiveness of a direct statement, or to forestall opposition from the addressee. Each of these pragmatic functions is a typical communicative strategy of the powerless:

Men's language is the language of the powerful. It is meant to be direct, clear, succinct, as would be expected of those who need not fear giving offense, who need not worry about the risks of responsibility. . . . Women's language developed as a way of surviving and even flourishing without control over economic, physical, or social reality. Then it is necessary to listen more than speak, agree more than confront, be delicate, be indirect, say dangerous things in such a way that their impact will be felt after the speaker is out of range of the hearer's retaliation.<sup>106</sup>

Understanding the significance of the female register within its social context, then, is impossible without carefully considering the issues of power and domination underlying the choice of linguistic registers by speakers.<sup>107</sup> It misses the point to ask whether a particular utterance is "really" equivocal or only just "apparently" equivocal, since the adoption of this register, whether conscious or unconscious, is a response by the speaker to contextual powerlessness. In a recent study of equivocal language use, several researchers concluded that individuals do not freely choose to express themselves in an equivocal manner; rather, equivocation is the product of the social context in which speakers find themselves, in which direct and assertive statements are seen as leading to negative consequences for the speakers.<sup>108</sup> This analysis

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104. LAKOFF, *supra* note 28, at 206; Pamela M. Fishman, *Interaction: The Work Women Do*, 25 SOC. PROBLEMS 397 (1978); Don H. Zimmerman & Candace West, *Sex Roles, Interruptions and Silences in Conversation*, in LANGUAGE AND SEX: DIFFERENCE AND DOMINANCE, *supra* note 40, at 105. For a cogent summary of the argument that women's linguistic usage is a product of male dominance, see DEBORAH CAMERON, FEMINISM AND LINGUISTIC THEORY 74-78 (2d ed. 1992).

105. Holmes, *supra* note 74, at 149-77.

106. LAKOFF, *supra* note 28, at 205.

107. Henley & Kramarae, *supra* note 55, at 24-30 (domination and power are crucial to understanding gender-linked language phenomena). On the importance of considering power when analyzing language issues in the broader social context, see GLYN WILLIAMS, SOCIOLINGUISTICS: A SOCIOLOGICAL CRITIQUE (1992) (criticizing work of virtually all sociolinguists for being inadequately attentive to issues of power and domination in language use).

108. JANET B. BAVELAS ET AL., EQUIVOCAL COMMUNICATION 54 (1990). "[A]lthough an individual equivocates, he or she is not the cause of equivocation. Rather, equivocation is the result of the individual's communicative situation. Equivocation is avoidance; it is the response chosen when all other communicative choices in the situation would lead to negative consequences." *Id.*

suggests that powerless people, who most often perceive themselves to be in such "no-win" situations, would tend to adopt more equivocal speech patterns.

Empirical research on the female register suggests that the greater the imbalance of power in the communicative relationship, the more likely the powerless speaker is to use features associated with the female register.<sup>109</sup> Professor William O'Barr, who has conducted research on the relationship among power, gender, and the use of the female register, has argued that the correlation between powerlessness and the use of the female register is more pronounced than is the correlation between gender and the use of the female register.<sup>110</sup> The discourse sample used in this research was composed of approximately 150 hours of taped courtroom proceedings from a North Carolina superior court, and included testimony from both male and female witnesses.<sup>111</sup> O'Barr examined this data to see whether and under what circumstances witnesses used the female register, which he defined in accordance with Lakoff's posited characteristics of women's language.<sup>112</sup> He found a continuum of usage of the female register, with some witnesses using many of these linguistic features in the course of their testimony, and others using few of them or none at all. Female witnesses fell more often into the higher end of this continuum, and men into the lower end; however, low social status correlated more directly with use of the female register than did gender.<sup>113</sup> For example, the speech of well-educated women with professional jobs had a lower incidence of female register features than the speech of what O'Barr called "housewives."<sup>114</sup> Although very high levels of these features were found to be "not within the normal range of accepted male verbal usage,"<sup>115</sup> males who held subordinate, low-status jobs or who were unemployed did use more of the characteristic features of the female register than males of higher social status.<sup>116</sup> Based on this discourse analysis, O'Barr

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109. Holmes, *supra* note 74, at 157 (summarizing research on correlation of powerlessness and use of female register).

110. WILLIAM O'BARR, LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM (1982); Bonnie Erickson et al., *Speech Style and Impression Formation in a Court Setting: The Effects of "Powerful" and "Powerless" Speech*, 14 J. EXPERIMENTAL SOC. PSYCHOL. 266 (1978); E. Allan Lind & William O'Barr, *The Social Significance of Speech in the Courtroom*, in LANGUAGE AND SOCIAL PSYCHOLOGY 66 (Howard Giles & Robert N. St. Clair eds., 1979); William M. O'Barr & Bowman K. Atkins, "Women's Language" or "Powerless Language?", in WOMEN AND LANGUAGE IN LITERATURE AND SOCIETY, *supra* note 36, at 93; cf. Thomas Holtgraves & Joong-Nam Yang, *Interpersonal Underpinnings of Request Strategies: General Principles and Differences Due to Culture and Gender*, 62 J. PERSONALITY & SOC. PSYCHOL. 246-56 (1992) (correlating the use of deferential politeness in making requests with both gender and relative power imbalances, but finding power better than gender as predictor of politeness among American subjects); Ochs, *supra* note 36, at 50 (observing gender-linked variables in language use in Samoa, but noting that factors such as speaker's age or social status sometimes overrode these differences).

111. O'BARR, *supra* note 110, at 61-65.

112. *Id.*

113. *Id.* at 65-70.

114. *Id.* at 69.

115. *Id.* at 73.

116. *Id.* at 69.

concluded that this linguistic register, distinguished by the predominance of hedged and indirect speech forms, is more appropriately called "powerless language" rather than "women's language."<sup>117</sup> He explained the results of other researchers who have correlated the use of this register with gender by noting that women "occupy relatively powerless social positions" more often than do men.<sup>118</sup>

The question of who uses this register and under what circumstances is multifactored, and consequently complex. Still, virtually all researchers note that this register tends to be adopted in situations in which the speaker is at a disadvantage in power,<sup>119</sup> and most agree that women in our society more frequently find themselves in such situations than do men. In the context of this Article, it is particularly notable that the disparity in linguistic usage between men and women appears to be greatest among lower socioeconomic classes,<sup>120</sup> the persons who are most likely to find themselves the subject of police interrogation.<sup>121</sup>

### C. *Power Asymmetry in Police Interrogation*

Whether any particular person undergoing police interrogation will adopt the mode of expression that I have called the female register is not a random matter. Rather, some distinct segments of the population—women, members of certain ethnic communities,<sup>122</sup> and the socioeconomically powerless<sup>123</sup>—are more likely than others to speak in this register. Thus,

117. *Id.* at 65-71.

118. *Id.* at 71.

119. In a recent work on this subject, Lakoff has explicitly recognized that what she had originally called "women's language" can be seen as a register spoken by those without access to power. LAKOFF, *supra* note 28, at 206.

120. FASOLD, *supra* note 27, at 92-102 (discussing research on social class and gender-linked language use in the United States, Great Britain, Canada, Australia, Tanzania, Ireland, and the Netherlands).

121. Criminologists have long asserted that the majority of persons arrested and prosecuted for crimes are from lower socioeconomic classes. *See, e.g.*, HERBERT A. BLOCH & GILBERT GEIS, *MAN, CRIME, AND SOCIETY* 128 (2d ed. 1970). Hard statistical evidence to support this axiomatic assertion is hard to come by. Although it may be an oversimplification to conflate social class with economic status, statistics do show that most persons charged with crimes are indigent, or financially unable to retain private counsel to represent them. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY 32-33 (1986) (estimating that about half of all felony defendants in the U.S. are indigent); ROBERT HERMANN ET AL., COUNSEL FOR THE POOR: CRIMINAL DEFENSE IN URBAN AMERICA 32, 90, 143 (1977) (81% of defendants in New York City, 84% of defendants in District of Columbia, and 65% of defendants in Los Angeles represented by public defender or court-appointed attorney).

Some recent sociological research has specifically taken into account noneconomic factors in ascribing social class to persons accused of white-collar crime. Even in this category of crime, nearly half of the defendants were classified as workers (i.e., non-owners with no subordinates). John Hagan & Patricia Parker, *White-Collar Crime and Punishment: The Class Structure and Legal Sanctioning of Securities Violations*, 50 AM. SOC. REV. 302, 305 (1985); David Weisburd et al., *Class, Status, and the Punishment of White-Collar Criminals*, 15 L. & SOC. INQUIRY 223, 228 (1990). Thus, one can justifiably conclude that the majority of arrestees interrogated by the police are of lower socioeconomic status.

122. *See infra* notes 312-26 and accompanying text.

123. O'BARR, *supra* note 110, at 65-71; Erickson et al., *supra* note 110, at 266-79; Lind & O'Barr, *supra* note 110, at 71-74; O'Barr & Atkins, *supra* note 110, at 93-110.

suspects who fall into any of these categories are less apt to use the mode of expression that will give them the highest degree of constitutional protection.

Gender, ethnicity, and socioeconomic class are not the only factors determining the likelihood that a speaker will use this register. Whether a speaker adopts one register of speech rather than another depends to some degree on the specific situation in which the speech occurs.<sup>124</sup> Therefore, pragmatic analysis of any particular interaction must take into account the context of that interaction,<sup>125</sup> including the power relations inherent in the situation.<sup>126</sup> A communicative context in which the speaker is, or is made to feel, relatively powerless enhances that individual's tendency to adopt the mode of expression characteristic of the female register.<sup>127</sup>

Police interrogation of a criminal suspect may be the paradigmatic context in which one participant, the questioned suspect, feels powerless before the other.<sup>128</sup> Many features of the typical police interrogation reinforce the questioned suspect's sense of powerlessness. First, interrogation in and of itself creates a power disparity between the person asking the question and the person being questioned. The questioner has the right to control the subject matter, tempo, and progress of the questioning, to interrupt responses to questions, and to judge whether the responses are satisfactory. The person questioned, on the other hand, has no right to question the interrogator, or even to question the propriety of the questions the interrogator has posed.<sup>129</sup>

The impact of these factors, present in any interview, is magnified in the highly adversarial context of a police interrogation of an arrested suspect,<sup>130</sup>

124. HALLIDAY & HASAN, *supra* note 39, at 38-39.

125. For a recent collection of sociolinguistic papers addressing the importance of context in pragmatic analysis, see *RETHINKING CONTEXT: LANGUAGE AS AN INTERACTIVE PHENOMENON* (Alessandro Duranti & Charles Goodwin eds., 1992).

126. Lamont Lindstrom, *Context Contests: Debatable Truth Statements on Tanna (Vanuatu)*, in *RETHINKING CONTEXT: LANGUAGE AS AN INTERACTIVE PHENOMENON*, *supra* note 125, at 101, 102-03.

127. LAKOFF, *supra* note 28, at 32, 206; cf. Holtgraves & Yang, *supra* note 110, at 246-56 (citing several studies that strongly support the conclusion that power is a key variable in increasing deferential politeness, and concluding that gender as independent variable likewise increases politeness in subject responses).

128. In discussing power here, I do not mean power in Foucault's sense of the discursively mediated reciprocity of knowledge and power. See generally MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (A.M. Sheriden Smith trans., 1972); MICHEL FOUCAULT, *POWER/KNOWLEDGE* (1980). Rather, I use the word in the colloquial sense, as a measure of one's ability to exert some degree of control over one's environment and over the actions of oneself and others.

129. On the inherent power disparity created by the interview context, see F. Niyi Akinnaso & Cheryl S. Ajitotutu, *Performance and Ethnic Style in Job Interviews*, in *LANGUAGE AND SOCIAL IDENTITY*, *supra* note 27, at 119-23. See also Roger W. Shuy, *Topic as a Unit of Analysis in a Criminal Law Case*, in *ANALYZING DISCOURSE: TEXT AND TALK* 113-26 (Deborah Tannen ed., 1982) (analyzing topic introduction as means of control in conversation).

130. See FAIRCLOUGH, *supra* note 77, at 18 (demonstrating that police questioning exemplifies control in communicative discourse); D.R. Watson, *Some Features of the Elicitation of Confessions in Murder Interrogations*, in *INTERACTION COMPETENCE* 263, 272-79 (George Psathas ed., 1990) (noting that because suspect confessions are invited (recipient-initiated) rather than volunteered (teller-initiated) story, interrogating officer can exert high degree of control over resulting narrative by interrupting to ask questions and focus narrative, deciding when story is "done," assessing adequacy and credibility of story, etc.).

especially when the police officer consciously manipulates the interaction to enhance the perceived power of the interrogator and the suspect's feelings of vulnerability.<sup>131</sup> Police interrogators are trained to conduct the questioning in a way calculated to increase the anxiety felt by the suspect and soften her resistance.<sup>132</sup> For example, the interrogating officer ideally maintains complete control over the physical environment in which the questioning takes place, isolating the suspect, who remains in unfamiliar surroundings designed to keep her psychologically off balance.<sup>133</sup> The interrogator decides how long the interrogation session will last; often the session is intentionally prolonged to achieve an advantage over the suspect.<sup>134</sup> Similarly, the interrogator unilaterally determines the subject matter of the interrogation and the manner in which the questions are asked, and may employ a wide variety of tactics designed to control the interrogation and overcome the suspect's resistance,<sup>135</sup> including confrontational accusations,<sup>136</sup> trickery and deception,<sup>137</sup> baiting questions designed to insult or humiliate,<sup>138</sup> and appeals to the suspect's religious values.<sup>139</sup> Even the suspect's ability to answer questions is constrained by the interrogator, who may repeatedly interrupt the suspect's denials and explanations to condition the suspect to accept complete domination by the interrogating officer.<sup>140</sup> In short, the interrogating officer aims to exercise total control over every aspect of the interrogation session.<sup>141</sup> When, as in police interrogation, the power asymmetry of the discourse is coupled with the actual physical power that the police have over the body of the individual in custody, the suspect feels a sense of powerlessness dramatically more acute than that felt in ordinary life. The criminal suspect in police interrogations will therefore be more likely to speak in the register of the powerless.<sup>142</sup>

#### D. *Multiple Registers and Mutual Misunderstanding*

The constitutional rights of suspects in police custody are at risk not only because of how they speak, but also because of how the police hear and interpret their words. Male police officers, occupying positions of power in

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131. Such tactics are suggested in leading police interrogation manuals. See FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 24-42 (3d ed. 1986); JOHN M. MACDONALD & DAVID L. MICHAUD, INTERROGATION AND CRIMINAL PROFILES FOR POLICE OFFICERS 33-35 (1987).

132. INBAU ET AL., *supra* note 131, at 342-45.

133. See *id.* at 24-28 (advising officers to maintain conditions of privacy in interrogation).

134. *Id.* at 310 (suggesting sessions of up to four hours in length to obtain confession).

135. See generally *id.* at 77-208; MACDONALD & MICHAUD, *supra* note 131, at 26-47.

136. INBAU ET AL., *supra* note 131, at 84-93.

137. *Id.* at 216-18, 319-23.

138. *Id.* at 68-72.

139. *Id.* at 164.

140. *Id.* at 141-53.

141. MACDONALD & MICHAUD, *supra* note 131, at 33.

142. Cf. O'BARR, *supra* note 110, at 64-71 (noting correlation between powerlessness and extent to which witnesses in court displayed female register characteristics in their speech).

interrogation, are unlikely to share the female register and the rules of implicature that it entails. As a result, suspects who use the female register are doubly disadvantaged in their attempts to exercise their *Miranda* rights.

Cognitive psychologists have demonstrated that hearers interpret the speech of others based on their presumptions about what the speaker probably means.<sup>143</sup> Such presumptions arise from the very same rules of implicature that the hearer unconsciously relies upon in speaking himself. In other words, when we interpret speech, we do so not by asking, "What does she mean by that?", but rather, "What would I mean if I had said that?" Ordinarily, this causes no problems, since most communication takes place between people who share the communicative conventions and cultural presumptions that mediate the rules of conversational implicature. When, however, the communicative style of the hearer differs from that of the speaker, there is a real possibility that the hearer will misinterpret the speaker's meaning.<sup>144</sup> The likelihood of misinterpretation has been shown to be the greatest under stressful conditions, when both the speaker and listener are less able to adapt consciously to each other's differing communicative conventions. Unfortunately, neither party is apt to appreciate the degree of misunderstanding that has occurred.<sup>145</sup>

Because children learn conversational style primarily in gender-segregated peer groups, males and females develop differing conventions of expression and implicature.<sup>146</sup> Differences in the typical communicative styles of men and women, learned from early childhood, lead to the oft-observed problem that men and women seem systematically to misunderstand one another.<sup>147</sup> For

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143. Psychologists explain that "[i]n the course of putting together the meanings of individual sentences, listeners are constantly making inferences about how they fit together to make a coherent 'story.'" JUDITH GREENE, *MEMORY, THINKING AND LANGUAGE* 79 (1987).

144. Lakoff has demonstrated how social and cultural differences in the unconsciously presumed rules of conversational implicature can lead to interpersonal misunderstanding. LAKOFF, *supra* note 28, at 172-78 (giving specific examples of such miscommunication). For an extended case study of the potential for misunderstanding implicit in cross-cultural communication between American and Japanese business negotiators as a result of inconsistent presumptions about conversational implicature, see HARU YAMADA, *AMERICAN AND JAPANESE BUSINESS DISCOURSES* (1992). See generally Susan Ervin-Tripp, *On Sociolinguistic Rules: Alternation and Co-Occurrence*, in *DIRECTIONS IN SOCIOLINGUISTICS* 213, 231 (John J. Gumperz & Dell Hymes eds., 1972) (noting that when there are competing sociolinguistic rule systems within society, speakers may misunderstand one another). J.L. Austin has observed that implicit performative utterances are particularly susceptible to misinterpretation in this way. AUSTIN, *supra* note 13, at 32-34.

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[R]elevant differences in conventions [in speaking] may not present serious problems when individuals are at ease or in routine situations, but when the situation is stressful . . . they are quite likely to affect communication. This is a largely unrecognized type of communicative problem and most people, therefore, interpret the other person's way of speaking according to their own conventions. This means that a person may draw totally incorrect inferences about someone else's speech].

Gumperz & Cook-Gumperz, *supra* note 27, at 18.

146. Daniel N. Maltz & Ruth A. Borker, *A Cultural Approach to Male-Female Miscommunication*, in *LANGUAGE AND SOCIAL IDENTITY*, *supra* note 27, at 196, 203.

147. The ways in which the contrasting communicative patterns of men and women result in failure to communicate have been the subject of both popular and scholarly writing. Linguist Deborah Tannen has addressed this problem in two very accessible works. See DEBORAH TANNEN, *THAT'S NOT WHAT I*



example, men whose own speech register favors direct, assertive lexical forms over indirect, hedging lexical forms, are likely to infer unintended degrees of uncertainty and tentativeness into speech that does not conform to male norms.<sup>148</sup> Likewise, men who use rising terminal intonation only in asking questions are apt to hear a suspect's use of rising intonation as evidence of uncertainty or equivocation.<sup>149</sup> A disproportionate percentage of police officers are male,<sup>150</sup> and by dint of their jobs occupy a position of power, which is heightened during interrogation. Powerless suspects, interrogated by officers who probably do not share their patterns of language use, may sound equivocal to their interrogators when they invoke their right to counsel. Such misunderstandings in the context of police interrogation can be seen as typifying a more general phenomenon observed by researchers. Studies investigating the impressions created by a speaker's use of the female register in a variety of contexts have shown that listeners perceive speakers who use the female register as less competent and credible than those whose speech conforms to dominant English usage.<sup>151</sup> Thus, it should not surprise us that suspects using powerless language may not be taken seriously in their attempts to exercise their rights.

The danger of misunderstanding a suspect's wishes is compounded by the reluctance of police officers to write down their version of the interrogation as it occurs. Taking notes is considered incompatible with effective interrogation questioning because maintaining eye contact increases emotional intensity, enhancing the chances that the suspect will incriminate herself.<sup>152</sup> In addition, interrogation experts warn that the formality of note-taking reminds the suspect

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MEANT!: HOW CONVERSATIONAL STYLE MAKES OR BREAKS YOUR RELATIONS WITH OTHERS (1986); DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1990). For more scholarly work on this topic, see JENNIFER COATES, *WOMEN, MEN, AND LANGUAGE* 151-55 (1986); Maltz & Borker, *supra* note 146, at 196-216.

148. See Anthony Mulac & Torberg L. Lundell, *Differences in Perceptions Created by Syntactic-Semantic Productions of Male and Female Speakers*, 47 COMM. MONOGRAPHS 111-18 (1980) (transcripts of speech displaying male speech characteristics perceived as more dynamic and assertive than transcripts containing female register characteristics).

149. Sociolinguistic researchers have found that male hearers often misunderstand the pragmatic significance of the female use of rising terminal intonation. A female speaker may intend her rising intonation as a signal to the listener to continue the interchange, but the male listener may hear it as expressing uncertainty. See McConnell-Ginet, *supra* note 61, at 554-55; see also PHILIP M. SMITH, *LANGUAGE, THE SEXES AND SOCIETY* 71-72 (1985) (summarizing research in which speech samples were assessed by listeners; rising tone was perceived as hesitant and emotional, while neutral tone was considered assertive and decisive).

150. According to the most recent government statistics, nearly 90% of police officers and detectives are male. U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 394 (112th ed. 1992) (10.3% of police officers are female).

151. James J. Bradac & Anthony Mulac, *A Molecular View of Powerful and Powerless Speech Styles*, 51 COMM. MONOGRAPHS 307-19 (1984); Erickson et al., *supra* note 110, at 266-79; Nora Newcombe & Diane B. Arnkoff, *Effects of Speech Style and Sex of Speaker on Person Perception*, 37 J. PERSONALITY & SOC. PSYCHOL. 1293-303 (1979); John W. Wright, II & Lawrence A. Hosman, *Language Style and Sex Bias in the Courtroom: The Effects of Male and Female Use of Hedges and Intensifiers on Impression Information*, 48 S. SPEECH COMM. J. 137 (1983).

152. INBAU ET AL., *supra* note 131, at 36, 173.

of the serious consequences of talking to the police, further decreasing the likelihood of self-incrimination.<sup>153</sup> In later filling out a police report on the interrogation, the officer must reassemble from memory disconnected bits of discourse into a coherent narrative, a task that is especially difficult after lengthy interrogations.<sup>154</sup> When later reconstructing the exact language used by the suspect, the officer is likely to exaggerate the equivocal nature of the speech, not necessarily out of mendacity but because of the way in which memory works. Contrary to popular perception, memory is not analogous to a tape recorder that passively records perceptions.<sup>155</sup> A memory is an encoded *interpretation* of an event, not a copy of it.<sup>156</sup> Psychological research has determined that hearers are poor at distinguishing between what a speaker actually said and the inferences that the hearer drew from the speaker's message.<sup>157</sup> Thus, even leaving aside the officer's professional incentive to interpret a suspect's speech as not invoking the right to counsel,<sup>158</sup> it is likely that indirect speech would be misunderstood, misinterpreted, and misremembered in later recounting by the interrogating police officer.

Police misinterpretation of a suspect's attempted invocation of the right to counsel ordinarily will be dispositive of the issue when it is raised later in court. Even if the defendant were to testify that, contrary to the police claims, she did invoke her right to counsel, a defendant's testimony is almost never believed over the conflicting testimony of a police officer.<sup>159</sup> For example, among the cases discussed later in this Article concerning the equivocal invocation of the right to counsel, there is not one in which the trial court

153. *Id.*; MACDONALD & MICHAUD, *supra* note 131, at 44-45.

154. Karin Aronsson, *Social Interaction and the Recycling of Legal Evidence*, in "MISCOMMUNICATION" AND PROBLEMATIC TALK, *supra* note 55, at 215, 217-18.

155. For an introduction to the psychological literature on memory, see generally ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 52-133 (1979).

156. *Id.* at 110-12 (summarizing psychological research on the nature of memory as storing interpretations of what we perceive rather than a copy of the perceptions themselves).

157. See GREENE, *supra* note 143, at 79-83. "[P]eople remember their interpretations of utterances rather than the exact words. The memory representation retains the meaning which has been extracted from an utterance, including any inferences which were involved in comprehending the utterance." *Id.* at 81.

158. Since the job of police officers is to solve crimes and convict criminals, they naturally prefer not to be thwarted in their interrogations by suspects demanding the right to counsel. As a result, police training manuals recommend that officers downplay the significance of the *Miranda* warnings as much as possible to decrease the odds that the suspect will elect to invoke the *Miranda* rights. See, e.g., MACDONALD & MICHAUD, *supra* note 131, at 17 ("Do not make a big issue of advising the suspect of his rights. Do it quickly, do it briefly, and do not repeat it . . .").

159. See, e.g., Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785 (1970).

Trial judges . . . and magistrates . . . are functionally and psychologically allied with the police.

[They] are the human beings that must find the "facts" when cases involving suspects' rights go into court . . . Their factual findings resolve the inevitable conflict between the testimony of the police and the testimony of the suspect . . . The result is about what one would expect.

*Id.* at 792. Alan Dershowitz puts the matter more directly. In his presentation of the unwritten rules under which the criminal justice system operates, he includes: "Rule VIII: Most trial judges pretend to believe police officers who they know are lying. . . . Rule X: Most judges disbelieve defendants about whether their constitutional rights have been violated, even if they are telling the truth." ALAN DERSHOWITZ, *THE BEST DEFENSE* xxii (1982).

resolved a conflict in testimony in favor of the defendant.<sup>160</sup> In any swearing match between a police officer and a defendant, the defendant loses.<sup>161</sup>

#### IV. INVOCATION OF THE RIGHT TO COUNSEL IN POLICE INTERROGATION

##### A. *The Legal Consequences of Invoking the Right to Counsel*

One of the fundamental constitutional rights guaranteed to any person accused of a criminal offense is the right to be free from compelled self-incrimination. This right, enshrined in the Fifth Amendment,<sup>162</sup> constrains police tactics in custodial interrogation of suspects. That is, no interrogation method can be constitutionally valid if it is tantamount to forcing the suspect to incriminate herself.

For the past quarter century, *Miranda v. Arizona*<sup>163</sup> has provided the doctrinal framework for the effectuation of the Fifth Amendment right against

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160. Cases involving factual disputes between the defense and prosecution about the interrogation include *Towne v. Dugger*, 899 F.2d 1104, 1105 (11th Cir.), *cert. denied*, 498 U.S. 991 (1990); *Norman v. Ducharme*, 871 F.2d 1483, 1486 (9th Cir.), *cert. denied*, 494 U.S. 1031 (1989), and *cert. denied*, 494 U.S. 1061 (1990); *Giacomazzi v. State*, 633 P.2d 218, 220-21 (Alaska 1981); *People v. Hulsing*, 825 P.2d 1027, 1029 (Colo. Ct. App. 1991); *Crawford v. State*, 580 A.2d 571, 572 (Del. 1990); *State v. Lamp*, 322 N.W.2d 48, 56 (Iowa 1982); *Holland v. State*, 587 So. 2d 848, 854 (Miss. 1991); *Russell v. State*, 727 S.W.2d 573, 574-75 (Tex. Crim. App.), *cert. denied*, 484 U.S. 856 (1987); *Poyner v. Commonwealth*, 329 S.E.2d 815, 823 (Va.), *cert. denied*, 474 U.S. 888, and *cert. denied*, 479 U.S. 865 (1985); *Bunch v. Commonwealth*, 304 S.E.2d 271, 274-75 (Va.), *cert. denied*, 464 U.S. 977 (1983); *State v. Robtoy*, 653 P.2d 284, 286-87 (Wash. 1982) (en banc); *State v. Smith*, 661 P.2d 1001, 1002 (Wash. Ct. App. 1983). In fact, there may well have been conflicting testimony in other cases in the sample where the statement of facts in the opinion does not refer to discrepant testimony by the defendant. Generally, the appellate court does not note the fact that the defendant gave a different version of the events because the reviewing court is bound to uphold the trial court's findings of fact. *See, e.g., State v. Wickey*, 769 P.2d 208, 210 n.2 (Or. Ct. App. 1989) ("Although defendant gave a different account, the trial court adopted the testimony of Detective Jensen. We must accept the court's factual finding, because there is evidence to support it. . . . Thus, we do not set out defendant's account of what occurred." (citations omitted)).

161. The lengths to which some trial judges will go to resolve factual issues against criminal defendants can be seen in *State v. Wilson*, 513 A.2d 620, 627-36 (Conn. 1986). In *Wilson*, the defendant testified that he had asked the police for a military lawyer, but the interrogating officer testified that he did not recall the defendant requesting counsel. The trial court issued oral findings from the bench accepting the police testimony that the defendant had never asked for counsel and expressly rejecting the defendant's testimony. Several days later, the trial court issued written findings of fact, this time accepting the defendant's testimony that he had asked for a military lawyer, but interpreting this statement as a "matter of professional pride" rather than an invocation of the right to counsel, and finding that he later waived his rights. More than three years later, the prosecutor writing the appellate brief discovered the discrepancy between the oral and the written factual findings by the judge. At the prosecutor's request, the trial judge issued an "amended" memorandum of factual findings that asserted that he found the defendant "not a credible witness and therefore reject[ed] his claim" that he had asked for a lawyer, claiming that the display of "professional pride" to which his earlier findings alluded was the defendant's demeanor in the courtroom. *Id.* at 629-30. The only consistency among the three sets of factual findings was that, in all of them, the defendant lost. The appellate court agonized over this rather embarrassing case for several pages before ultimately conceding that, due to the inconsistent and contradictory factual findings by the trial judge, the case should be remanded for a new hearing on the issue. *Id.* at 636.

162. The Fifth Amendment provides, in pertinent part, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

163. 384 U.S. 436 (1966).

compulsory self-incrimination in the context of custodial<sup>164</sup> police interrogation,<sup>165</sup> requiring police to recite prescribed warnings informing suspects of their rights.<sup>166</sup> Chief Justice Warren, author of the majority opinion, supported *Miranda*'s unprecedented holding with an exhaustive sixty-page opinion, reciting the long record of physical abuse of suspects in police interrogation<sup>167</sup> and the historical roots of the privilege against self-incrimination.<sup>168</sup> The Court recognized that interrogation of suspects behind closed doors, with no witnesses except the police and the suspect, invites coercive practices.<sup>169</sup> The Court disapprovingly detailed what it called

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164. *Miranda* stated that its holding applied once "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. Subsequent to *Miranda*, a body of constitutional decisions authorized police actions which involve significant deprivations of freedom but do not amount to arrests. See *Terry v. Ohio*, 392 U.S.1 (1968) (permitting brief detention of suspects for police inquiries as long as police have articulable suspicion that the suspect is involved in criminal activity). Once such forcible detentions were authorized, the Supreme Court had to decide whether *Miranda* warnings were required during these less-than-arrest detentions. In *California v. Beheler*, 463 U.S. 1121 (1983), the Court determined that *Miranda* warnings were required both in formal arrests and during police restraint of a suspect similar in degree to the restraint of arrest. Whether the restraint in a particular case is sufficient to require *Miranda* warnings must be assessed on a case-by-case basis. See *Pennsylvania v. Bruder*, 488 U.S. 9 (1988) (police detention for field sobriety tests not custody for purposes of *Miranda* rule); *Berkemer v. McCarty*, 468 U.S. 420 (1984) (routine traffic stop not custody).

165. The Supreme Court defined "interrogation" for these purposes in *Rhode Island v. Innis*, 446 U.S. 291, 298-302 (1980). The Court interpreted interrogation to include both "express questioning" and activities that can be considered its "functional equivalent," such as "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301. In defining interrogation to include the "functional equivalent" of questioning, the Supreme Court apparently recognized that utterances that do not take the grammatical form of interrogatory questions can, through the commonly accepted norms of conversational implicature, be reasonably interpreted as questions.

166. The Court's first statement of its holding reads:

Our holding . . . is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. . . . Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. . . . If . . . he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.

*Miranda*, 384 U.S. at 444-45.

167. *Id.* at 445-48. Immediately after cataloguing a series of cases in which police abused or tortured suspects, the Court detailed the "modern" practice of using psychological stratagems during interrogation. It thus rhetorically equated physical and psychological coercion. *Id.* at 448.

168. The opinion traced the history of the privilege against self-incrimination from the Star Chamber of seventeenth-century England to *Miranda*'s immediate antecedent, *Escobedo v. Illinois*, 378 U.S. 478 (1964). *Miranda*, 384 U.S. at 458-66.

169. As the Court noted, "Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms." *Miranda*, 384 U.S. at 448. The Court, however, was plainly suspicious about what was occurring in what it characterized as an "incommunicado police-dominated atmosphere." *Id.* at 456. As later cases make clear, however, secrecy itself does not render a confession inadmissible. *Miranda* can be satisfied even when the police conduct the waiver transaction and subsequent interrogation in secret, with neither objective recording of the "waiver transaction" nor presence of a disinterested observer. See Yale Kamisar, POLICE INTERROGATION AND CONFESSIONS 84-87 (1980).

"deceptive stratagems"<sup>170</sup> recommended by the authors of police training manuals, methods designed variously to pressure, trick, intimidate, coax, or cajole suspects into incriminating themselves in police interrogation.<sup>171</sup> The *Miranda* Court was skeptical that suspects in police custody could meaningfully exercise their right against self-incrimination under these circumstances: "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak."<sup>172</sup> In an attempt to "dispel the compulsion inherent in custodial surroundings,"<sup>173</sup> the *Miranda* Court held that the Fifth Amendment required the police to inform suspects in custody of their constitutional rights and to obtain waivers of those rights before any police interrogation.<sup>174</sup> Specifically, the Court required police to inform suspects of their right to remain silent in the face of police questioning and of their right to consult legal counsel during this interrogation.<sup>175</sup> The Court intended to reduce the psychological pressure on suspects created by common interrogation practices by providing them with the ability to interpose the presence of legal counsel.<sup>176</sup> Having been informed of their right to remain silent and to have the assistance of a lawyer if desired, suspects who nevertheless waive these rights and elect to make statements to the police were presumed by the Court to have made the decision to do so free of police coercion.<sup>177</sup>

The *Miranda* Court determined that implicit within the Fifth Amendment right against self-incrimination is the right to have the assistance of counsel while being questioned in police custody.<sup>178</sup> Because the right to counsel in this circumstance emanates from the Fifth Amendment, however, the assistance of

170. *Miranda*, 384 U.S. at 455.

171. *Id.* at 448-55. After documenting a number of these interrogation tactics, the Court observed that psychologically coercive interrogation procedures can result in false confessions, giving specific examples in which innocent suspects had confessed. *Id.* at 455 n.24. However, it should be noted that the *Miranda* Court did not outlaw any specific techniques. Many lower courts have since admitted evidence secured by one or more of these interrogation techniques. See, e.g., Daniel W. Sasaki, Note, *Guarding the Guardians: Police Trickery and Confessions*, 40 STAN. L. REV. 1493, 1594 (1988).

172. *Miranda*, 384 U.S. at 461. The *Miranda* opinion equated the effect of this environment to the effect of threats of physical violence: "This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity." *Id.* at 457.

173. *Id.* at 458.

174. *Id.* at 444-45, 478-79.

175. *Id.* at 444-45, 469, 471, 478-79.

176. *Id.* at 449-50, 470.

177. Despite its reservations about the inherently coercive atmosphere created by custodial interrogation, the Court believed that a suspect in that atmosphere could freely waive her Fifth Amendment rights. "After such warnings have been given, and such opportunity [to exercise his rights] afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement." *Id.* at 479.

178. *Id.* at 470-73. The majority opinion does not explicitly ground the right to counsel in the Fifth Amendment, but it can be inferred from the Court's reference to the right to counsel during interrogation as "indispensable to the protection of the Fifth Amendment privilege." *Id.* at 469. Subsequent case law makes it clear that this right to counsel created in *Miranda* stems directly from the Fifth Amendment. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

counsel is available only to those who specifically request it. Unlike the Sixth Amendment right to counsel in a criminal prosecution, which automatically takes effect without invocation once the factual predicates for its attachment occur,<sup>179</sup> the rights conferred upon an accused by the Fifth Amendment are not ordinarily self-executing.<sup>180</sup> That is, except in certain limited circumstances,<sup>181</sup> a suspect must affirmatively claim the Fifth Amendment privilege against self-incrimination in order for the right to be legally effective. Similarly, the Fifth Amendment rights that the *Miranda* Court accorded to suspects undergoing police interrogation must be expressly invoked by any suspect who wishes their protection. Once a suspect under interrogation affirmatively invokes the right against self-incrimination under the Fifth Amendment, however, further police questioning is severely constrained.<sup>182</sup>

In later case law interpreting this aspect of the *Miranda* holding, the Supreme Court has distinguished between invocation of the right to remain silent and invocation of the right to counsel.<sup>183</sup> When an accused invokes the

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179. *Brewer v. Williams*, 430 U.S. 387, 404 (1977) (holding that Sixth Amendment is self-executing and hence need not be invoked by suspect); see also *United States v. Henry*, 447 U.S. 264 (1980) (holding that use of jailhouse informer violates indicted defendant's Sixth Amendment rights notwithstanding defendant's failure to invoke right to counsel); *Massiah v. United States*, 377 U.S. 201 (1964) (questioning of indicted defendant by codefendant—turned police informant—violates Sixth Amendment notwithstanding defendant's failure to invoke right to counsel). Contrast the terminology used by the Supreme Court in *Edwards v. Arizona*, 451 U.S. 477, 481-82 (1981), in its discussion of the Fifth Amendment right to counsel, which must be "asserted," *id.* at 482, with that used by the Court in addressing the Sixth Amendment right to counsel, which passively "attaches" at a certain point in the criminal proceedings. *Id.* at 481 n.7.

180. *Minnesota v. Murphy*, 465 U.S. 420, 427-40 (1984) (stating general rule that Fifth Amendment privilege must be affirmatively claimed to be legally effective, but noting established exceptions).

181. In circumstances in which an individual has no meaningful opportunity to claim the Fifth Amendment privilege, the Supreme Court has established exceptions to the requirement that the Fifth Amendment right against self-incrimination be explicitly asserted. The most common of these exceptions is that created by *Miranda*, where a suspect is being interrogated while in police custody. Because of the "inherently compelling pressures which . . . compel [the suspect] to speak where he would not otherwise do so freely," the Fifth Amendment prohibits admission of the suspect's responses to questioning if the suspect is not adequately apprised of his rights as outlined in *Miranda*, whether or not the suspect affirmatively asserts the Fifth Amendment privilege. *Murphy*, 465 U.S. at 430 (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)); see also *Murphy*, 465 U.S. at 429-40 (listing other exceptions to general rule that Fifth Amendment is not self-executing). However, once the suspect has been informed of her *Miranda* rights, as a practical matter, the suspect must claim the privilege, or risk an almost inevitable finding of waiver. See *North Carolina v. Butler*, 441 U.S. 369 (1979) (express waiver of *Miranda* rights by suspect not necessary for prosecution to sustain its burden of showing waiver; valid waiver may be inferred from circumstances of interrogation).

182. *Miranda*, 384 U.S. at 444-45 (holding that during custodial interrogation, when suspect indicates in any manner that he wants assistance of counsel or that he does not want to be interrogated, police must cease questioning).

183. The language of the *Miranda* opinion appears to support the conclusion that invoking the right to remain silent and the right to counsel should be treated identically; it can also be read to support the conclusion that the consequences of invoking the two rights should differ. The ambiguity arises from Justice Warren's various restatements of the holding in *Miranda*, each time using slightly different language with slightly differing emphasis and nuance. In its initial statement of the holding, the Court stated that:

If . . . [the suspect] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking *there can be no questioning*. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, *the police may not question him*.

Fifth Amendment right not to answer police questions, the police must "scrupulously honor[]" the suspect's decision to cut off the interrogation, but may resume questioning after a short lapse of time, as long as the suspect again is informed of the so-called *Miranda* rights.<sup>184</sup> In contrast, subsequent police interrogation appears to be more restricted under *Miranda* if the suspect invokes the Fifth Amendment right to counsel.<sup>185</sup> Under one interpretation of the language of the *Miranda* opinion, invoking the right to counsel operates to bar the police completely from further questioning the suspect in the absence of legal counsel.

The stringency of this interpretation of the *Miranda* rule, absolutely cutting off police questioning upon assertion of the right to counsel, was reaffirmed fifteen years after *Miranda* in *Edwards v. Arizona*.<sup>186</sup> In *Edwards*, the Supreme Court made it clear that, once the suspect invokes the Fifth Amendment right to counsel,<sup>187</sup> the police may not resume questioning until counsel has been provided or the suspect herself initiates the resumption of the exchange.<sup>188</sup> Post-*Edwards* Supreme Court cases have continued to confirm

*Id.* at 444-45 (emphasis added). This implies that the legal effect of the invocation of either right is the same. Later in the opinion, the Court reiterates the holding, saying:

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease . . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.

*Id.* at 473-74 (emphasis added) (citations omitted). This language supports the interpretation that invocation of the right to counsel triggers a different degree of constraint upon police behavior than would invocation of the right to remain silent. Later Supreme Court case law adopted this second interpretation of the effect of invocation of *Miranda* rights, holding that the suspect's constitutional protections turn upon which of the rights detailed in the *Miranda* warning he invokes. *See, e.g., Michigan v. Mosley*, 423 U.S. 96, 109-10 (1975) (White, J. concurring).

184. *Mosley*, 423 U.S. at 103-06 (quoting *Miranda* 384 U.S. at 479) (resumption of interrogation after two-hour break and repeat of *Miranda* warnings "scrupulously honored" suspect's asserted right to remain silent).

185. The substantial difference between the protections afforded a suspect invoking the right to remain silent and those given to the suspect who invokes the right to counsel is difficult to justify, and has been criticized by commentators. *See, e.g., Yale Kamisar, The Edwards and Bradshaw Cases: The Court Giveth and the Court Taketh Away, in THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1982-1983*, at 153, 154-57 (Jesse Choper et al. eds., 1984).

186. 451 U.S. 477 (1981). *Edwards* was being interrogated at a police station upon his arrest for first degree murder, robbery, and burglary. After being given the *Miranda* warnings, he initially denied involvement in the crime, and then told the police, "I want an attorney before making a deal." The police ceased interrogation at that time, but detectives returned the next day to resume questioning. *Edwards* was again warned of his *Miranda* rights, and ultimately made incriminating statements to the police. The Supreme Court held that in resuming their questioning after *Edwards* asserted his right to counsel, the police violated the rule announced in *Miranda*. *Id.* at 479, 484-85.

187. The *Edwards* Court rested its holding on the Fifth Amendment right to counsel, expressly declining to address *Edwards*' Sixth Amendment right-to-counsel claim. *Id.* at 480 n.7.

188. The *Edwards* Court expressly stated that "additional safeguards [from those provided upon invocation of the right to remain silent] are necessary when the accused asks for counsel." *Id.* at 484. Having definitively determined that invoking the right to counsel serves to curtail police behavior more than does invoking the right to remain silent, the Court held:

[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused . . . having expressed his desire to deal with the police only through counsel,

the vitality of this bright-line rule prohibiting police-initiated interrogation after invocation of the right to counsel. Following *Edwards*, the Supreme Court enforced its prohibition on further police questioning after the invocation of the right to counsel notwithstanding the fact that the later interrogation concerned a separate and unrelated criminal investigation,<sup>189</sup> and was conducted by police officers unaware of the earlier invocation of rights.<sup>190</sup> Recently, the Supreme Court again extended this bright-line rule, forbidding post-invocation interrogation even after the suspect had been given an opportunity to consult with counsel and had been warned again of the *Miranda* rights.<sup>191</sup>

*Edwards* and its progeny represent a constitutional bulwark against police overreaching in interrogation practices. One purpose of the required *Miranda* warnings is to communicate to suspects that the police intend to respect constitutional guarantees.<sup>192</sup> Bright-line protective rules, such as absolute prohibition of police resumption of interrogation after the invocation of the right to counsel, support that objective. Unlike other constitutional protections accorded a criminal accused, the potency of this rule has not been compromised by the adoption of a good-faith exception to its application.<sup>193</sup> The blanket prohibition of police-initiated interrogation following the invocation of the right to counsel is one of the only significant constitutional protections for the criminal accused that has not been eroded considerably during the tenure of the Rehnquist court.<sup>194</sup> More remarkably, as the case law above demonstrates, the Supreme Court has not merely reaffirmed but actually expanded the scope of this protection in recent years.<sup>195</sup>

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is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

*Id.* at 484-85 (footnote omitted).

189. *Arizona v. Roberson*, 486 U.S. 675, 682-85 (1988).

190. *Id.* at 687-88.

191. *Minnick v. Mississippi*, 498 U.S. 146 (1990).

192. *Miranda v. Arizona*, 384 U.S. 436, 468 (1966).

193. *Cf. Illinois v. Krull*, 480 U.S. 340 (1987) (applying good-faith exception to the exclusionary rule to allow admission of evidence seized in warrantless search pursuant to statute later held to be unconstitutional); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) (allowing admission of evidence obtained under warrant that incorrectly described the items to be seized, holding that good-faith reliance of searching officer on warrant justified the search); *United States v. Leon*, 468 U.S. 897 (1984), *superseded by rule as stated in* 905 F.2d 1367 (10th Cir. 1990) (allowing admission of evidence obtained under warrant unsupported by probable cause, holding that searching officer acted in "good faith" pursuant to facially valid search warrant).

194. This erosion of constitutional protections, which began under the tenure of the Burger Court, is detailed in Charles H. Whitebread, *The Burger Court's Counter-Revolution in Criminal Procedure*, 24 *WASHBURN L.J.* 471 (1985) and Craig M. Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquisition Begun?*, 62 *IND. L.J.* 273 (1986-1987).

195. The line of Supreme Court cases interpreting the *Edwards* rule has not uniformly favored the criminal accused. In *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), a four-Justice plurality of the Court qualified *Edwards* to the detriment of the defendant in that case. Bradshaw had invoked his right to counsel, ending the interrogation. Shortly thereafter, he asked the police, "Well, what is going to happen to me now?" to which the officer responded, "You do not have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say—because—since you have requested an attorney, you know, it has to be at [sic] your own free will."



Before the *Edwards* rule can operate to prevent subsequent police interrogation, the suspect must say or do something that will be considered an effective invocation of the Fifth Amendment right to counsel.<sup>196</sup> Ideally, the suspect will clearly articulate this invocation, stating, "I want a lawyer and I won't talk to you without one." When, however, the suspect's words are less emphatic or are ambiguous, the courts must determine after the fact whether the words were adequate to invoke the suspect's right to counsel and activate the protective shield barring the police from initiating further questioning.

The question then becomes, by what standard should courts determine whether a suspect has invoked the right to counsel? Should courts liberally construe a suspect's words as assertions of the right to counsel? Or should courts require that suspects invoke their rights with unambiguous clarity before they will consider the invocation to be effective? Courts<sup>197</sup> and commentators<sup>198</sup> have vacillated between two policy concerns in attempting to resolve this issue. On the one hand, the inherently coercive atmosphere of custodial interrogation, which, in the words of the Supreme Court, "carries its own badge of intimidation,"<sup>199</sup> suggests that the suspect should be given the benefit of the doubt in the interpretation of ambiguous requests for counsel. On the other hand, some fear that the restrictions upon police questioning imposed in *Miranda* and *Edwards* substantially impede the use of a valuable technique

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*Id.* at 1042. Bradshaw said that he understood, and spoke further with the officer about the charges to be filed. *Id.* Ultimately, he agreed to take a polygraph test, and, after additional *Miranda* warnings, made inculpatory statements. *Id.* The plurality held that because Bradshaw had initiated the conversation, *Edwards* was not violated, and his waiver of counsel was valid. *Id.* at 1045-46.

Bradshaw had the potential to vitiate the bright-line *Edwards* rule if the concept of suspect initiation of further interrogation had been broadly interpreted. Soon after the *Bradshaw* opinion, Professor Yale Kamisar noted with alarm that the case threatened to undermine *Edwards*. Kamisar, *supra* note 185, at 167-69. Subsequent case law has shown, however, that *Bradshaw* is an anomalous opinion, with *Edwards* retaining its vitality through repeated re-affirmance.

196. *Edwards* makes it clear that, at least with respect to the right to counsel implicit in the Fifth Amendment, the protections of the Fifth Amendment are not self-executing for the properly Mirandized suspect undergoing custodial interrogation. *Edwards*, 451 U.S. at 485. Whether the suspect must likewise affirmatively claim the right to remain silent is more debatable, given the general rule that the government has the burden of proving that the suspect waived her *Miranda* rights. *Miranda*, 384 U.S. at 475-76. See *supra* note 183 and accompanying text.

197. Compare the dissenting opinion of Justice White in *Miranda* ("The rule announced today will measurably weaken the ability of the criminal law to perform these tasks [of prosecuting crimes] . . . In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets . . . to repeat his crime whenever it pleases him)," *Miranda*, 384 U.S. at 541-42 with the majority's extensive discussion of the inherently coercive environment of custodial interrogation in *Miranda*. *Id.* at 445-58.

198. Compare James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 1010-11 (1986) (expressing concern that invocation of counsel rule should not "unreasonably constrain legitimate investigating endeavors") with YALE KAMISAR, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 27, 31-32 (1980) (arguing that without judicial constraints upon police methods of interrogation, suspects would be treated like "game" to be "stalked and cornered" by any means available). For a point-counterpoint pair of commentaries on the desirability of *Miranda*, see Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417 (1985), and Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1 (1986).

199. *Miranda*, 384 U.S. at 457.

for criminal investigations.<sup>200</sup> Given the importance of police interrogation in solving crimes, it can be argued that the police should not be fettered in such a drastic manner absent convincing evidence that the suspect affirmatively invoked the right to counsel.

The Supreme Court has not provided clear guidance as to the proper standard for assessing purported invocations of counsel. The *Miranda* opinion contains language supporting liberal construction of suspect requests: "If . . . [the suspect] indicates *in any manner* and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning."<sup>201</sup> Language in *Edwards*, on the other hand, can be read to require an unambiguous and decisive assertion of rights by the suspect: "[I]t is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterview an accused in custody if he has *clearly* asserted his right to counsel."<sup>202</sup>

Since *Edwards*, the Supreme Court has twice expressly declined to decide the legal adequacy of an equivocal or ambiguous<sup>203</sup> invocation of the right

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200. Empirical studies comparing conviction rates before and after *Miranda* have not borne out claims of its deleterious effect on law enforcement, however. Several early studies concluded that *Miranda* had little effect on criminal-case outcomes. See, e.g., John Griffiths & Richard E. Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protestors*, 77 YALE L.J. 300 (1967) (study of Yale faculty, students, and staff interrogated by the FBI, showing that *Miranda* warnings did not prevent self-incrimination); Richard J. Medalie et al., *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347, 1394-95 (1968) (*Miranda* had no measurable effect on police, suspect, and attorney behavior in Washington, D.C.); Richard H. Seeburger & R. Stanton Wettick, Jr., *Miranda in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 23 (1967) (no effect on conviction rates in Pittsburgh); Michael Wald et al., *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1523 (1967) (*Miranda* had no significant impact on criminal justice system in New Haven).

Most later commentators have agreed with the conclusions of these early studies, finding that *Miranda* has had little negative effect on criminal prosecutions. See, e.g., Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 737 & n. 31 (1987); Yale Kamisar, *Remembering the 'Old World' of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REF. 537, 585-87 (1990); Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 455-58 (1987); White, *supra* note 198. But see Caplan, *supra* note 198 (questioning the validity of the empirical studies); Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering Miranda"*, 54 U. CHI. L. REV. 938, 945-48 (1987) (asserting that *Miranda* has had damaging effects on law enforcement). For an argument that *Miranda* is undesirable because the litigation of *Miranda* issues occupies too much valuable courtroom time, see Fred E. Inbau & James P. Manak, *Miranda v. Arizona: Is It Worth the Cost? (A Sample Survey, with Commentary, of the Expenditure of Court Time and Effort)*, 24 CAL. W. L. REV. 185, 198-99 (1988). Inbau and Manak's statistics are not systematically sampled, however, and fail to compare court time expended on *Miranda* issues with court time that would otherwise be spent on due-process voluntariness analysis if *Miranda* were to be overruled or supplanted as urged by the authors.

201. *Miranda*, 384 U.S. at 444-45 (emphasis added).

202. *Edwards*, 451 U.S. at 485 (emphasis added).

203. Although the terms "ambiguous" and "equivocal" are generally used interchangeably in the case law addressing this issue, they should be distinguished. Properly speaking, a statement is ambiguous if the addressee is unsure which of two or more interpretations to adopt to understand the meaning of an utterance; the statement is equivocal if the speaker is uncertain or ambivalent about what he or she really means to say. Ambiguity is judged by the effect on the listener, whereas equivocality is assessed by the intent of the speaker. In J.L. Austin's terminology, ambiguity has perlocutionary force; equivocality has illocutionary force. AUSTIN, *supra* note 13, at 98-102.

to counsel. In *Smith v. Illinois*,<sup>204</sup> the Court granted review in a case in which a suspect responded to *Miranda* warnings concerning counsel by saying, "Uh, yeah. I'd like to do that."<sup>205</sup> The police continued the interchange with the suspect, who subsequently expressed uncertainty about whether or not he should talk to a lawyer before answering questions. Ultimately, he agreed to talk to the police without counsel.<sup>206</sup> Although the Court acknowledged that the various federal and state appellate courts were not in accord on the issue of how to assess ambiguous and equivocal invocations of the right to counsel,<sup>207</sup> the Court decided the *Smith* case on narrow grounds and left the issue unresolved.<sup>208</sup> Three terms later, the Supreme Court reviewed a case that the state court had construed as one involving an equivocal assertion of the right to counsel.<sup>209</sup> Again, the Supreme Court decided the case on narrow grounds,<sup>210</sup> sidestepping the larger question of the standard for determining when the *Edwards* rule has been triggered. Both before and since these cases, the Court has denied certiorari in more than a dozen cases raising this issue,

204. 469 U.S. 91 (1984) (per curiam).

205. The trial transcript, quoted within the opinion, set forth the pertinent part of the interrogation as follows:

Q. . . . You have a right to remain silent. You do not have to talk to me unless you want to do so. Do you understand that?

A. Uh. She told me to get my lawyer. She said you guys would railroad me.

. . .

Q. You have a right to consult with a lawyer and to have a lawyer present with you when you're being questioned. Do you understand that?

A. Uh, yeah. I'd like to do that.

Q. Okay.

. . .

Q. . . . If you want a lawyer and you're unable to pay for one a lawyer will be appointed to represent you free of cost, do you understand that?

A. Okay.

Q. Do you wish to talk to me at this time without a lawyer being present?

A. Yeah and no, uh, I don't know what's what, really.

Q. Well. You either have [to agree] to talk to me this time without a lawyer being present and if you do agree to talk with me without a lawyer being present you can stop at any time you want to.

Q. All right [sic]. I'll talk to you then.

*Id.* at 92-93.

206. *Id.* at 92-94. After making some incriminating statements, the defendant reiterated his desire for a lawyer. At that point, the interrogating officer ended the questioning. *Id.* at 94.

207. *Id.* at 96 n.3.

208. The Court stated:

Our decision is a narrow one. We do not decide the circumstances in which an accused's request for counsel may be characterized as ambiguous or equivocal . . . in the request itself, nor do we decide the consequences of such ambiguity or equivocation. We hold only that . . . an accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself.

*Id.* at 99-100.

209. *Connecticut v. Barrett*, 479 U.S. 523 (1987) (holding that suspect's refusal to make written statement without counsel was not an invocation of right to counsel per *Edwards*, and did not render inadmissible oral statements made without counsel in response to police questioning).

210. By concluding that Barrett's refusal to make a written statement without counsel was irrelevant to a determination as to whether he had waived his right to counsel during oral interrogation, the Court avoided articulating a standard for judging equivocal assertions of the right to counsel.

notwithstanding the split among the state and circuit courts on its proper resolution.<sup>211</sup>

### B. *The Legal Consequences of Invocations Found To Be Ambiguous or Equivocal*

As the Supreme Court has recognized,<sup>212</sup> lower courts have failed to agree on the appropriate legal test to assess the adequacy of invocation of the constitutional right to counsel during custodial interrogation.<sup>213</sup> Three different standards<sup>214</sup> have been adopted: 1) the so-called threshold-of-clarity standard, under which an attempted invocation of the right to counsel must satisfy a certain threshold of clarity before it will be considered effective; 2) the per se invocation standard, under which any postwarning reference by the suspect to a desire for counsel is considered a per se invocation of the right to counsel, necessitating the cessation of police-initiated questioning;<sup>215</sup> and 3)

211. See, e.g., *Towne v. Dugger*, 899 F.2d 1104, 1107-08 (11th Cir.), *cert. denied*, 111 S. Ct. 536 (1990); *United States v. Fouché*, 833 F.2d 1284, 1286-89 (9th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988); *Pittman v. Black*, 764 F.2d 545, 546-47 (8th Cir.), *cert. denied*, 474 U.S. 982 (1985); *United States v. Cherry*, 733 F.2d 1124, 1129-32 (5th Cir. 1984), *cert. denied*, 479 U.S. 1056 (1987); *Nash v. Estelle*, 597 F.2d 513, 517-20 (5th Cir.), *cert. denied*, 444 U.S. 981 (1979); *People v. Superior Court*, 542 P.2d 1390, 1394-95 (Cal. 1975), *cert. denied*, 429 U.S. 816 (1976); *People v. Krueger*, 412 N.E.2d 537, 540 (Ill. 1980), *cert. denied*, 451 U.S. 1019 (1981); *People v. Alexander*, 261 N.W.2d 63, 64 (Mich. Ct. App. 1977), *cert. denied*, 436 U.S. 958 (1978); *State v. Howard*, 324 N.W.2d 216, 221-22 (Minn. 1982), *cert. denied*, 459 U.S. 1172 (1983); *Commonwealth v. Hubble*, 504 A.2d 168, 171-73 (Pa.), *cert. denied*, 477 U.S. 904 (1986); *Russell v. State*, 727 S.W.2d 573, 575-77 (Tex. Crim. App.), *cert. denied*, 484 U.S. 856 (1987); *Poyner v. Commonwealth*, 329 S.E.2d 815, 823 (Va.), *cert. denied*, 474 U.S. 888 (1985); *Bunch v. Commonwealth*, 304 S.E.2d 271, 274-77 (Va.), *cert. denied*, 464 U.S. 977 (1983).

212. See *supra* note 208 and accompanying text.

213. In fact, appellate courts within the same jurisdiction have frequently applied different standards. Compare *People v. Superior Court*, 542 P.2d at 1394-95 (per se rule) with *People v. Bestelmeyer*, 212 Cal. Rptr. 605, 607-09 (Ct. App. 1985) (threshold-of-clarity rule); compare *People v. Hulsing*, 825 P.2d 1027, 1029-30 (Colo. 1991) (clarification rule) with *People v. Traubert*, 608 P.2d 342, 346 (Colo. 1980) (implicit application of per se rule); compare *People v. Starling*, 381 N.E.2d 817, 821 (Ill. 1978) (adopting per se invocation rule) with *People v. Krueger*, 412 N.E.2d 537, 540 (Ill. 1980), *cert. denied*, 451 U.S. 1019 (1981) (adopting threshold-of-clarity rule); compare *People v. Plyler*, 272 N.W.2d 623, 625-26 (Mich. Ct. App. 1978) (per se rule) with *People v. Giuchici*, 324 N.W.2d 593, 594-95 (Mich. Ct. App. 1982) (clarification rule); compare *State v. Elmore*, 500 A.2d 1089, 1092-95 (N.J. Super. Ct. App. Div. 1985) (per se rule) with *State v. Wright*, 477 A.2d 1265, 1268-69, 1271-72 (N.J. 1984) (clarification rule); compare *Ochoa v. State*, 573 S.W.2d 796, 800-01 (Tex. Crim. App. 1978) (per se rule) with *Russell v. State*, 727 S.W.2d 573, 575-76 (Tex. Crim. App.), *cert. denied*, 484 U.S. 856 (1987) (clarification rule). In the aftermath of the Supreme Court's decision in *Smith v. Illinois*, 469 U.S. 91, 96 n.3 (1984), outlining the three doctrinal options, several state courts have acknowledged their earlier inconsistency on the issue and have settled on one of the options as the controlling rule in the state. See, e.g., *State v. Lopez*, 822 P.2d 465, 468-69 (Ariz. Ct. App. 1991) (noting that past Arizona cases had used both the clarification rule and the threshold-of-clarity rule); *State v. Robinson*, 427 N.W.2d 217, 222-23 (Minn. 1988) (adopting clarification rule and acknowledging that it had used the threshold-of-clarity test in prior cases); *Kuykendall v. State*, 585 So. 2d 773, 776-77 (Miss. 1991) (adopting clarification approach but noting that earlier Mississippi case law had used threshold-of-clarity rule).

214. This taxonomy is paraphrased from that given by the Supreme Court in *Smith v. Illinois*, 469 U.S. at 96 n.3. Prior to *Smith*, some courts' opinions did not explicitly identify which standard they used to decide this issue. Since *Smith*, however, state and lower federal courts have tended to adopt the Supreme Court's classifications in characterizing their positions.

215. See *infra* notes 245-53 and accompanying text.

the clarification standard, under which an ambiguous or equivocal invocation of the right to counsel permits the police to continue the exchange in order to clarify the suspect's intent before proceeding with further questioning.<sup>216</sup>

### 1. *The Threshold-of-Clarity Standard*

When a court finds that a suspect made ambiguous or equivocal statements suggesting an attempt to invoke the right to counsel, some jurisdictions have determined that only those assertions of the right to counsel that satisfy a certain threshold of clarity will be considered to have triggered the *Edwards* prohibition against further police interrogation.<sup>217</sup> Courts adopting this standard, while paying lip service to *Miranda's* assurance that the right to counsel can be invoked by a suspect "in any manner,"<sup>218</sup> have in practice required that a purported assertion of the right to counsel be direct and unambiguous before according it legal effect.<sup>219</sup>

The threshold-of-clarity standard tends to operate without regard for inferences inherent in normal conversation, by emphasizing the literal meaning of a suspect's words in preference to their indirectly implicated meaning and by seizing upon any hedges used by a suspect to find lack of an invocation of *Miranda* rights. A frequently cited Illinois case demonstrates the practical operation of the threshold-of-clarity standard. In *People v. Krueger*,<sup>220</sup> police were questioning a suspect in custody about several burglaries. In the course of the interrogation, the interrogating officers began to ask the suspect about

216. See *infra* notes 254-306 and accompanying text.

217. See, e.g., *State v. Prince*, 772 P.2d 1121, 1125 (Ariz. 1989); *State v. Moorman*, 744 P.2d 679, 685-86 (Ariz. 1987); *State v. Linden*, 664 P.2d 673, 677-78 (Ariz. Ct. App. 1983); *People v. Bestelmeyer*, 212 Cal. Rptr. 605, 608-09 (Ct. App. 1985); *People v. Evans*, 530 N.E.2d 1360, 1369-71 (Ill. 1988), *cert. denied*, 498 U.S. 911 (1990); *People v. Harper*, 418 N.E.2d 894, 896-97 (Ill. 1981); *People v. Krueger*, 412 N.E.2d 537, 540-41 (Ill. 1980), *cert. denied*, 451 U.S. 1019 (1981); *People v. Kendricks*, 459 N.E.2d 1137, 1140-41 (Ill. App. Ct. 1984); *Bane v. State*, 587 N.E.2d 97, 102-04 (Ind. 1992); *Pasco v. State*, 563 N.E.2d 587, 591-92 (Ind. 1990); *State v. Lamp*, 322 N.W.2d 48, 56 (Iowa 1982); *State v. Johnson*, 318 N.W.2d 417, 429-31 (Iowa), *cert. denied*, 459 U.S. 848 (1982); *State v. Campbell*, 367 N.W.2d 454, 458-59 (Minn. 1985); *State v. Moore*, 744 S.W.2d 479, 480-81 (Mo. Ct. App. 1988); *State v. Cardona*, 590 A.2d 1220, 1222-23 (N.J. Super. Ct. Law Div. 1991); *People v. Lattanzio*, 549 N.Y.S.2d 179, 181 (App. Div. 1989); *People v. Santiago*, 519 N.Y.S.2d 413, 414-15 (App. Div. 1987), *aff'd*, 530 N.Y.S.2d 546 (1988); *Eaton v. Commonwealth*, 397 S.E.2d 385, 395-96 (Va. 1990), *cert. denied*, 112 S. Ct. 88 (1991); *Poyner v. Commonwealth*, 329 S.E.2d 815, 823 (Va.), *cert. denied*, 474 U.S. 888 (1985); *Bunch v. Commonwealth*, 304 S.E.2d 271, 275-77 (Va.), *cert. denied*, 464 U.S. 977 (1983); *Daniel v. State*, 644 P.2d 172 (Wyo. 1982) (citing to clarification rule at 177, but appearing to apply threshold-of-clarity rule at 178).

218. See, e.g., *People v. Krueger*, 412 N.E.2d 537:

*Miranda's* "in any manner" language directs that an assertion of the right to counsel need not be explicit, unequivocal, or made with unmistakable clarity. We do not believe, however, that the Supreme Court intended by this language that every reference to an attorney, no matter how vague, indecisive or ambiguous, should constitute an invocation of the right to counsel.

*Id.* at 540.

219. Courts adhering to the threshold-of-clarity rule have required that a suspect's words be "clear and unambiguous," *People v. Bestelmeyer*, 212 Cal. Rptr. at 609; "clear and unequivocal," *Bane v. State*, 587 N.E.2d at 103; "unequivocal," *People v. Lattanzio*, 549 N.Y.S. 2d at 181; and "without qualification," *Daniel v. State*, 644 P.2d at 178.

220. 412 N.E.2d 537 (Ill. 1980).

a stabbing death. At that point the suspect said, "Wait a minute. Maybe I ought to have an attorney. You guys are trying to pin a murder rap on me, give me 20 to 40 years."<sup>221</sup> The officers did not provide a lawyer for the suspect, but instead continued their interrogation of him.<sup>222</sup> According to their testimony at a suppression hearing, none of the interrogating officers considered this statement to be a request for counsel.<sup>223</sup> Nor, amazingly enough, did the Illinois Supreme Court. Although the court claimed to be "sensitive to the requirement that authorities refrain from interrogation whenever a suspect invokes his right to counsel,"<sup>224</sup> it held that a "more positive indication or manifestation of a desire for an attorney was required" before the police were obligated to cease their questioning.<sup>225</sup>

In *Krueger*, the Illinois Supreme Court found that the use by the defendant of the hedge "maybe," even in the context of his exclamation that the police were trying to pin a murder rap on him, deprived him of the protection of the *Edwards* rule, which would have prevented the police from continuing to question him without a lawyer. In jurisdictions that adhere to the threshold-of-clarity rule, many cases have held that suspects who used lexical hedges such as "maybe,"<sup>226</sup> "I think,"<sup>227</sup> "I feel like,"<sup>228</sup> "I'd like to,"<sup>229</sup> or "I

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221. *Id.* at 538. One of the interrogating officers testified to this version of the suspect's words at a pretrial suppression hearing. Two other officers who took part in the questioning also testified about the suspect's statement. One said that the defendant "raised partially up out of his chair and said, 'Hey, you're trying to pin a murder on me. Maybe I need a lawyer.'" *Id.* A third officer quoted the suspect as having said, "Just a minute. That's a 20 to 40 years sentence. Maybe I ought to talk to an attorney. You're trying to pin a murder rap on me." *Id.* According to the defendant's testimony, he "indicated to [the police] that he thought he should have an attorney . . . [and] that the officers' account of the conversation was accurate." *Id.* at 539.

222. *Id.* at 538-39.

223. *Id.* at 540. Although the Illinois high court noted that the subjective beliefs of the officers are not dispositive of the issue, the opinion went on to state that "the officers must be allowed to exercise their judgment in determining whether a suspect has requested counsel." *Id.* The court placed considerable emphasis on the self-serving testimony of the police as to their "good faith" and "apparently genuine belief" about their interpretation of the suspect's words. *Id.* The Illinois Supreme Court's stress on the ostensible good faith of the officers is at odds with the U.S. Supreme Court's refusal to accord significance to the good faith of interrogating officers in its post-*Miranda* decisions. *Cf. supra* note 193 and accompanying text.

224. *Krueger*, 412 N.E.2d at 540.

225. *Id.*

226. *State v. Campbell*, 367 N.W.2d 454, 456 (Minn. 1985) (holding that suspect's statement "'if I'm going to be charged with murder maybe I should talk to an attorney'" was not a valid invocation of her right to counsel); *State v. Moore*, 744 S.W.2d 479, 480 (Mo. Ct. App. 1988) (holding that suspect's statement that "'maybe he should have an attorney'" did not invoke right to counsel).

227. *People v. Bestelmeyer*, 212 Cal. Rptr. 605, 607, 609 (Ct. App. 1985) (holding that suspect who said, "'I just thinkin', maybe I shouldn't say anything without a lawyer and then I thinkin' ahh,'" did not validly invoke right to counsel); *People v. Kendricks*, 459 N.E.2d 1137, 1139 (Ill. 1984) (holding that suspect who said to police, "'You know, I kind of think I know [sic] a lawyer, don't I?'" or "'I think I might need a lawyer,'" had not effectively invoked the right to counsel); *People v. Lattanzio*, 549 N.Y.S.2d 179, 181 (App. Div. 1989) (holding that suspect who told interrogator "'that he thought, he believed that he wanted a lawyer, that he needed time to think about it'" had not invoked his right to counsel).

228. *Bunch v. Commonwealth*, 304 S.E.2d 271, 275 (Va.) (holding that suspect who said he "'felt like he might want to talk to a lawyer'" did not invoke his right to counsel), *cert. denied*, 464 U.S. 977 (1983).

229. In *Bane v. State*, the Indiana high court held that a suspect did not invoke the right to counsel in the following conversation with his interrogator:

wonder<sup>230</sup> in their invocations have failed to assert their right to counsel adequately.

The threshold-of-clarity standard has likewise permitted courts to require suspects to frame valid invocations in the imperative mood and to disallow attempted invocations phrased in the form of a question, despite the common use of interrogative forms as polite imperatives in ordinary conversation.<sup>231</sup> For example, in *People v. Santiago*,<sup>232</sup> the reviewing court found that a suspect who said to the interrogating officer, "Will you supply [a lawyer] now so that I may ask him should I continue with this interview at this moment?" had not unequivocally invoked his right to counsel.<sup>233</sup> Presumably, the suspect's invocation would have prevented further interrogation had he curtly demanded a lawyer instead of politely requesting the officer to summon counsel. Courts have held that suspects who seek confirmation that they are entitled to counsel,<sup>234</sup> who ask their interrogators how they can get a lawyer,<sup>235</sup> or who ask the police whether they need a lawyer<sup>236</sup> have failed to invoke their right to counsel under the threshold-of-clarity standard because they chose the wrong syntactic form.

Off: "[I]t's my understanding you don't want to sign the rights form now is that right?" Defendant: "Not 'til you know?" Off: "O.K." D: "When I talk to my lawyer I'll." Off: "O.K. But you don't want a lawyer at this time, is that correct?" D: "I will get a lawyer." Off: "O.K. But you don't want one now is what I'm saying. O.K.?" D: "I'd like to have one but you know I [sic] it would be hard to get hold of one right now." Off: "Well what I am asking you Clayton is do you wish to give me a statement at this time without having a lawyer present?" D: "Well I can I can [sic] tell you what I did." Off: "O.K. that's what, that's what [sic] I'm asking.") (emphasis added).

*Bane v. State*, 587 N.E.2d 97, 103 (Ind. 1992) (emphasis added); see also *Daniel v. State*, 644 P.2d 172, 174, 177 (Wyo. 1982).

230. *State v. Moorman*, 744 P.2d 679, 685-86 (Ariz. 1987) (holding that suspect's statement, "I wonder if I need an attorney," did not invoke right to counsel).

231. See, e.g., *supra* note 19 and accompanying text, discussing Searle's famous example "Can you pass the salt?" to substitute for the imperative "Pass me the salt."

232. 519 N.Y.S.2d 413 (Sup. Ct. 1987), *aff'd*, 530 N.Y.S.2d 546 (1988).

233. *Santiago*, 519 N.Y.S.2d at 414-15.

234. *Eaton v. Commonwealth*, 397 S.E.2d 385, 393-94 (Va. 1990) (holding that suspect's statement, "you did say I could have an attorney if I wanted one?" was not an effective assertion of the right to counsel); *Poyner v. Commonwealth*, 329 S.E.2d 815, 823 (Va.) (holding that suspect's words, "didn't you say I have the right to an attorney?" was not a valid assertion of the right to counsel), *cert. denied*, 474 U.S. 888 (1985).

235. *People v. Evans*, 530 N.E.2d 1360, 1370-71 (Ill. 1988) (holding that a suspect who twice asked about whether he could have a public defender right away or had to wait, and was told that it would take a little while to contact one, did not invoke his right to counsel); *Daniel v. State*, 644 P.2d 172, 174-75, 178 (Wyo. 1982) (holding that a suspect, after having earlier said that he would "probably like to have an attorney present . . . because I just don't want to be taken advantage of" asked, "may I still—if I can't afford a lawyer—may I still be appointed a lawyer?" did not invoke his right to counsel because he did not say "without qualification" that he wanted a lawyer).

236. *State v. Prince*, 772 P.2d 1121, 1125 (Ariz. 1989) (holding that asking the police "do you think I should get a lawyer?" suspect did not invoke right to counsel); *State v. Johnson*, 318 N.W.2d 417, 430 (Iowa 1982) (holding that a suspect who asked interrogating officer, "[o]kay. Should I have my lawyer here?" did not make a "statement sufficient to request counsel"); *Commonwealth v. Weaver*, 418 A.2d 565, 568 (Pa. Super. Ct. 1980) (holding that a suspect who asked interrogating officer, "do you think I need an attorney?" did not validly invoke right to counsel).

The threshold-of-clarity standard also leads courts to interpret a suspect's statements as nonresponsive to the *Miranda* warnings unless the suspect's response literally and directly requests counsel. Thus, courts disregard normal rules of conversational implicature through which implicated meaning is contextually generated. For example, in *People v. Harper*,<sup>237</sup> the suspect told police that he had a lawyer, and asked the interrogating officer to get the wallet containing his lawyer's business card from his car. The officer responded that this wouldn't be necessary, and continued the interrogation.<sup>238</sup> Upon appellate review, the court found that the suspect's words were only an "equivocal," and hence ineffective, assertion of the right to counsel, since the suspect never clearly said that the reason he wanted the officer to retrieve the business card was that he desired to seek the assistance of counsel during the interrogation.<sup>239</sup> In the context of a suspect having just been read his *Miranda* rights, however, Gricean maxims of implicature would strongly suggest that the suspect intended to assert his right to counsel by asking the officer to give him the card printed with his lawyer's phone number. The Gricean maxim of relation, requiring that statements be interpreted as relevant to the circumstances of the conversation, presumes that the request for the lawyer's card has some relevance to the situation at hand; the obvious relevance is that the suspect wishes to call his lawyer now.<sup>240</sup> Similarly, the words of a suspect who asks the interrogating officer to recommend a good lawyer,<sup>241</sup> or who says that he cannot afford a lawyer,<sup>242</sup> or who says that she is sick of being hassled and wants to call a lawyer,<sup>243</sup> should be naturally interpreted as implicit statements that the suspect is requesting a lawyer. None of these statements has any relevance to the exchange taking place unless interpreted as indirect invocations of the right to counsel.<sup>244</sup> In each of these cases, however, courts using the threshold-of-clarity standard have found these statements inadequate as assertions of the right to counsel. In limiting their consideration to the literal sense of the suspects' words, courts applying the

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237. 418 N.E.2d 894 (Ill. App. Ct. 1981).

238. *Id.* at 896.

239. *Id.*

240. See *supra* notes 23-27 and accompanying text on Gricean implicature.

241. *State v. Linden*, 664 P.2d 673, 677-78 (Ariz. Ct. App. 1983) (holding that suspect's asking police "who a good attorney would be" was not unequivocal invocation of right to attorney during police questioning).

242. *People v. Mandrachio*, 433 N.E.2d 1272 (N.Y.) (holding that suspect's statement to the police that he could not afford a lawyer was not a valid invocation of his right to counsel), *cert. denied*, 457 U.S. 1122 (1982).

243. *People v. Johnson*, 436 N.Y.S.2d 486, 488 (App. Div. 1981) (Callahan, J., dissenting) (reasoning that defendant who responded to police questioning by saying that she was "sick and tired" of the police bothering her and that "she wanted to call a lawyer" had not adequately invoked her right to counsel). On appeal, the New York Court of Appeals affirmed this dissenting opinion, 434 N.E.2d 261 (N.Y. 1982).

244. The Gricean maxim of relevance presumes that the comment would not be made unless it had some immediate relevance to the situation at hand. In this case, these suspect responses to police questioning and their attendant *Miranda* warnings entail the implicature that the suspect intends to obtain the assistance of counsel during questioning. See *supra* notes 25-27 and accompanying text on implicature.



threshold-of-clarity standard penalize those whose indirect speech acts rely upon normal conversational implicature for their meaning.

## 2. *The Per Se Standard*

A second approach to the problem of ambiguous or equivocal assertions of the right to counsel, the *per se* standard, is the polar opposite of the threshold-of-clarity standard. Under this standard, even ambiguous requests for counsel by an arrestee are considered to be *per se* effective invocations of the right to counsel; pursuant to *Edwards*, police must cease all further interrogation.<sup>245</sup> Whereas the threshold-of-clarity rule requires the court to construe any lack of clarity or precision on the part of the suspect as failure to invoke the right to counsel, this approach instructs the reviewing court to interpret an ambiguous request for counsel as an effective invocation of the Fifth Amendment right.<sup>246</sup> Courts adhering to this standard point to the language in *Miranda* indicating that invocation of the right to counsel can be made "in any manner."<sup>247</sup>

The *per se* and threshold-of-clarity standards yield very different results in analogous factual situations. Application of the *per se* standard results in findings of effective assertion of the Fifth Amendment when a suspect responds to *Miranda* warnings with invocations qualified by hedges such as "maybe"<sup>248</sup> or "I think,"<sup>249</sup> whereas the threshold-of-clarity standard

245. Cases applying this standard include *United States v. Porter*, 764 F.2d 1, 6 (1st Cir. 1985); *Maglio v. Jago*, 580 F.2d 202, 205 (6th Cir. 1978); *People v. Superior Court*, 542 P.2d 1390, 1394-95 (Cal. 1975) (en banc), *cert. denied*, 429 U.S. 816 (1976); *People v. Hinds*, 201 Cal. Rptr. 104, 109 (Ct. App. 1984); *People v. Russo*, 196 Cal. Rptr. 466, 469 (Ct. App. 1983); *People v. Duran*, 189 Cal. Rptr. 595, 599 (Ct. App. 1983), *cert. denied*, 464 U.S. 991 (1983); *People v. Munoz*, 148 Cal. Rptr. 165, 166 (Ct. App. 1978); *People v. Cerezo*, 635 P.2d 197, 199-200 (Colo. 1981) (en banc); *People v. Traubert*, 608 P.2d 342, 346 (Colo. 1980) (en banc); *People v. Plyler*, 272 N.W.2d 623, 625-26 (Mich. Ct. App. 1978); *State v. Blakney*, 605 P.2d 1093, 1097 (Mont. 1979), *vacated*, 451 U.S. 1013 (1981); *State v. Elmore*, 500 A.2d 1089, 1092 (N.J. Super. Ct. App. Div. 1985); *State v. Furlough*, 797 S.W.2d 631, 638-39 (Tenn. Crim. App. 1990); *Hunt v. State*, 632 S.W.2d 640, 642 (Tex. Ct. App. 1982); *Ochoa v. State*, 573 S.W.2d 796, 800-01 (Tex. Crim. App. 1978) (en banc).

246. *See, e.g.*, *State v. Elmore*, 500 A.2d 1089, 1092 (N.J. Super. Ct. App. Div. 1985) (holding that the court was bound to "liberally construe[] ambiguous requests" in the light "most favorable to [the] defendant").

247. *See, e.g.*, *Ochoa v. State*, 573 S.W.2d 796, 800 (Tex. Crim. App. 1978) ("We read this language in *Miranda* literally; where a defendant indicates in any way that he desires to invoke his right to counsel, interrogation must cease."); *People v. Superior Court*, 542 P.2d 1390, 1394 (Cal. 1975), *cert. denied*, 429 U.S. 816 (1976) (quoting the same language from *Miranda*).

248. *Maglio v. Jago*, 580 F.2d 202, 203, 205 (6th Cir. 1978) ("Maybe I should have an attorney" is sufficient to invoke right to counsel); *United States v. Prestigiacomo*, 504 F. Supp. 681, 683 (E.D.N.Y. 1981) (suspect's statement, "maybe it would be good to have a lawyer," held sufficient invocation); *People v. Munoz*, 148 Cal. Rptr. 165, 165-66 (Cal. Ct. App. 1978) ("Well, maybe I should talk to my attorney, Mr. Corbin," held effective invocation); *State v. Blakney*, 605 P.2d 1093, 1097 (Mont. 1979) ("[M]aybe I should have an attorney" was a valid invocation); *Commonwealth v. Santiago*, 591 A.2d 1095, 1101 n.11, 1102 (Pa. Super. Ct. 1991) (suspect's statement that "maybe . . . I should talk to an attorney now or something" held a valid invocation); *State v. Furlough*, 797 S.W.2d 631, 638-39 (Tenn. Crim. App. 1990) (suspect's saying "maybe she ought to talk to an attorney" adequately invoked right). *Cf. Singleton v. State*, 344 So. 2d 911, 912-13 (Fla. Dist. Ct. App. 1977) (suspect who said, "Maybe I had

considers such invocations devoid of legal significance.<sup>250</sup> Similarly, courts using the *per se* invocation standard give effect to a suspect's words from which a request for counsel can be reasonably inferred, even when the suspect's words do not literally invoke the right to counsel.<sup>251</sup> For example, in cases involving suspects who respond to *Miranda* warnings by asking whether the interrogating officer thinks they ought to have a lawyer, courts using a threshold-of-clarity standard find no invocation,<sup>252</sup> but those using the *per se* standard interpret such questions as valid invocations of the right to counsel.<sup>253</sup> Thus, the *per se* invocation rule gives legal effect to a much broader spectrum of speech patterns than does the threshold-of-clarity standard.

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better ask my mother if I should get [an attorney],” asserted her right in a valid manner), *cert. denied*, 354 So.2d 986 (1977).

249. *People v. Goodwin*, 286 Cal. Rptr. 564, 568-69 (Cal. Ct. App. 1991) (suspect's words, “I think I should call an attorney,” held valid invocation of the right to counsel), *vacated*, 9 Cal. Rptr. 2d 158 (1992); *People v. Cerezo*, 635 P.2d 197, 198 (Colo. 1981) (en banc) (“I think I better have a lawyer” was valid invocation); *People v. Traubert*, 608 P.2d 342, 344 (Colo. 1980) (en banc) (“I think I need to see an attorney” was valid invocation); *Jones v. State*, 742 S.W.2d 398, 405-06 (Tex. Crim. App. 1987) (en banc), *rev'd on other grounds*, 795 S.W.2d 171 (Tex. Crim. App. 1990) (en banc) (“I think I want a lawyer” held sufficient invocation); *Wentela v. State*, 290 N.W.2d 312, 314, 316 (Wis. 1980) (“I think I need an attorney” or “I think I should see an attorney” was a valid invocation of the right to counsel). *Cf. Sleek v. State*, 499 N.E.2d 751, 753-54 (Ind. 1986) (suspect's response when asked to sign a *Miranda* waiver form, “Well, I feel [sic] like I ought to have an attorney around,” held valid invocation of right to counsel) (alteration in original); *Ochoa v. State*, 573 S.W.2d 796, 799-801 (Tex. Crim. App. 1978) (suspect who told police “he thought he should talk to an attorney before answering any questions or signing anything” or “he might possibly want to talk to an attorney” or “he probably ought to talk to a lawyer or something to this effect or didn't want to sign anything until he talked to a lawyer” had adequately invoked his right to counsel).

250. See *supra* notes 226-30 and accompanying text.

251. *People v. Superior Court*, 542 P.2d 1390, 1394-95 (Cal. 1975), (suspect who asked police to recommend lawyer, coupled with hedged statements about right to counsel, made valid invocation) *cert. denied*, 429 U.S. 816 (1976); *People v. Duran*, 189 Cal. Rptr. 595, 597-99 (Cal. Ct. App. 1983) (suspect responded to interrogation by saying, “Well then I think it's better that I have an attorney here. But other than that, I'll give you my version of it, you know. Don't ask me no questions. All right? Is that okay? . . . I'll just tell you what, you know, what I did and, you know but I mean, or have you got an attorney right here present, close?” and was told by the officer, “It will take quite a while to get one. But go ahead” and court held suspect adequately invoked his right to counsel); *People v. Quirk*, 181 Cal. Rptr. 301, 307-08 (Cal. Ct. App. 1982) (suspect's inquiry whether his wife had retained an attorney for him held to constitute an assertion of the right to counsel); *Hunt v. State*, 632 S.W.2d 640, 641 (Tex. Ct. App. 1982) (suspect apprehended out of state who told police that “he did not want an out-of-state attorney; that he wanted to wait until he got back to Dallas and get a court-appointed attorney” had adequately invoked his right to counsel even though he did not clearly state that he wanted counsel during questioning); *State v. Elmore*, 500 A.2d 1089 (N.J. Super. Ct. App. Div. 1985) (suspect's statement to her mother in the presence of the police that she was not allowed to have a lawyer held to be a valid invocation of the right to counsel).

252. See *supra* note 236 and accompanying text.

253. *People v. Superior Court*, 542 P.2d 1390, 1394-95 (Cal. 1975) (“Do you think we need an attorney?” or “I guess we need a lawyer,” coupled with asking police for recommendation as to a lawyer to call, is valid invocation of right to counsel), *cert. denied*, 429 U.S. 816 (1976); *People v. Hinds*, 201 Cal. Rptr. 104, 109 (Ct. App. 1984) (“Tell me the truth, wouldn't it be best if I had an attorney with me?” was valid invocation); *People v. Alexander*, 261 N.W.2d 63, 64, (Mich. Ct. App. 1977) (suspect's question to police “if [he] thought she should have an attorney” was sufficient to invoke her right to counsel), *cert. denied*, 436 U.S. 958 (1979); *State v. Lampe*, 349 N.W.2d 677, 679-80, 683 (Wis. 1984) (suspect's statement “Do you think I ought to have an attorney?” was valid assertion of her right to counsel).

### 3. *The Clarification Standard*

The majority of courts that have decided the question of the appropriate standard to use in assessing ambiguous or equivocal invocations of the right to counsel have chosen to take a third approach, adopting a rule that permits clarification of unclear assertions.<sup>254</sup> This third approach charts a middle course between the other two standards, instructing police to respond to ambiguous assertions of the right to counsel by clarifying the suspect's request.<sup>255</sup> In contrast to the threshold-of-clarity standard, this clarification approach gives some legal effect to ambiguous or equivocal assertions of the right to counsel. Specifically, under the clarification standard, hedged assertions of the right to counsel that would be accorded no significance under the threshold-of-clarity standard<sup>256</sup> may be given legally operative effect, limiting further police interrogation.<sup>257</sup> On the other hand, unlike the per se

254. See, e.g., *Towne v. Dugger*, 899 F.2d 1104, 1107 (11th Cir.), *cert. denied*, 498 U.S. 991 (1990); *Smith v. Endell*, 860 F.2d 1528, 1532-33 (9th Cir. 1988), *cert. denied*, 498 U.S. 981 (1990); *United States v. Gotay*, 844 F.2d 971, 975 (2d Cir. 1988); *United States v. Fouché*, 833 F.2d 1284, 1286-87 (9th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988); *United States v. Porter*, 776 F.2d 370 (1st Cir. 1985) (citing clarification rule with approval in denying the government's petition for rehearing); *United States v. Cherry*, 733 F.2d 1124, 1130-31 (5th Cir. 1984), *cert. denied*, 479 U.S. 1056 (1987); *Thompson v. Wainwright*, 601 F.2d 768, 771 (5th Cir. 1979); *Nash v. Estelle*, 597 F.2d 513, 517 (5th Cir.), *cert. denied*, 444 U.S. 981 (1979); *Robinson v. State*, 574 So. 2d 910, 914 (Ala. Crim. App. 1990); *Giacomazzi v. State*, 633 P.2d 218, 222 (Alaska 1981) (discussing with approval clarification rule in dicta); *Hampel v. State*, 706 P.2d 1173, 1180 (Alaska Ct. App. 1985); *State v. Staatz*, 768 P.2d 143, 146 (Ariz. 1988) (en banc); *State v. Inman*, 728 P.2d 283, 286 (Ariz. Ct. App. 1986); *People v. Hulsing*, 825 P.2d 1027, 1030 (Colo. Ct. App. 1991); *State v. Anderson*, 553 A.2d 589, 593-595 (Conn. 1989); *Crawford v. State*, 580 A.2d 571, 576-77 (Del. 1990); *Ruffin v. United States*, 524 A.2d 685, 701 (D.C. 1987), *cert. denied*, 486 U.S. 1057 (1988); *Martinez v. State*, 564 So. 2d 1071, 1073 (Fla. 1990); *Long v. State*, 517 So. 2d 664, 667 (Fla. 1987), *cert. denied*, 486 U.S. 1017 (1988); *Cannady v. State*, 427 So. 2d 723, 728-29 (Fla. 1983); *Calixte v. State*, 585 So. 2d 974, 976 (Fla. Dist. Ct. App. 1991); *Hall v. State*, 336 S.E.2d 812, 818 (Ga. 1985); *State v. Moulds*, 673 P.2d 1074, 1081-82 (Idaho Ct. App. 1983); *Sleek v. State*, 499 N.E.2d 751, 754-55 (Ind. 1986); *People v. Giuchici*, 324 N.W.2d 593, 595 (Mich. Ct. App. 1982); *State v. Pilcher*, 472 N.W.2d 327, 332 (Minn. 1991); *State v. Doughty*, 472 N.W.2d 299, 303 (Minn. 1991); *State v. Robinson*, 427 N.W.2d 217, 223 (Minn. 1988); *Holland v. State*, 587 So. 2d 848, 856 (Miss. 1991); *Kuykendall v. State*, 585 So. 2d 773, 777 (Miss. 1991); *Sechrest v. State*, 705 P.2d 626, 630 (Nev. 1985); *State v. Wright*, 477 A.2d 1265, 1268, 1272 (N.J. 1984); *State v. Post*, 783 P.2d 487, 490 (N.M. Ct. App. 1989); *Russell v. State*, 727 S.W.2d 573, 576-78 (Tex. Crim. App.) (en banc), *cert. denied*, 484 U.S. 856 (1987); *State v. Sampson*, 808 P.2d 1100, 1109-10 (Utah Ct. App.), *cert. denied*, 817 P.2d 327 (Utah 1991), and *cert. denied*, 112 S. Ct. 1282 (1992); *State v. Griffin*, 754 P.2d 965, 969 (Utah Ct. App. 1988); *State v. Robtoy*, 653 P.2d 284, 290 (Wash. 1982) (en banc); *Cheatham v. State*, 719 P.2d 612, 619-21 (Wyo. 1986); *Daniel v. State*, 644 P.2d 172, 177-78 (Wyo. 1982) (claiming to apply clarification standard, but apparently applying threshold rule).

255. For an oft-quoted statement of this position, see *Nash v. Estelle*, 597 F.2d 513, 517 (5th Cir.), *cert. denied*, 444 U.S. 981 (1979): "Where the suspect's desires [for counsel during interrogation] are expressed in . . . an equivocal fashion, it is permissible for the questioning official to make further inquiry to clarify the suspect's wishes."

256. See *supra* notes 226-30 and accompanying text.

257. In jurisdictions using the clarification standard, invocations phrased using lexical hedges have generally been accepted as equivocal invocations of the right to counsel. See, e.g., *Owen v. Alabama*, 849 F.2d 536, 539 (11th Cir. 1988) ("I think I'll let y'all appoint me [a lawyer]"); *United States v. Fouché*, 833 F.2d 1284, 1286-87, 1289 (9th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988) (suspect saying to FBI agents that he "might want to talk to a lawyer"); *United States v. Cherry*, 733 F.2d 1124, 1127 (5th Cir. 1984), *cert. denied*, 479 U.S. 1056 (1987) ("Maybe I should talk to an attorney before I make a further statement," and later on, "Why should I not get an attorney?"); *State v. Staatz*, 768 P.2d 143, 145-46 (Ariz. 1988) ("Maybe I should be talking to a lawyer" or "Maybe it would be in my best interests to

invocation rule, which absolutely bars further police interrogation upon any assertion of the right to counsel, the clarification approach permits police to continue the interrogative exchange with the suspect after a less than clear invocation of the right to counsel.<sup>258</sup> The ensuing police questioning is, at least in theory,<sup>259</sup> limited solely to questions designed to clarify whether the suspect intended her ambiguous statements to invoke the Fifth Amendment right to assistance of counsel.<sup>260</sup>

Courts that have adopted the clarification standard frequently cite with approval the Fifth Circuit's decision in *Nash v. Estelle*.<sup>261</sup> In *Nash*, a murder suspect had been brought from custody to the offices of the district attorney, where he was interrogated by Assistant District Attorney F.R. Files, Jr.<sup>262</sup> Files began the interview by advising Nash of his *Miranda* rights. As Files was explaining the right to counsel, Nash asked, "If I want a lawyer present, I just put down I want him present?"<sup>263</sup> In the ensuing discussion, Nash twice told

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speak to a lawyer"); *Cannady v. State*, 427 So. 2d 723, 728 (Fla. 1983) ("I think I should call my lawyer"); *State v. Moulds*, 673 P.2d 1074, 1081-83 (Idaho Ct. App. 1983) ("Maybe I need an attorney" or "I think I need an attorney"); *State v. Robtoy*, 653 P.2d 284, 290-91 (Wash. 1982) ("Maybe I should call my attorney").

Similarly, invocations using interrogative rather than imperative forms have been interpreted as equivocal assertions of the right to counsel under this standard. *See, e.g.*, *Howard v. Pung*, 862 F.2d 1348, 1350-51 (8th Cir. 1988) ("Why don't I have an attorney here now?"); *United States v. Cherry*, 733 F.2d 1124, 1127 (5th Cir. 1984), *cert. denied*, 479 U.S. 1056 (1987) ("Why should I not get an attorney?"); *State v. Doughty*, 472 N.W.2d 299, 301-03 (Minn. 1991) ("Shouldn't I have an attorney so you don't ask me any illegal questions?"); *Holland v. State*, 587 So. 2d 848, 856-58 (Miss. 1991) ("Don't you think I need a lawyer?").

Generally, suspects who ask an interrogating officer whether they need a lawyer are held under this standard to have equivocally invoked their right to counsel. *Kuykendall v. State*, 585 So. 2d 773, 775 (Miss. 1991) ("When will I be able to go to Court on this here and talk to a lawyer or something?"); *see, e.g.*, *Towne v. Dugger*, 899 F.2d 1104, 1107 (11th Cir.), *cert. denied*, 111 S. Ct. 536 (1990); *Crawford v. State*, 580 A.2d 571, 576-77 (Del. 1990); *Ruffin v. United States*, 524 A.2d 685, 700-02 (D.C. 1987); *State v. Pilcher*, 472 N.W.2d 327 (Minn. 1991); *People v. Alexander*, 261 N.W.2d 63, 64 (Minn. 1977), *cert. denied*, 436 U.S. 958 (1978); *Holland v. State*, 587 So. 2d 848, 856-858 (Miss. 1991); *State v. Tapply*, 470 A.2d 900, 903-04 (N.H. 1983); *State v. Torres*, 412 S.E.2d 20, 27 (N.C. 1992); *State v. Smith*, 661 P.2d 1001, 1003 (Wash. Ct. App. 1983). *But see* *Norman v. Ducharme*, 871 F.2d 1483, 1484-86 (9th Cir. 1989) (holding that suspect who asked police officer whether he should get an attorney had not thereby requested counsel); *Russell v. State*, 727 S.W.2d 573, 575-76 (Tex. Crim. App.) (en banc), *cert. denied*, 484 U.S. 856 (1987) (suspect asking police officer whether he needed an attorney held not to be a request for counsel).

258. *Compare* *Cannady v. State*, 427 So. 2d 723, 728 (Fla. 1983) (finding, under clarification standard, the suspect's words, "I think I should call my lawyer," to be equivocal assertion that permitted police to continue questioning limited to clarifying the suspect's wishes) *with* *People v. Traubert*, 608 P.2d 342, 344, 346 (Colo. 1980) (en banc) (finding, under per se invocation standard, suspect's words, "I think I need to see an attorney," to be an effective invocation that barred further police interrogation).

259. *See infra* notes 294-96 and accompanying text discussing the problem of appellate courts adopting a strained interpretation of police questioning as "clarifying" in order to preserve the admissibility of a subsequent confession.

260. *See, e.g.*, *Thompson v. Wainwright*, 601 F.2d 768 (5th Cir. 1979). In *Thompson*, the court stated, "[W]hen . . . an equivocal request for an attorney is made by a suspect during custodial interrogation, the scope of that interrogation is immediately narrowed to one subject and one only. Further questioning thereafter must be limited to clarifying that request until it is clarified." *Id.* at 771. *But see infra* notes 294-96.

261. 597 F.2d 513 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 981 (1979).

262. *Id.* at 515.

263. *Id.* at 516.

Files that he “‘would like . . . to have [a lawyer] appointed.’”<sup>264</sup> Files then told Nash, “‘. . . if you want a lawyer, well, I am going to have to hold off, I can’t talk to you.’”<sup>265</sup> Nash replied that he “‘would like to have a lawyer, but [he’d] rather talk to [Files].’”<sup>266</sup> Nash eventually signed a waiver form and made incriminating statements without having the assistance of counsel during questioning.<sup>267</sup>

The federal district court granted the writ of habeas corpus, but the Fifth Circuit reversed, holding that Nash’s invocation of the right to counsel was merely equivocal<sup>268</sup> and that Files’ subsequent comments to Nash, intended to clarify whether Nash truly wished assistance of counsel, were proper.<sup>269</sup> Because Nash had expressed to Files both a desire to talk to him and a desire to have counsel present, the majority opinion held that Files had acted properly in continuing to question Nash in order to clarify Nash’s apparently inconsistent statements.<sup>270</sup> Writing in dissent,<sup>271</sup> Judge Godbold pointed out that the majority opinion erred both in finding Nash’s invocation to be

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at 515, 517. The portion of the transcript that detailed the colloquy between the suspect and his interrogator regarding the right to counsel was set forth in the opinion verbatim:

NASH: If I want a lawyer present, I just put down I want him present?

FILES: Please just tell us about it. Any time we are talking and you decide that you need somebody else here, you just tell me about it and we will get somebody up here.

NASH: Well, I don’t have the money to hire one, but I would like, you know, to have one appointed.

FILES: You want one to be appointed for you?

NASH: Yes, sir.

FILES: Okay. I had hoped that we might talk about this, but if you want a lawyer appointed, then we are going to have to stop right now.

NASH: But, uh, I kinda, you know, wanted, you know, to talk about it, you know, to kinda, you know, try to get it straightened out.

FILES: Well, I can talk about it with you and I would like to, but if you want a lawyer, well, I am going to have to hold off, I can’t talk to you. It’s your life.

NASH: I would like to have a lawyer, but I’d rather talk to you.

FILES: Well, what that says there is, it doesn’t say that you don’t ever want to have a lawyer, it says that you don’t want to have a lawyer here, now. You got the right now, and I want you to know that. But if you want to have a lawyer here, well, I am not going to talk to you about it.

NASH: No. I would rather talk to you.

FILES: You would rather talk to me? You do not want to have a lawyer here right now?

NASH: No, sir.

FILES: You are absolutely certain of that?

NASH: Yes, sir.

FILES: Go ahead and sign that thing.

*Id.* at 516-17.

268. *Id.* at 517.

269. *Id.* at 518-20.

270. *Id.*

271. Four judges in the *en banc* panel—Chief Judge Brown and Circuit Judges Godbold, Goldberg, and Vance—concurred in part and dissented in part, agreeing to adopt a standard limiting police interrogation after ambiguous invocation of the right to counsel, but disagreeing with the majority’s application of the standard to the facts in the case. *Id.* at 520-34. A fifth judge, Circuit Judge Rubin, dissented in a separate opinion. *Id.* at 534.

equivocal<sup>272</sup> and in finding Files' responses to Nash to be appropriate clarification.<sup>273</sup> As the dissent accurately noted, Nash had made a direct and unqualified statement that he wanted a lawyer to be appointed for him, and had repeated this request after Files echoed, "You want one to be appointed for you?"<sup>274</sup> This invocation was neither ambiguous nor equivocal. Not until Files began explaining to him the consequences of invoking the right to counsel did Nash express any inconsistent or equivocal desires. Thus, Nash's supposed equivocation<sup>275</sup> was incited by Files *after* Files should have terminated the interrogation because the right to counsel had been asserted.<sup>276</sup> Further, as the dissent observed, far from merely "clarifying Nash's wishes with respect to counsel, Files "strongly intimated that the decision [to request counsel] was not in Nash's best interests."<sup>277</sup> In the words of the dissent, the *Nash* case "contains the seeds of great mischief,"<sup>278</sup> providing a standard that would "seduce courts"<sup>279</sup> into acquiescing to the evisceration of the right to counsel during custodial interrogation.

Subsequent case law applying the clarification standard has proven the concerns of the *Nash* dissent to be well-founded.<sup>280</sup> On its face, the clarification standard appears to strike a reasonable balance between the desire of law enforcement to conduct suspect interrogations and the need to guarantee that individuals can exercise their constitutional right to counsel.<sup>281</sup> As *Nash* illustrates, however, the clarification standard is fraught with possibilities for misapplication. The *Nash* majority opinion explicitly presumed that Files, as an officer of the court, had conducted the interrogation with a good-faith solicitude for Nash's constitutional rights.<sup>282</sup> But there is no reason to believe (and many reasons to doubt) that police officers can be counted on to value the possible exercise of a suspect's rights if it impedes criminal investigations.<sup>283</sup>

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272. *Id.* at 522-24.

273. *Id.* at 524-25.

274. *Id.* at 523.

275. The dissent expressed some skepticism as to whether Nash's request for counsel was equivocal, observing that none of the other three courts involved in the proceedings had ever suggested that Nash's invocation was equivocal. *Id.* at 524.

276. In the words of the dissent:

The court . . . finds that Nash's position was "equivocal" in that he expressed conflicting desires to have counsel and to continue the interrogation without counsel, so that Files was entitled to continue the interview by asking "clarifying" questions. *What is, of course, wrong with this at the threshold is that Nash's statements concerning desire to continue without a lawyer were the fruits of continued questioning by Files after Nash requested counsel.* The supposed need for clarification arose from interrogation continued after it was bound to cease.

*Id.* at 522-23.

277. *Id.* at 525.

278. *Id.* at 520.

279. *Id.* at 526.

280. See *infra* notes 290-306 and accompanying text.

281. This position is well-articulated in Tomkovicz, *supra* note 198, at 1009-13.

282. *Nash*, 597 F.2d at 518-20. The *Nash* dissent criticizes this remarkable presumption, appropriated from administrative law, as inapplicable to the context of waiver of *Miranda* rights. *Id.* at 532-34.

283. The attitudes that can lead police officers to subvert suspects' constitutional rights can be seen

Appellate courts have warned that the clarification standard does not sanction police attempts, whether by coercion or persuasion, to discourage suspects from invoking the right to counsel.<sup>284</sup> Nevertheless, the large number of appeals in which the record shows that police tried to dissuade suspects from exercising their right to counsel suggests that the police response to equivocal invocations of the right to counsel often tends to go beyond merely clarifying the suspect's wishes. Tactics used by the police to undermine assertions of the right to counsel include suggesting to a suspect that she does not yet need a lawyer,<sup>285</sup> advising her that having counsel would not be in her best interests,<sup>286</sup> telling her that the process of obtaining counsel is slow and cumbersome,<sup>287</sup> confronting a suspect with evidence against her, in the hope she will feel compelled to respond,<sup>288</sup> and simply asking the suspect point-blank for her side of the story.<sup>289</sup>

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in the surprising testimony of a federal Narcotics Task Force agent in *United States v. Nordling*, 804 F.2d 1466, 1470 (9th Cir. 1986). During his interrogation, Nordling said he wanted to speak to his lawyer. The agent refused to permit this, testifying in court as to his refusal: "There's a lot of things in the past that have happened that are not in law enforcement's favor when we let defendants contact lawyers. It has compromised investigations severely." *Id.* at 1471 n.4. One suspects it is the agent's candor, not his attitude, that is unusual among law enforcement officers.

284. See, e.g., *Thompson v. Wainwright*, 601 F.2d 768 (5th Cir. 1979). In *Thompson*, the suspect in a homicide case told police that he would make a statement to them after he had spoken to an attorney. The interrogating officers advised him "that if he waited and talked to an attorney, the first thing the attorney would tell him is not to say anything and that if he had anything that he thought we should know, that he should go ahead and tell us." *Id.* at 770 n.2. On appeal, the *Thompson* court disapproved of the interrogating officers' response, holding that:

the limited inquiry permissible after an equivocal request for legal counsel may not take the form of an argument between interrogators and suspect about whether counsel would be in the suspect's best interests or not. . . . Such measures are foreign to the purpose of clarification, which is not to persuade but to discern.

*Id.* at 772.

285. See, e.g., *People v. Russo*, 196 Cal. Rptr. 466, 468 (1983) (police responding to equivocal invocation with, "If you didn't do this, you don't need a lawyer, you know."); *State v. Torres*, 412 S.E.2d 20, 23 (N.C. 1992) (witness testifying that "[The deputy] told [defendant] she didn't need a lawyer right now.>").

286. See, e.g., *Thompson v. Wainwright*, 601 F.2d 768 (5th Cir. 1979) (police responding to suspect's statement that he wanted to tell his story to a lawyer before talking to them by emphasizing that counsel would advise him not to talk to the police, which would not be in his best interests); *State v. Lampe*, 349 N.W.2d 677, 679-80 (Wis. 1984) (prosecutor responding to suspect's equivocal invocation of the right to counsel with, "Carol, an attorney will tell you at this point that you shouldn't say anything, and I can tell you that if you don't say anything, I am going to ask the next person to see if they will cooperate with us or not and they will get the benefit of the cooperation, so it's your choice.>").

287. See, e.g., *Hampel v. State*, 706 P.2d 1173, 1181-82 (Alaska Ct. App. 1985) (after informing suspect of right to counsel, interrogating officer emphasized inconvenience and delay involved in obtaining counsel).

288. See, e.g., *Towne v. Dugger*, 899 F.2d 1104, 1107 (11th Cir.) (police responding to equivocal assertion of right to counsel by accusing suspect of the crime and confronting him with damaging evidence against him), *cert. denied*, 111 S. Ct. 536 (1990); *Smith v. Endell*, 860 F.2d 1528, 1529 (9th Cir. 1988) (suspect accused of a shooting asking, "Can I talk to a lawyer? At this point, I think maybe you're looking at me as a suspect, and I should talk to a lawyer. . .," to which interrogating officer responded by discussing the suspect's motive to kill the victim); *State v. Moulds*, 673 P.2d 1074, 1081-83 (Idaho Ct. App. 1983) (police confronting suspect who had just equivocally asserted his right to counsel with apparently incriminating evidence).

289. See, e.g., *People v. Alexander*, 261 N.W.2d 63, 64 (Mich. 1977) (police responding to suspect's equivocal invocation of right to counsel with, "I told her I thought she should tell me what happened"),

Further, by categorizing post-invocation police questioning of a suspect as proper "clarification" when that questioning is of dubious legitimacy, courts in jurisdictions adopting the clarification approach have effectively encouraged police to disregard assertions of counsel.<sup>290</sup> For example, in *State v. Robtoy*,<sup>291</sup> the police responded to a suspect who said, "Maybe I should call my attorney," by warning him, "Do you understand that once you say you want an attorney, you know, we have to stop talking. It's going to be difficult to change and go back and forth."<sup>292</sup> The court found this blatant ploy to discourage the suspect from asserting his right to counsel to be proper "clarification."<sup>293</sup> By approving such attempts to dissuade suspects from asserting their rights, courts encourage the police to engage in equally coercive "clarification" in future interrogations.

In a similar fashion, appellate courts have legitimized post-assertion clarifying interrogation by characterizing fairly definite assertions of the right to counsel as "equivocal," thus condoning follow-up "clarifying questions" by the police that would otherwise have rendered subsequent statements by the suspect inadmissible.<sup>294</sup> Among the assertions of the right to counsel that courts have found "equivocal" are "This is a lie. I'm calling an

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*cert. denied*, 436 U.S. 958 (1977); *State v. Doughty*, 472 N.W.2d 299, 301 (Minn. 1991) (police responding to an equivocal invocation of the right to counsel by saying, "I'm very interested in hearing your side of the story."): For a case illustrating all of the tactics outlined here, see *Hampel v. State*, 706 P.2d 1173, 1181-82 (Alaska Ct. App. 1985) (police answering suspect's inquiry about obtaining counsel by explaining how complicated and inconvenient the process would be, detailing all of the evidence against the suspect, and touting the advantages of telling his side of the story to the police before possible codefendants told their side).

290. *See, e.g.*, *Nash v. Estelle*, 597 F.2d 513, 516-20 (5th Cir. 1979) (approving as proper clarification, "Okay. I had hoped that we might talk about this, but if you want a lawyer appointed, then we are going to have to stop right now. . . . Well, I can talk about it with you and I would like to, but if you want a lawyer, well, I am going to have to hold off, I can't talk to you. It's your life."), *cert. denied*, 444 U.S. 981 (1979); *State v. Mada*, 812 P.2d 1107, 1108 (Ariz. Ct. App. 1991) (approving as proper clarification response of police, after twice being told by suspect that he had been advised by counsel not to speak with them, that "[t]he decision [to answer police questions] is yours. Your attorney cannot order you to be quiet. That decision is totally yours").

291. 653 P.2d 284 (Wash. 1982).

292. *Id.* at 290-91 (emphasis omitted).

293. *Id.* at 289-91.

294. *See United States v. Gonzalez*, 833 F.2d 1464, 1466 (11th Cir. 1987) (finding that suspect who told police that she had sought an attorney but it was too expensive to retain the attorney for assistance during the interrogation had only "ambiguously" requested counsel); *State v. Anderson*, 553 A.2d 589, 593-95 (Conn. 1989) (holding that suspect, confronted with damaging evidence against him by police, did not unequivocally invoke his right to counsel when he "indicate[d] that he better call his wife and lawyer"); *Long v. State*, 517 So. 2d 664, 666-67 (Fla. 1987) (interpreting suspect's words "The complexion of things have sure changed since you came back into the room. I think I might need an attorney," as only an equivocal assertion of right to counsel); *State v. Robinson*, 427 N.W.2d 217, 221-23 (Minn. 1988) (finding prisoner's assertion equivocal when he said that if he was a suspect in a murder, he wanted to call a lawyer); *Sechrest v. State*, 705 P.2d 626, 629 (Nev. 1985) (holding that suspect who told police his lawyer had advised him to "keep his mouth shut" had at best only equivocally invoked his right to counsel); *Cheatham v. State*, 719 P.2d 612, 618 (Wyo. 1986) (noting that suspect who answered police inquiry whether he would answer their questions with, "Well I don't care, I'd like to see a lawyer, too you know," had only equivocally invoked the right to counsel).



attorney;”<sup>295</sup> “I believe gentlemen that if this is going to get into something deep where you’re attempting to get me to incriminate myself then I should have an attorney present. If there is any questioning on that particular subject.”<sup>296</sup> As long as post-invocation police questioning can be characterized as clarifying, many courts go to great lengths to classify the invocation as equivocal.

When post-assertion questioning cannot by any stretch of the judicial imagination be considered mere “clarification,” courts sometimes conclude that what seems to be an equivocal invocation was not, in fact, an invocation of any sort, thus relieving the police of the obligation to confine further interrogation to clarifying questions.<sup>297</sup> For example, in *Daniel v. State*,<sup>298</sup> the suspect told the interrogating officer that he would “probably like to have an attorney present.”<sup>299</sup> After further discussion of the right to counsel, the suspect explained his earlier request, saying to the police, “If it’s necessary, that’s because I just don’t want to be taken advantage of or anything like that.”<sup>300</sup> Later, after being asked to sign a *Miranda* waiver form, the suspect

295. *State v. Griffin*, 754 P.2d 965, 966-69 (Utah Ct. App. 1988).

296. *State v. Lewis*, 645 P.2d 722, 726-27 (Wash. Ct. App. 1982). During the initial *Miranda* warnings, the suspect responded to being informed of his right to counsel with “We’ll cross that bridge when we come to it,” and to the prosecuting investigator’s question, “Keeping these rights in mind, would you like to waive these rights and talk?” with “No, I’m not going to waive any rights, a a [sic] I’ll just wait until I know what’s happening.” *Id.* at 724. Several questions about the crime were then asked, when a deputy prosecutor interrupted to say: “Let me interject something here, before you go forward since Mr. Lewis has indicated that he isn’t sure whether or not he wants to waive his right to remain silent and right to the presence of an attorney, you might get some clarification on that.” The suspect responded, “I believe gentlemen that if this is going to get into something deep where you’re attempting to get me to incriminate myself then I should have an attorney present. If there is any questioning on that particular subject.” *Id.* at 724. The court held that this was only an equivocal assertion of the right to counsel. *Id.* at 727.

297. See *infra* notes 298-306 and accompanying text. For additional cases in which courts have found no invocation, see also *Wernert v. Arn*, 819 F.2d 613, 615-16 (6th Cir. 1987) (holding suspect’s statement to corrections officer that her husband would telephone an attorney and suspect’s own unsuccessful attempts to reach attorney by phone not invocation of right to counsel), *cert. denied*, 484 U.S. 1011 (1988); *United States v. Gordon*, 655 F.2d 478, 485-86 (2d Cir. 1981) (holding unsuccessful attempt to contact attorney not invocation of right to counsel); *State v. Lopez*, 822 P.2d 465, 468-70 (Ariz. Ct. App. 1991) (finding statement, “My attorney would shit bricks if he knew I was talking to you right now. He told me not to discuss this case with anyone” not invocation of right to counsel); *State v. Mada*, 812 P.2d 1107, 1108 (Ariz. Ct. App. 1991) (holding that suspect twice telling police of attorney’s instructions to remain silent not invocation of right to counsel); *State v. Shifflett*, 508 A.2d 748, 758-59 (Conn. 1986) (holding suspect’s discussion of attorney’s role in negotiating a “package deal” before talking about crime not invocation of right to counsel); *State v. Summers*, 325 S.E.2d 419, 420-21 (Ga. Ct. App. 1984) (finding that suspect’s statement that his wife had informed him of right to attorney was not assertion of right to counsel); *Commonwealth v. Todd*, 563 N.E.2d 211, 213 (Mass. 1990) (holding that suspect who “wondered aloud about the advisability of having a lawyer” did not invoke right to counsel); *Kapocsi v. State*, 668 P.2d 1157, 1159-60 (Okla. Crim. App. 1983) (“I’m thinking I will need a lawyer” not invocation of right to counsel), *cert. denied*, 464 U.S. 1070 (1984); *Massengale v. State*, 710 S.W.2d 594, 598-99 (Tex. Crim. App. 1984) (holding that suspect who, in earshot of police, told his wife to retain a lawyer did not invoke right to counsel); *State v. Bledsoe*, 658 P.2d 674, 676-77 (Wash. Ct. App. 1983) (finding suspect’s statement that his attorney told him not to talk to police not invocation of right to counsel).

298. 644 P.2d 172 (Wyo. 1982).

299. *Id.* at 174.

300. *Id.*

reiterated his request: “‘May I still—if I can’t afford a lawyer—may I still be appointed a lawyer?’”<sup>301</sup> Despite these repeated statements indicating a desire for counsel, the reviewing court nevertheless found that the suspect had never invoked his right to counsel.<sup>302</sup> Likewise, in *State v. Campbell*,<sup>303</sup> a suspect who said, “‘If I’m going to be charged with murder, maybe I should talk to an attorney,’” was held to have not even equivocally asserted her right to counsel.<sup>304</sup> Nor, according to the appellate court, did the defendant in *United States v. Ivy*,<sup>305</sup> when he responded to the police’s question, “‘Who can you get dynamite from?’” with “‘I’ll tell you, let me talk to my lawyer before I answer that.’”<sup>306</sup> Taken in context, these suspects’ statements appear to be at least equivocal invocations of the right to counsel. The police follow-up questioning in each case was so patently beyond clarification, however, that only by refusing to recognize the invocations as equivocal in the first place could the appellate courts find later incriminating statements to be admissible evidence.

The clarification standard thus encourages appellate courts either to indulge in tortured interpretations of invocations as “equivocal” and of police follow-up questioning as “clarification,” or to deny flatly the equivocal character of suspects’ statements in order to justify admitting into evidence subsequent incriminating statements. In practice, the clarification approach is scarcely more generous in its protection of individual rights than is the threshold-of-clarity standard.

#### V. TRANSCENDING THE “WOMAN QUESTION”: CULTURAL PLURALISM AND THE FEMALE REGISTER

In a majority of jurisdictions, the standard governing invocation of the right to counsel affords greater protection to suspects who speak in a direct and assertive manner. Implicit in the majority doctrine is the assumption that direct and assertive speech—a mode of expression more characteristic of men than women<sup>307</sup>—is, or should be, the norm. This kind of gender bias, which tacitly treats prototypically *male* behavior and experience (confident, assertive, powerful) as a synonym for *human* behavior and experience, is especially pernicious because it is generally invisible and therefore immune to criticism.<sup>308</sup> The androcentric nature of such legal doctrines can easily be

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301. *Id.* at 175.

302. *Id.* at 176-77.

303. 367 N.W.2d 454 (Minn. 1985).

304. *Id.* at 456.

305. 929 F.2d 147 (5th Cir.), *cert. denied*, 112 S. Ct. 234 (1991).

306. *Id.* at 152.

307. See *supra* notes 32, 49, 57-93 and accompanying text on the disproportionate use of the “female register” by women.

308. The unconscious conflation of male experience and behavior with human experience and behavior

mistaken for true gender neutrality.<sup>309</sup> As this study demonstrates, the law's incorporation of a male normative standard<sup>310</sup> may be invisible but it is not

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is not, of course, limited to law. In social discourse, men provide the benchmark, with women judged either to measure up or to be aberrational. Feminist linguists have observed that male norms of language use are automatically seen as the standard according to which other usage is compared: "Wherever male behavior defines the norm, women's behavior, including women's speech, will be deviant by definition." Holmes, *supra* note 74, at 170. I was forcefully reminded of this during my sociolinguistic research for this Article. When I wanted to find out what a reference text said about gender-linked differences in language use, I had to look up "women" instead of "men" in the index of the text, because women are considered the "special" case and men the norm.

309. In a variety of contexts, appellate courts have begun to recognize the unspoken androcentric nature of seemingly gender-neutral legal standards and doctrines, and have acted to correct this bias in the law. For instance, a number of courts have held that the "reasonable person" standard, in theory gender-neutral, is in practice gender-biased to the extent that the standard incorporates male attitudes and assumptions about appropriate behavior. In *Ellison v. Brady*, 924 F.2d 872, 878-80 (9th Cir. 1991), the Ninth Circuit explicitly applied a "reasonable woman" standard in a Title VII action, stating:

We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share. . . . We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.

*Id.* at 879 (citations and footnotes omitted). Other courts have followed the Ninth Circuit's lead in adopting a "reasonable woman" standard to correct for implicit male norms incorporated within the so-called "reasonable person" standard. See *Jenson v. Eveleth Taconite*, 139 F.R.D. 657, 665 (D. Minn. 1991); *Smolsky v. Consolidated Rail*, 780 F. Supp. 283, 294 (E.D. Pa. 1991); *Carrillo v. Ward*, 770 F. Supp. 815 (S.D.N.Y. 1991); *Tindall v. Housing Auth. of Fort Smith*, 762 F. Supp. 259, 262 (W.D. Ark. 1991); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1524 (M.D. Fla. 1991); *Austen v. Hawaii*, 759 F. Supp. 612, 628 (D. Haw. 1991); *Radtke v. Everett*, 471 N.W.2d 660, 664 (Mich. Ct. App. 1991); *Muench v. Township of Haddon*, 605 A.2d 242, 247-48 (N.J. Super. Ct. App. Div. 1992); *T.L. v. Toys 'R' Us*, 605 A.2d 1125, 1135 (N.J. Super. Ct. App. Div. 1992).

A second example of judicial recognition of the male norms implicit in ostensibly gender-neutral legal doctrine is found in the opinion of the Washington Supreme Court in *State v. Wanrow*, 559 P.2d 548 (Wash. 1977). In that case, jury instructions using the generic male pronoun were held to have contributed to reversible error in the homicide prosecution of a woman defendant. The *Wanrow* court noted that:

the persistent use of the masculine gender leaves the jury with the impression the objective standard to be applied is that applicable to an altercation between two men. . . . [C]are must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination. . . . The . . . instruction . . . err[s] by utilizing language suggesting that the respondent's conduct must be measured against that of a reasonable male individual finding himself in the same circumstances.

*Id.* at 558-59 (citations omitted); *cf.* *Commonwealth v. Dillon*, 598 A.2d 963, 967 (Pa. 1991) (Nix, C.J., concurring) (asserting that court's refusal to permit testimony that female defendant had been battered by the victim prevented jury from ascertaining subjective reasonableness of defendant's actions); *State v. Leidholm*, 334 N.W.2d 811, 814-19 (N.D. 1983) (holding that jury instruction using objective standard of reasonableness prejudiced jury against female defendant). Earlier judicial decisions had rejected the argument that generic self-defense instructions using masculine pronouns were biased against women defendants. See *People v. Rush*, 4 Cal. Rptr. 853, 856 (Dist. Ct. App. 1960); *Dowdell v. State*, 38 S.E.2d 780, 785 (Ga. 1946).

310. More generally, feminist theory claims that the law incorporates unspoken male norms in two ways: first, legal doctrine and practice are predicated upon philosophical preferences for autonomous individualism, a philosophical orientation seen as male; second, law presupposes that its subjects have traditional male life patterns and characteristics, so that legal doctrine is shaped to accommodate men's lives rather than women's lives. Joan C. Williams, *Deconstructing Gender*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 95, 106-07 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991). This second presumption gives rise to the multifaceted problem that women face in achieving justice within a legal system normatively predicated on equality in the application of the law. For example, as many feminist legal theorists have pointed out, obtaining appropriate legal recognition for workplace and insurance needs during pregnancy has posed formidable analytic problems under a legal system dedicated

inconsequential. Those whose behavior fails to conform to these presumed norms of behavior encoded within legal doctrine are penalized.

The framers of the majority doctrine never asked the "woman question," and failed to shape legal standards to take into account the characteristic speech patterns of women. The insight derived from asking the woman question—that the underpinnings of legal doctrine unconsciously and unwittingly incorporate a bias favoring males—raises another question. If women were not considered in the framing and interpretation of legal doctrine, are there other groups whose perspectives may likewise be missing from the law?<sup>311</sup>

Women are not the only group whose typical speech patterns put them at a legal disadvantage. In light of the link established between the use of the female speech register and powerlessness, one would expect that speech patterns among those from historically disempowered communities would manifest similar characteristics. It is therefore unsurprising that at least one researcher<sup>312</sup> has observed that indirect speech patterns are common within

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to equal treatment for all parties. Since the "generic" subjects of law are presumed to be incapable of childbirth, women appear to require "special" treatment if the law is to accommodate the unique needs of pregnancy. See, e.g., Lucinda M. Finley, *Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985); Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985); see also Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987) (proposing essentially asymmetrical "equality as acceptance" model of sexual equality).

311. See Bartlett, *supra* note 4, at 847 (proposing that feminist inquiry into legal consequences of failing to consider women be extended to broader consideration of failure of law to incorporate perspectives of other subordinated groups).

312. Unfortunately, little research explores the pragmatics of African-American language use. While there is a considerable body of scholarly work on what is generally termed Black English, the research agenda driving much of the study of African-American speech patterns has not emphasized pragmatic analysis. Much of the linguistic research done on African-American language use has concentrated on descriptive analysis of the grammatical and phonological characteristics of Black English, with an emphasis on tracing the African roots of its features. See, e.g., VERB PHRASE PATTERNS IN BLACK ENGLISH AND CREOLE (Walter F. Williams & Donald Winford eds., 1991) (syntactic features of Black English); Ralph W. Fasold & Walt Wolfram, *Some Linguistic Features of Negro Dialect*, in BLACK AMERICAN ENGLISH 49 (Paul Stoller ed., 1975) (same); PHILIP A. LUELSDOFF, A SEGMENTAL PHONOLOGY OF BLACK ENGLISH (1975) (phonological features of Black English); LABOV, LANGUAGE IN THE INNER CITY, *supra* note 56 (syntactic, lexical, and phonological features of Black English); BAUGH, *supra* note 56 (phonological and syntactic features of Black English and historical derivation of these features); William J. Thomas, *Black Language in America*, 49 WICHITA STATE U. BULL. 3-14 (Feb. 1973) (same); DILLARD, *supra* note 56 (same). Other work explores the cultural significance of Black English within the African-American community. See, e.g., EDITH A. FOLB, RUNNIN' DOWN SOME LINES (1980); LABOV, LANGUAGE IN THE INNER CITY, *supra* note 56, at 201-396; GENEVA SMITHERMAN, TALKIN AND TESTIFYIN (1977); RAPPIN' AND STYLIN' OUT (Thomas Kochman ed., 1972). Some of the impetus for research on Black English reflects deep concerns over formulation of educational policy to serve the needs of children who use Black English as their customary speech register. See, e.g., DILLARD, *supra* note 56 at 265-95; HERBERT L. FOSTER, RIBBIN', JIVIN', AND PLAYIN' THE DOZENS: THE UNRECOGNIZED DILEMMA OF INNER CITY SCHOOLS (2d ed. 1986); ELEANOR WILSON ORR, TWICE AS LESS: BLACK ENGLISH AND THE PERFORMANCE OF BLACK STUDENTS IN MATHEMATICS AND SCIENCE (1987); Symposium, *Ebonics (Black English): Implications for Education*, 9 J. BLACK STUD. 363 (1979). For an overview of the competing theoretical perspectives and concerns underlying scholarship on Black English, see Dorothy K. Williamson-Ige, *Approaches to Black Language Studies: A Cultural Critique*, 15 J. BLACK STUD. 17 (1984).

African-American spoken language.<sup>313</sup> In his pragmatic analysis of Black English, Thurmon Garner described what he termed a "strategy of indirection" by speakers as a linguistic mechanism to avoid conflict.<sup>314</sup> The speaker's "message is delivered as suggestions, innuendos, implications, insinuations, or inferences."<sup>315</sup> This use of indirect speech patterns in order to avoid conflict is the hallmark of a pragmatic usage by persons without power, and can be found both in the female register<sup>316</sup> and in the adaptive speech patterns of subordinated African Americans forced to deal with white authority figures.

One striking example of this can be seen operating in an area of the law unrelated to *Miranda* doctrine. In *Owens v. First American National Bank of Nashville*,<sup>317</sup> a secured party, through his white agent, repossessed an automobile for which the black plaintiff was in arrears. Under the Uniform Commercial Code, the agent was permitted to take possession of the automobile without judicial process as long as the plaintiff did not withdraw consent to repossession, which he had earlier given under the standard sales contract. Thus, the case turned upon the question of whether the plaintiff had indeed withdrawn his consent when he "pleaded with [the agent] not to take the car,"<sup>318</sup> and when he responded to the agent's threat to take the car by responding, "I never argue with no white man, because they always know right."<sup>319</sup> The language used by the plaintiff in this instance can be interpreted as an indirect withdrawal of consent, since the power asymmetry in this interracial interchange functionally prevented the plaintiff from directly confronting the white agent with an explicit withdrawal of his consent. Instead, he used the indirect speech patterns developed to avoid confrontations when there is an imbalance of power. Like the courts adhering to the threshold-of-clarity and clarification standards, the *Owens* court nevertheless failed to find an effective withdrawal of consent. The language used by the plaintiff did not satisfy the court's implicit assumption that a withdrawal of consent should be framed in direct and assertive language.<sup>320</sup>

Other speech communities within the United States fail to share the legally privileged norm of a direct, assertive, unqualified speaking style. For example, many ethnic groups—whose native tongues include such languages as Arabic, Farsi, Yiddish, Japanese, Indonesian, and Greek—use indirect and hedged

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313. Thurmon Garner, *Cooperative Communication Strategies: Observations in a Black Community*, 14 J. BLACK STUD. 233 (1983). Cf. SMITHERMAN, *supra* note 312, at 97-99 (exploring the rhetorical use of indirection in Black English).

314. Garner, *supra* note 313, at 234-48.

315. *Id.* at 235.

316. See *supra* notes 95-121 and accompanying text.

317. 6 U.C.C. Rep. Serv. (Callaghan) 427 (Dec. 6, 1968). I am indebted to Sid DeLong for calling my attention to this case.

318. *Id.* at 429.

319. *Id.*

320. *Id.* at 433-34.

speech patterns more frequently than do speakers of standard English.<sup>321</sup> Moreover, speakers of these languages often use these indirect speech patterns when speaking English.<sup>322</sup> In fact, evidence suggests that ethnic communities perpetuate their indirect speech conventions over generations, and even third and fourth generation members who speak only English continue to use speech patterns typical of their ethnic groups.<sup>323</sup>

Under the standards requiring clear and unambiguous invocation of the right to counsel, therefore, a speaker from an ethnic group that uses more indirect speech conventions is likely to be misunderstood as having declined to invoke that right.<sup>324</sup> Further, the norms of behavior and expression typical of many of these ethnic groups, particularly those from the Middle East and Asia, require refusing an offer, with the expectation that the offerer should and will make the offer again. To accept an offering the first time it is offered is considered impolite and impertinent.<sup>325</sup> Obviously, someone whose cultural conventions include this rule of first refusal would be unlikely to invoke her right to counsel directly and unambiguously upon being read the *Miranda* rights, even though she might well desire the assistance of counsel. Current legal doctrine, premised on the expectation that an invocation of rights should be direct and unequivocal in form, does not serve the interests of the many speech communities whose discourse patterns deviate from the implicit norms in standard, "male register" English.<sup>326</sup>

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321. A preference for indirect speech patterns occurs among a wide variety of unrelated languages. SAVILLE-TROIKE, *supra* note 36, at 14, 35. See, e.g., Deborah Tannen, *Ethnic Style in Male-Female Conversation*, in LANGUAGE AND SOCIAL IDENTITY, *supra* note 27, at 217, 223-30.

322. SAVILLE-TROIKE, *supra* note 36, at 35; Gumperz & Cook-Gumperz, *supra* note 27, at 6.

323. Gumperz & Cook-Gumperz, *supra* note 27, at 6. In her discourse analysis of speech patterns across three generations of Greek-Americans, Deborah Tannen concluded that Greek Americans, even those who spoke no Greek, persistently used more indirect speech patterns than those found in standard English. Tannen, *supra* note 321, at 223-30.

324. John J. Gumperz has done considerable research on how culturally variable speech patterns can result in cross-cultural misunderstanding. See, e.g., John J. Gumperz, *The Conversational Analysis of Interethnic Communication*, in INTERETHNIC COMMUNICATION 13 (E. Lamar Ross ed., 1978); John J. Gumperz, *Dialect and Conversational Inference in Urban Communication*, 7 LANGUAGE SOC'Y 393 (1978); John J. Gumperz, *Fact and Inference in Courtroom Testimony*, in LANGUAGE AND SOCIAL IDENTITY, *supra* note 27, at 163; John J. Gumperz, *Sociocultural Knowledge in Conversational Inference*, in LINGUISTICS AND ANTHROPOLOGY (Muriel Saville-Troike ed., 1977); Gumperz & Cook-Gumperz, *supra* note 27.

325. Those whose culture requires this polite "first refusal" are often puzzled and frustrated when they interact with Americans who do not share this convention; they may be taken aback at a party when, after they have politely refused proffered food, their hosts whisk the food away without urging it upon them again. SAVILLE-TROIKE, *supra* note 36, at 33-34.

326. Misunderstanding caused by cultural differences in discourse norms occurs in other aspects of the legal system as well. Cf. Walter Käutlin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing*, 20 INT'L MIGRATION REV. 230 (1986) (discussing how cultural relativity in the use of words, expressions, and communicative patterns leads to misinterpretation during asylum hearings for immigrants).

## VI. CONCLUSION: HOW LAW CAN ACCOMMODATE MULTIPLE REGISTERS

In the vast majority of jurisdictions—both those adopting the threshold-of-clarity approach and those adopting the clarification approach—a premium is placed on suspects making direct, assertive, unqualified invocations of counsel. Suspects who do so have the benefit of a bright-line protective rule that forbids the police completely from resuming the of interrogation unless the suspects initiate the contact or have counsel present during the questioning. On the other hand, those suspects who frame their attempt to invoke their Fifth Amendment right to counsel in a softer and less emphatic manner receive far less favorable treatment under the law. Only those jurisdictions that employ the per se rule, treating all arguable references to counsel as valid invocations of the right to counsel, provide both assertive and deferential suspects with equivalent protection.

In this study, I have demonstrated that majority doctrine on the invocation of the right to counsel during custodial police interrogation is a gendered doctrine that privileges male speech norms. It is based on an unexamined assumption that suspects use a register of speech in which claims are made using assertive syntax and intonation. Majority invocation doctrine thus disadvantages women and other marginalized and relatively powerless groups in society, who are more likely to use less direct and assertive patterns of speech characteristic of the “female register.”<sup>327</sup>

How could this legal doctrine be reconstructed to eliminate its gender and cultural bias? At the very least, courts should embrace the per se invocation standard, giving full legal effect to all arguable invocations of the right to counsel. Universal adoption of the per se standard for assessing invocation of the right to counsel would accord legal validity to all invocations, whether direct or indirect. Such a standard would give those who use the female register the same degree of constitutional protection as those who use the more assertive, characteristically male speech register. Under this doctrine, the powerless would be accorded the same constitutional protections as the powerful.

My purpose in this Article has been to demonstrate that the threshold-of-clarity and clarification standards should be discarded in favor of the per se standard. The inquiry into *Miranda* doctrine, however, should not end there.<sup>328</sup> A more incisive feminist critique of this doctrine would note that the law privileges not merely assertive forms of speech but also assertion in the abstract by requiring an actual invocation of the constitutional right before it becomes legally operative. From a feminist perspective, the

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327. See *supra* notes 95-120 and accompanying text.

328. Nor do I intend to leave it there. I plan to pursue this inquiry in a subsequent article focusing on the legal issues presented by the exercise of will in this and other contexts.

characteristically masculine preference for assertive speech can be seen as simply one instance of a more generalized masculine preference for assertive behavior. Such a critique would lead one to ask why the law should obligate suspects in police custody affirmatively to invoke the right to counsel at all. Instead of requiring the suspect to confront police by asserting her rights, why not automatically provide arrested suspects with counsel to be consulted before interrogation begins?

This is not so radical a proposal as it might seem.<sup>329</sup> The law already recognizes certain instances in which an accused's right to counsel attaches whether or not he acts to assert that right.<sup>330</sup> Extending these precedents to the context of custodial interrogation is admittedly a large step beyond *Miranda*, but not an unwarranted one. The *Miranda* Court found a Fifth Amendment right to counsel because it assumed that a warning of the right to remain silent alone would not suffice to protect the suspect's privilege against self-incrimination.<sup>331</sup> As the *Miranda* Court noted, the inherent coerciveness of custodial interrogation "can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators."<sup>332</sup> However, the Court did not extend its insight into coercion to its logical conclusion. The same factors militating against the suspect's free exercise of the right to remain silent while in police custody also inhibit the free exercise of the right to counsel in that situation. It is the law's unspoken privileging of the assertive exercise of individual will, however, that allows the *Miranda* Court to ignore the pressures against suspect invocation of the right to counsel in the same opinion that so eloquently details the psychological factors undermining free exercise of the right to remain silent. A feminist critique would inquire whether this privileging of assertive behavior, like the doctrinal privileging of assertive speech, has a disparate impact upon women and other relatively powerless classes of persons. The reason that women disproportionately use the female register, with its avoidance of direct and assertive statements, is that women are disproportionately powerless and cannot afford to adopt a speech

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329. The ACLU advocated this result in their amicus brief in *Miranda*, calling the actual presence of counsel during police interrogation a "necessary protective device." Brief of the American Civil Liberties Union as Amicus Curiae, 63 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 701, 727 (Philip B. Kurland & Gerhard Casper eds., 1975). More recently, Professor Charles Ogletree has taken a similar position on this issue, arguing that *Miranda* warnings are, practically speaking, ineffective. Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1842-45 (1987).

330. See, e.g., *Minnesota v. Murphy*, 465 U.S. 420 (1984) (detailing exceptions to the rule that Fifth Amendment rights must be affirmatively claimed to be effective); *Brewer v. Williams*, 430 U.S. 387 (1977) (affirming continued vitality of rule set forth in *Massiah v. United States*, 377 U.S. 201 (1964), that Sixth Amendment right to counsel during police interrogation is self-executing).

331. *Miranda*, 384 U.S. at 469-73. "A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice [to assure the individual's unfettered right to choose between speech and silence]. . . ." *Id.* at 469.

332. *Id.* ("[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege . . .").



style perceived as more confrontational.<sup>333</sup> For the same reason, might women be less likely than men to adopt other forms of assertive behavior? More generally, might those who are relatively powerless, or who at least perceive themselves to be so, be unlikely to act in an assertive manner and affirmatively invoke their constitutional rights? An inquiry prompted by feminist theory suggests that any version of legal doctrine that requires the express invocation of a right will disadvantage those who are uncomfortable asserting themselves in the adversarial atmosphere of police interrogation. Just as the current doctrinal preference for unqualified assertions of the right to counsel tends disproportionately to impair exercise of their rights by those who use the female speech register, so too a doctrine that demands affirmative assertion of the right may well tend to favor those who generally display assertive behavior and disadvantage those who do not.

A critique focused upon the legal privileging of assertive behavior would challenge as untenable the balance struck by the *Miranda* Court between the protection of individual rights and the preservation of favored techniques in law enforcement procedure.<sup>334</sup> A full exploration of all of the issues raised in making the Fifth Amendment right to counsel self-executing is clearly beyond the scope of this Article. The preceding comments are intended to be provocative preliminary reflections in this further inquiry, raising the fundamental question of whether *Miranda* itself ought to be reconsidered, so that it fulfills its promise of providing fair and neutral constitutional protection to all, whether male or female, powerful or powerless.

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333. LAKOFF, *supra* note 28, at 205; CAMERON, *supra* note 104, at 74-78; Henley & Kramarae, *supra* note 55, at 18, 24-30; Fishman, *supra* note 104, at 397.

334. Many commentators have characterized *Miranda* as a compromise between safeguarding individual exercise of constitutional rights and maintaining the effectiveness of police interrogation as a means of solving crimes. See, e.g., Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 119-21, 161 (1989); Herman, *supra* note 200, at 735-36; Kamisar, *supra* note 200, at 577-84; Stephen A. Saltzburg, *Miranda v. Arizona Revisited: Constitutional Law or Judicial Fiat*, 26 WASHBURN L.J. 1, 21-23 (1986).