

## **Linguistic Ignorance or Linguistic Ideology?: Sociolinguistic and Pragmatic Issues in Police Interrogation Rules**

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Ever since Foucault, it has become an academic cliché to speak of discursively created disciplinary regimes. Law, however, functions both metaphorically and literally as a disciplinary regime created by and mediated through discourse. More to the point, in legal practice, a consequence such as going to jail is not just a metaphoric form of discipline but rather a physical embodied experience of the disciplinary power of law. That power, expressed in legal theory, is exercised through the use of language as a tool for the creation of and extinction of rights and obligations.

Given this explicit link between the disciplinary authority of law and its use of language as a vehicle for instantiating that authority, it is unsurprising that law has been a situs for language scholars considering the consequences of language deployment. For example, J.L. Austin, in taxonomizing the performative uses of language, drew upon legal language as quintessential exemplars of words that *did* things (Austin, 1962). “I now pronounce you man and wife,” or “We the jury find the defendant guilty,” are classic examples of Austinian speech acts that, assuming appropriate felicity conditions, bring specific legal consequences into being by their utterance. In so doing, their speakers become juridical actors whose speech acts are accorded legally operative significance.

A speech-act use of language to call a legal state of affairs into being may be all well and good if the speaker understands this practice as a recipe for achieving a particular sought-after legal result. The patterned recitation of a verbal formulation, constrained in its efficacy both by the social role of the speaker and the time, place, and circumstances of the utterance, is relatively unproblematic. After all, in the examples given, the minister performing the marriage and the presiding juror announcing the verdict are consciously aware of the fact that what they say in the context in which they are saying it will produce—indeed, is explicitly *intended* to produce—a specific, desired legal outcome. Legal language of this nature performs a kind of “word magic.” (cf. Ogden & Richards, 1989).

Not all speech acts with legal consequences occur within that kind of ritualized, scripted context, however. In cases other than such scripted situations, inadvertently legally infelicitous pronouncements may cause the speakers to fail to achieve their desired legal outcomes. In some cases, using the wrong language exposes speakers to unintended and unforeseen legal consequences. These unfortunate results are particularly likely to occur when the speaker is legally naïve—without the legal training needed to know how to shape legally felicitous speech acts—and when there either is no pre-existing script channeling language into an efficacious pattern or, when such a script does exist, but the speaker is unaware of it.

This paper explores an example of a recurring legal situation in which a legally naïve speaker with limited or no awareness of the script needed for a legally effective speech act must nevertheless attempt to use language in such a way as to achieve a desired legal result: that is, what an arrestee must say while in police custody in order to exercise the constitutional *Miranda* rights during a police interrogation. First, it is necessary to map out the constitutional framework in which the *Miranda* rights are embedded. The United States Constitution guarantees that citizens in police custody cannot be forced to incriminate themselves, and furthermore, that all confessions, to be considered legally valid, must be voluntary, or the product of free will. In the context of the coercive and intimidating atmosphere of police interrogation, however, whether any confession could be considered truly a voluntary act of unfettered free will is questionable. Yet a Supreme Court holding that such confessions are inherently involuntary would require the police to forego such interrogation entirely—a result understandably unpalatable to the Supreme Court, since interrogation results in the police acquiring much valuable evidence that would be otherwise unobtainable. The *Miranda* decision governing the conduct of custodial police interrogation was intended as a compromise between the extremes of outright banning police interrogation and allowing it to proceed without any legal constraint at all. Incommunicado police questioning of an arrested person—often for hours on end—was acknowledged by the *Miranda* Court to be so inherently coercive as to create a presumption that a resulting confession was involuntary unless the suspect was explicitly told prior to questioning that he need not answer questions and that he had the right to consult with an attorney for advice. In the Court's view, preceding police questioning with this information—the now-famous *Miranda* warnings<sup>1</sup>—mitigated the oppressive pressure to talk that might taint the voluntariness of any resulting confession. Suspects who were specifically informed that they were under no obligation to answer questions and who were additionally told that they were entitled to call upon an attorney to advise them presumably now could make a voluntary choice about whether to cooperate and answer police questions or to exercise their constitutionally protected right to remain silent.

Under the rules announced in *Miranda* and refined in later cases, an arrested suspect had only to invoke his right to remain silent or his right to the assistance of counsel to bring interrogation to an immediate halt. (*Michigan v. Mosley*, 1975; *Edwards v. Arizona*, 1981). If the police failed to do so and continued to question a suspect after such

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<sup>1</sup>. As formulated by the Supreme Court, the warning preceding custodial interrogation is “You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to have the assistance of an attorney during questioning. If you cannot afford an attorney, one will be appointed for you.”

invocation, any resulting statements were not to be admissible by prosecutors at trial.<sup>2</sup> In short, invocation of *Miranda* rights constitutes a potent speech act through which the suspect in police custody becomes a juridical actor—someone whose linguistic act of invocation constrains both the interrogating police officers and later on the prosecuting attorney at trial. Powerful word magic indeed.

Because of the significant legal consequences attendant upon invocation of the *Miranda* rights, courts have had to determine exactly what kind of speech acts will count as legally felicitous, thereby triggering these legal constraints on the police. Unlike the minister at a wedding or the juror announcing a verdict, suspects in police custody have no ready script for what it is that they must say in order to effectuate the rights they are trying to claim. All that the suspect knows in this regard is the information given by the *Miranda* warnings recited to him at the beginning of the questioning session. One might assume, then, that courts would generously construe attempts by legally-naïve arrestees to invoke these rights to be efficacious. Perhaps surprisingly, then, the Supreme Court held that attempts to invoke *Miranda* rights would be legally efficacious only if the invocations were made using clear, unequivocal, and unambiguous language. (*Davis v. United States*, 1994). If not, the attempted invocation of rights is treated as an infelicitous speech act without consequences. Police may continue questioning as though nothing had happened, and any resulting statements would be admissible at trial. In the *Davis* case, the arrested suspect being questioned said to his interrogators at one point, “Maybe I should talk to a lawyer.” The Supreme Court disallowed this as an efficacious invocation to the right to counsel, noting that it appeared to be on its face only an equivocal assertion of the right to speak with a lawyer.

After the *Davis* case, reviewing courts have been required to determine on a case by case basis whether an attempted invocation in a particular case is ambiguous or equivocal, and therefore not entitled to legal effect, or sufficiently clear and unambiguous to count as a legally operative speech act. In doing so, courts are making assumptions, albeit mostly tacit assumptions, about the nature of human communication. However, consideration of the insights from linguistic discourse analysis—particularly sociolinguistics and pragmatics—can expose the problematic nature of courts’ assessments of whether particular invocations should be respected and accorded legal force. Specifically, the insights of Gricean conversational implicature, coupled with a sociolinguistically-grounded recognition of the impact of power asymmetry on speech register, illuminate the inadequacy of current legal doctrine and practice in the light of what linguistics can tell us about how communication works.

H.P. Grice’s influential pragmatic framework on the significance of implicature in communication serves to explain why ordinary sequential conversation, which literally construed would seem to be a series of non-sequiturs, is nevertheless understood by its participants as a coherent, responsive discourse. Grice posited that conversation is a rule-governed activity, with participants interpreting responses as relevant to the context of the situation and to what has been said earlier in the interchange (Grice, 1989). For example, consider the following short conversation between two university colleagues:

(1) Colleague 1: “Have you eaten?”

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<sup>2</sup>. Such statements are, however, admissible to impeach a defendant who testifies at trial inconsistently with the earlier, *Miranda*-violative statement. (*Harris v. New York*, 1971).

Colleague 2: "Oh, I have a one o'clock class..."

Colleague 1: "Another time, then."

Interpreted literally, this conversation begins with a request for information about recent food consumption, followed not with a response about food intake but instead with a report about the second speaker's proximate class schedule. The first speaker does not follow up on the topic of class schedules but replies with an elliptic phrase which appears to be a non-specific reference (promise? prediction?) to an indefinite point of time in the future. Surely someone who lacked an understanding of the conventions of conversational implicature—say, a Martian armed with a good English language grammar and dictionary—would find this exchange incomprehensible nonsense. But, in light of the Gricean maxim of relevance, these colleagues (and anyone else overhearing this conversation) have no problem interpreting it as an invitation for Colleague 2 to join Colleague 1 at lunch, with Colleague 2 declining in order to prepare for an impending class that she will be teaching, and Colleague 1 responding in turn with a promise to renew the invitation at some unspecified future date. So natural are the operations of these implicatures that both speakers are likely unaware of the fact that they occurred at all. If asked later to report on the conversation, each is likely to (erroneously) fill in the literal gaps in the conversation with the implied but unspoken information conveyed—"Mary asked me to have lunch with her, but I told her I couldn't because I was prepping for class. We decided to do it some other day."

In order for Gricean implicature to result in successful communication, the parties to the exchange must share frames of cultural meaning. In the given example, for instance, the implicature depends on mutual understanding that eating is a social activity that can be shared with others, that teachers ought to prepare for classes that they are to teach, that professional obligations such as teaching should trump the desire to engage in social interaction, that proffered invitations refused for adequate but situation-specific reasons ought to be renewed to show that no offense is taken at the refusal, etc. The point that Gricean analysis drives home is that competent communicators construe their conversational partners' language as though it were intended to be relevant to the social context in which it occurs and as responsive to what has been said earlier in the conversation. In contrast, literal, acontextual interpretation of utterances would result in an inaccurate assessment of what a speaker intends to mean in making that utterance.

Not only are utterances to be construed as relevant and responsive, but their interpretation must also take into account the ways in which social identity and social context shape speakers' choices about how they will choose to express themselves. Sociolinguistic research exploring the variability of linguistic register used by speakers depending on those social factors helps to explain systematic structural variation in word choice and syntax by speakers situated in a particular cultural and social setting. Not every semantic imperative, for example, is accomplished by speakers using bald and unmitigated syntactic imperatives. Instead, speakers often use hedged or indirect language in preference to an unmodified direct imperative. Furthermore, the likelihood that someone will express themselves using hedged or indirect language is increased when there is power asymmetry between the parties, with the relatively powerless speaker unlikely to make direct and unhedged demands upon the more powerful party. For example, to get someone to open a window, a speaker might use the direct imperative, "Open the window." If the speaker, for whatever reason, did not want to use a bald command form, she might say instead:

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- (2) “Could you open the window please?” or  
 “I need you to open the window.” or  
 “I’d like you to open the window.” or  
 “Does that window open?” or  
 “Can we get some air in here?” or  
 “Would it be okay with you if we got some air in here?”

Robin Lakoff first suggested in the 1970’s that the use of hedged and indirect language to express demands and requests is a characteristic of women’s language. (Lakoff, 1973). Although the tightness of her posited correlation between gender and hedged language was problematized by later empirical research on language use by men and women, the robust link between relational powerlessness and the use of hedged and indirect imperatives has been confirmed. (O’Barr and Atkins, 1980). William O’Barr’s study of language used by witnesses in court showed such a tight correlation between the use of such language and being at a power disadvantage that he came to call this speech register “powerless language.” (O’Barr, 1982).

Being under arrest and questioned by the police is obviously a situation in which there is an extreme power asymmetry between the interrogating police officers and the suspect. Every aspect of the interaction underscores that power imbalance. The physical setting and circumstances of custodial interrogation magnify the helplessness of the arrested person. The arrestee is alone and isolated, and may be confronted by several accusing officers at once. He is physically restrained during the interrogation and can neither leave the room nor control the timing and duration of the interaction. He cannot choose when to eat or sleep or smoke or use the bathroom—all of those normal human activities are now at the sole discretion of his interrogators. The discursive aspects of the interrogation are likewise within the exclusive control of the police. The tempo and tone of the questioning is set by the questioners. The topics asked about and the assessment of whether an answer is satisfactory or not are both entirely up to the police. In short, police interrogators wield almost total power over every aspect of the questioning. In addition, the suspect is made acutely conscious of the fact that, if his answers are deemed to be displeasing or inadequate, serious consequences may occur. He may, rightly or wrongly, fear physical mistreatment at the hands of his jailors, and he must certainly consider that imprisonment or even death may await the conviction that his answers may facilitate.

It was this extreme power asymmetry inherent in custodial police interrogation, coupled with its potentially devastating consequences for arrestees, that impelled the Supreme Court in *Miranda* to require the police to inform arrested suspects that they had the constitutional right not to answer questions and to seek the advice of counsel during interrogation as a way of ensuring that the choice to answer police questions was in fact a free and voluntary one. (*Miranda v. Arizona*, 1966). By invoking those rights, an arrestee could halt an interrogation that threatened to overwhelm his ability to make free and voluntary choices. However, the very fact that justifies *Miranda* warnings—the coercive atmosphere of police domination—also impacts the kind of language that an arrestee is apt to use in expressing his intent to exercise those constitutional rights. The sociolinguistic research on powerlessness and language strongly suggests that suspects undergoing police interrogation would frequently attempt to invoke their rights using the hedged and indirect language characteristic of “powerless language.” This is exactly what an examination of the record in these cases confirms.

A look at post-*Davis* caselaw assessing arrestees' attempts to exercise their *Miranda* rights<sup>3</sup> shows the many pitfalls for suspects trying to claim their constitutional rights. For example, some people make the mistake of trying to invoke their right to a lawyer by asking for it with an interrogative syntactic form rather than an imperative one.

- (3) a. "Could I call my lawyer?" (*Dormire v. Wilkinson*, 2001).
- b. "Can I get my lawyer?" (*State v. Nixon*, 1996).
- c. "Could I get a lawyer?" (*U.S. v. Wesela*, 2000).
- d. "May I call a lawyer? Can I call a lawyer?" (*State v. Payne*, 2001).
- e. "Do you mind if I have my lawyer with me?" (*U.S. v. Whitefeather*, 2006).
- f. "Can I speak to an attorney before I answer the question to find out what he would have to tell me?" (*Taylor v. Carey*, 2007).

All of these requests were held to be ineffective as invocations because they were deemed to be questions unrelated to the preceding *Miranda* warnings telling them that they had the right to assistance of a lawyer during questioning.

Another mistake made by suspects is to use language that softens the harshness of a demand made for a lawyer. The following attempts to invoke the right to counsel have similarly been held to be legal nullities because they were considered ambiguous or equivocal:

- (4) a. "I think I would like to talk to a lawyer." (*Clark v. Murphy*, 2003).
- b. "I think I will talk to a lawyer." (*State v. Farrah*, 2006).
- c. "It seems like what I need is a lawyer...I do want a lawyer." (*Oliver v. Runnels*, 2006).

Preceding the request with introductory qualifying language was fatal to the suspect who said, "If I'm going to jail on anything, I want to have my attorney present before I start speaking to you about whatever it is you guys are talking about" (*Kibler v. Kirkland*, 2006). Those who asked for police assistance in reaching an attorney were not considered to have invoked their rights, either. An arrestee who responded to the *Miranda* warnings with a request that the police retrieve his lawyer's business card had not invoked his right to counsel, one appellate court decided. (*US v. Tran*, 2006.) Neither did a hospitalized suspect who asked the police, "Could I get a phone in here so I can talk to a lawyer?" (*Jackson v. Commonwealth*, 2006).

Those who attempt to exercise their constitutional right to remain silent fare no better than those trying to obtain a lawyer. The following responses to the *Miranda* warnings have all been found to be too ambiguous or equivocal to count as successful invocations of the right to silence:

- (5) a. "I don't want to talk about it." (*Owen v. State*, 2003).
- b. "I don't have anything to say." (*State v. Hickles*, 1996).
- c. "I don't got nothing to say." (*U.S. v. Banks*, 1996).

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<sup>3</sup> There have been nearly five hundred state and federal cases adjudicating the adequacy of an attempted invocation of *Miranda* rights since the Supreme Court's ruling in *Davis v. United States*. More than 90% of them conclude that the invocation was legally invalid.

- d. "I don't wanna talk no more." (*U.S. v. Stephenson*, 2005).
- e. "I just don't think I should say anything." (*Burket v. Angelone*, 2000).
- f. Officer: "Do you want to make a statement to us?" Arrestee: "Nope." (*James v. Marshall*, 2003).

Combining a refusal to answer questions with a request for a lawyer was also not enough to trigger constitutional protections:

- (6) a. "I don't even want to talk unless I have me a lawyer and go through this shit." (*Harper v. State*, 2001).
- b. "I don't feel like I can talk with you without an attorney sitting right here to give me some legal advice." (*Baker v. State*, 2005).
- c. Arrestee responded to police questions by saying, "You're going to have to ask my lawyer that." (*U.S. v. Langford*, 2005).

Gricean principles of conversational implicature tell us that courts should interpret these utterances as relevant and responsive to the conversational situation at hand, a police interrogation in which the suspect has just been told that he has the right to refuse to answer questions and the right to the assistance of a lawyer during questioning. Interpreted in light of this context, it is clear that these responses by arrestees represent attempts, even if somewhat indirect or inarticulate, to invoke rights guaranteed under the Constitution. Yet, all too frequently, reviewing courts, applying hyper-literal readings to these replies, held that they did not constitute successful invocations of the right to counsel or to remain silent. Instead of being legally operative requests, these replies were deemed infelicitous legal speech acts because they took the form of questions, or were framed in the subjunctive mood, or preceded the request with softening expressions of emotion or desire.

How would a Gricean framework lead to a different, and likely more accurate, interpretation of these statements? First, the analysis would situate the apparent invocation language in its discourse context. That is, in each case, the arrestee-speaker is responding to the just-read *Miranda* warnings telling him that he need not answer any questions and that he has the right to a lawyer, appointed if he cannot afford to hire one, during the impending questioning. Second, the Gricean maxim of relevance posits that conversational utterances should be seen as being specifically relevant in the overall context of the exchange and as specifically responsive to what has just been said. When one asks of a fellow diner, "Can you pass the salt?" the request must be read in light of the social situation not as a question about whether one's companion has sufficient arm strength to lift the salt cellar and adequate reach to move it across the table, but instead as a softened imperative that the salt actually be passed. So too, when a Mirandized arrestee asks his interrogators, "Can I have a lawyer?" that language should not be read acontextually as an abstract question about the theoretical availability of lawyers but rather as a relevant response to the *Miranda* warnings—in other words, as a specific request for a lawyer here and now.

If judges were more linguistically sophisticated, they would understand that people frequently use indirect and modified forms of imperatives that are nevertheless intended as demands. For example, just as a diner might tell the waiter, "I think I would like to have the salmon," or "Can I have another cup of coffee?" and would expect the waiter to understand those utterances as unequivocal orders, so too an arrestee who says, "I think I

would like to talk to a lawyer,” (*Clark v. Murphy*, 2003) or “Can I get my lawyer?” (*State v. Nixon*, 1996) should be understood as having made unambiguous requests for counsel. The linguistically informed judge would recognize that speakers in powerless positions are even more likely to resort to indirect and hedged syntactic forms in lieu of using unmodified imperatives, but that usages in a “powerless” register are intended by their users to be just as clear and unequivocal as those that are syntactically unmodified.

The doctrinal message of the Supreme Court in *Davis v. United States* that only clear, unambiguous, and unequivocal invocations are legally effective has been seen by lower courts to signal that they should indulge every presumption against effective invocation as they interpret the language used by arrestees attempting to claim their constitutional rights. As a result, unless the right to counsel is invoked using a bald and completely unmodified imperative such as “Give me a lawyer,” or “I want a lawyer,” the arrestee’s attempt to exercise this constitutional right is unlikely to be respected by either the police or by reviewing courts. Any perceived hedging or indirectness in locution by a suspect attempting to invoke the *Miranda* rights will be construed as failing the requirement that invocation be clear, unambiguous, and unequivocal and thus disqualified as a legally effective speech act. Ironically, these courts have been even more hostile to finding legally efficacious invocation than was the Supreme Court itself in the *Davis* case, which ultimately determined that Davis’ later statement, “I think I want a lawyer before I say anything else,” did constitute an effective invocation of the right to counsel. (*Davis v. United States*, 1994). Few reviewing courts today apparently agree.

In insisting that the literal meaning rather than the contextual meaning of a suspect’s words controls, courts fail to give effect to ordinary speaker-intended implicature and are blind to the degree to which power asymmetry impacts how people will express themselves in social context. This result, however, is not the result of linguistic ignorance but is instead the product of an ideology of language. Courts appear to be less interested in how people *actually* express themselves in claiming their rights than in imposing an explicitly normative regime on how people *ought* to do so. Consequently, courts have been resistant to considering the implications of research in pragmatics and sociolinguistics that empirically indicate how language is used by people in favor of imposing an explicitly normative disciplinary rubric on how they ought to use language. Even more troubling, some courts appear to discount the possibility that criminal suspects mean what they say when they try to invoke their constitutional rights no matter how directly and clearly they express themselves. For example, in one case, an arrestee tried to claim his right to remain silent by saying, “I’m not answering anything else.” Yet the reviewing court found this not to be a valid invocation, despite its clarity, saying: “It’s not clear that the comments were intended to be taken literally. Sometimes people . . . make statements in contradiction to what they really think. In context, defendant’s statement that he wasn’t going to answer anything else did not appear to clearly announce a decision to invoke his *Miranda* rights.” (*U.S. v. Ford*, 2006). Here, a clear and unmodified declaration that the arrestee intended to remain silent was ignored in favor of the court’s belief that he probably didn’t really mean what he unequivocally said.

The legal rules governing *Miranda* rights as applied by the trial and appellate courts after *Davis* thus privilege a particular way of expressing oneself, giving effective constitutional protection to some and denying it to others on the basis of the speech register in which they happen to make their attempt to claim their rights. Further, the law as applied to the facts of these cases intentionally effaces the mechanics of power in the



police-suspect interaction by blinding itself to the relevance of power asymmetry in register selection. This is particularly apparent when you consider that even those invocations that the courts concede are not equivocal by the speaker or ambiguous to the hearer—in which the suspect definitely intends to exercise his rights and the police officer understood him as doing so—are given no legal effect as long as they *could* in theory be interpreted to be ambiguous. As long as the courts can construe an attempted invocation as subject to a possible interpretation as a non-invocation—however strained or implausible that interpretation might be—they empower the police to ignore it.

If courts cared about making accurate interpretations of the language used by arrestees, they would do well to attend to what linguistics tells us about the dynamic processes of human communication. The Supreme Court in *Davis* reassured us that one “need not speak with the discrimination of an Oxford don” in claiming one’s constitutional rights. Subsequent appellate cases applying the *Davis* formula for assessing invocations have made that assurance ring hollow. As it turns out, few Oxford dons could successfully exercise their rights under the standards being applied in American courts today.

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