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Linguistic Estoppel: A Custodial Interrogation Subject's Reliance on Traditional Language Customs when Facing Unknown Expectations for Legally Efficacious Speech

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Linguistic Estoppel: A Custodial Interrogation Subject's Reliance on Traditional Language Customs when Facing Unknown Expectations for Legally Efficacious Speech

Taylor J. Smith*

For various reasons, speakers often communicate indirectly, hiding their words' true meaning beneath an apparent surface meaning. For example, a woman trying to brush off her co-worker's date invitation might respond, "I have to prepare for a presentation tomorrow." While the words' surface meaning doesn't relate to the date invitation, the hearer usually understands the underlying message – that is to say, the words' function differs from their form. However, because the law's language ideology requires directness and surface-level meaning, lay-speaking interrogation subjects often have difficulty effectively invoking their Miranda rights. Because the legal system's search for determinacy often results in reliance on affirmative speech or actions, lay speakers often face significant disadvantages when held to the exacting expectations for legal speech because the law's insistence on direct affirmative behavior contradicts natural and frequent linguistic behaviors, which implement indirectness. Warning lay speakers about exacting legal language requirements would allow these individuals to effectively communicate in a new language environment without improperly relying on societal conversation norms while still allowing the law to maintain its affirmative language expectations.

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* J. Reuben Clark Law School, J.D. 2020. Brigham Young University, B.A. Linguistics 2017. Publishing this note would have been impossible without BYU Linguistics professors Dr. William G. Eggington's and Alan D. Manning's expertise, and J. Reuben Clark Law Professor and Utah Supreme Court Justice Thomas R. Lee's mentorship. I offer them my gratitude.

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INTRODUCTION

As Marlon Jackson sat across from a Wichita detective, he listened as the detective read his *Miranda* rights aloud detailing that, as a suspect in a criminal investigation, he had the right to remain silent, that whatever he did say would and could be used against him in a court of law, that he had the right to an attorney, and that if he could not afford one then the court would appoint

one to him.¹ Following each right, the detective asked Jackson if he understood.² Each time he answered yes.³ The detective invited him to sign a form confirming his understanding and asked, "Having these rights in mind, do you wish to talk to us?"

Jackson responded: "Can I put no 'til I get my lawyer?"

Detective: "Well, that's your decision to make."

Jackson: "But, I'm still going to have to talk to you all anyway, right?"

Detective: "I'm sorry?"

Jackson: "I'm still going to have to talk to you all about whatever?"

Detective: "Well, you know, if you want to get a lawyer that's fine, I don't have a problem with that."

Jackson: "I have a lawyer already —"

Detective: "Okay, and —"

Jackson: "— but I have to get him before I can talk or —"

Detective: "You don't have to do that, that's just —"

Jackson responded, "I don't have time for this . . ." and he initialed the form. The detective continued, "Okay, go ahead and sign your name." And Jackson did.⁴

In another instance, as Richard LeRoy Mohr's interrogation proceeded, the officers asked if they could record the interrogation.⁵ Mohr denied the request and said, "I want my lawyer. . . . [I]f you want this recorded, I want a lawyer present."⁶ The police did not record the interrogation that followed.⁷

At a different sheriff's office, Raymond Wilkinson heard his rights, as read from a written form, confirmed he understood, and refused to sign the form as a waiver of his rights.⁸ He asked if he could call his girlfriend, to which he was told no.⁹ Wilkinson then asked, "Could I call my lawyer?"¹⁰ Wilkinson was told yes.¹¹ The

1. State v. Jackson, 19 P.3d 121, 124 (Kan. 2001).

2. *Id.*

3. *Id.*

4. *Id.* at 124–25.

5. United States v. Mohr, 772 F.3d 1143, 1145 (8th Cir. 2014).

6. *Id.* (alterations in original).

7. *Id.* at 1146.

8. Dormire v. Wilkinson, 249 F.3d 801, 803 (8th Cir. 2001).

9. *Id.*

10. *Id.*

11. *Id.*

court opinion then indicates nothing else was said about the matter and the interrogation continued.¹²

So, have these suspects invoked the right to counsel guaranteed by the *Miranda* warnings? Linguistic philosophy, and most casual observers, would say, unequivocally, yes. According to linguists, and a premise to which almost every native English speaker can attest, speakers often communicate with a speech form that differs from the intended function of the speech.¹³ For example, after receiving medical advice, a patient might object to the proposed treatment by saying, “I don’t know about that.” When asked if he hit his sister, a little boy might dodge the answer by saying, “She started it!” A restaurant patron might order a meal by saying, “Can I have the steak?” Each of these examples communicates an intended meaning that is different from the strict surface meaning of each word or form. Although the patient responds to the proposed treatment using words which, by their form, indicate a lack of knowledge, the patient, who may actually understand completely, is more likely trying to say, “That idea makes me uncomfortable.” Although the little boy actually makes an observation about the way he views the world, what he means to convey is, “It’s not my fault!” And although the restaurant patron orders the meat in the form of a question, the waiter understands perfectly that the patron was not inquiring about the theoretical possibility of the steak as an option for the meal.¹⁴ This type of utterance—in which the surface meaning and surface form differ from the primary intended communicative content and ultimate function of the language—is called an indirect speech act.¹⁵ And these indirect speech acts permeate daily life.¹⁶

However, when Jackson, Mohr, and Wilkinson moved to suppress their statements, and in support, appealed the question of whether they had invoked their rights, each and every court said no.¹⁷ These courts relied on Supreme Court precedent in *Davis*

12. *Id.*

13. Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 267–68 (1993) [hereinafter Ainsworth, *Different Register*].

14. Note that, had the patron said something like “Is the steak still available?”, the waiter likely would have taken that as an inquiry as to whether the restaurant was still able to offer steak and not as an order for steak.

15. Ainsworth, *Different Register*, *supra* note 13.

16. *See id.*

17. *United States v. Mohr*, 772 F.3d 1143, 1145–46 (8th Cir. 2014); *Dormire*, 249 F.3d at 805; *State v. Jackson*, 19 P.3d 121, 125 (Kan. 2001).

v. United States,¹⁸ which held that “[m]aybe I should talk to a lawyer”¹⁹ did not qualify as an invocation of right requiring the “cessation of questioning” because the Court considered it a “reference to an attorney that [was] ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel.”²⁰

Linguistic and legal scholars have pointed out the contradiction between lay language and legal language that results in failed attempts to invoke rights during custodial interrogation.²¹ At least one scholar discussed the legal foundation of the Court’s opinions in *Miranda v. Arizona* and *Edwards v. Arizona*.²² Scholars have presented examples, and offered some analysis, of indirect speech acts in these contexts and explanations of the courts’ interpretation of them.²³ Scholars have also argued that the legal standards for language interpretation in these contexts have been inappropriate mechanisms for truly understanding what a speaker actually means to communicate even when that meaning isn’t fully reflected in the words’ surface form, and have presented arguments which would broaden the courts’ indirect speech acceptance.²⁴

Previous scholars have identified and documented numerous examples of indirect speech in custodial interrogations and have engaged in some discussion regarding legal standards for their interpretation.²⁵ This Note seeks to add to that discussion by

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

19. *See id.* at 455, 459. This utterance was followed by a clarification by the officers and a subsequent confirmation from the interrogatee that he was “not asking for a lawyer.” However, the remainder of the case and subsequent case law has pulled this phrase out of its context as justification for interpreting similar phrases as equivocal or ambiguous and thus, inefficacious attempts by suspects to avail themselves of their rights. *See, e.g., Mohr*, 772 F.3d at 1145–46; *State v. Jennings*, 647 N.W.2d 142, 151 (Wis. 2002); *infra* Part III.

20. *Davis*, 512 U.S. at 459 (emphasis in original).

21. Janet Ainsworth, ‘You Have the Right to Remain Silent . . .’ But Only If You Ask For It Just So: The Role of Linguistic Ideology in American Police Interrogation Law, 15 INT’L J. SPEECH, LANGUAGE & L. 1, 6–7 (2008) [hereinafter Ainsworth, *Right to Remain Silent*]; Marianne Mason, *Can I Get a Lawyer? A Suspect’s Use of Indirect Requests in a Custodial Setting*, 20 INT’L J. SPEECH, LANGUAGE & L. 203, 217 (2013).

22. Ainsworth, *Different Register*, *supra* note 13, at 292–301.

23. *See generally id.*; Ainsworth, *Right to Remain Silent*, *supra* note 21; Mason, *supra* note 21.

24. *See* sources cited *supra* note 23.

25. *See* sources cited *supra* note 23.

(1) more clearly framing the phenomenon for legal scholarship;²⁶ (2) thoroughly describing the linguistic scholarship of previous authors and updating the discussion on the legal history surrounding custodial interrogations and the invocation of right;²⁷ (3) showing that the combination of indirect speech acts and asymmetries in conversational power dynamics, described by other authors, ultimately result in cross-cultural pragmatic failure;²⁸ (4) analyzing more deeply in-context examples of specific mechanisms for indirect speech in custodial interrogation;²⁹ and, most significantly, (5) offering an alternative solution, couched in novel and legally founded justifications that recognize and reconcile the differing values between linguistic philosophy and the law.³⁰

In short, building off the work of other scholars, this Note explores the intersection where linguistic philosophies about standard human communication collide with American jurisprudence's exacting speech expectations. Part I of this paper investigates the linguistic philosophies and behaviors underlying indirect speech acts and the resulting impact on societal norms and expectations for communication, as documented by linguists.³¹ Part II reviews the standard language expectations of American jurisprudence and the precedent behind courts' navigation of ambiguous and unambiguous invocation of right.³² Part III highlights the collision between these two philosophies and the resulting impact on lay suspects who find themselves in an exacting legal-language setting by reviewing the work of other scholars and conducting an independent analysis of particular instances.³³ Part IV proposes a unique solution to this difficult problem

26. The most thorough, contextualized, and analytic piece on this topic is Ainsworth's article *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*. See Ainsworth, *Different Register*, *supra* note 13. However, the article focused on these characteristics as indicative of primarily female speech, only analyzed cases in terms of the courts' standards (and not based on the mechanism of direct speech employed), and was written in 1993, one year before the Supreme Court decided the pivotal *Davis* case. See *Davis v. United States*, 512 U.S. 452 (1994). Thus, additional discussion on the topic is justified, and a new recommendation for legal action is warranted.

27. See *infra* Part II.

28. See *infra* Part IV.

29. See *infra* Part III.

30. See *infra* Part IV.

31. See *infra* Part I.

32. See *infra* Part II.

33. See *infra* Part III.

by suggesting an education mechanism that can help lay speakers bridge the gap between traditional conversational conventions and the law's speech expectations.³⁴ The legal system's search for determinacy often results in reliance on affirmative speech or actions. Thus, lay speakers often face significant disadvantages when held to legal speech's exacting expectations because the law's insistence on direct affirmative behavior and language contradicts natural and frequent linguistic behaviors that implement indirectness. Providing a warning to lay speakers regarding the exacting requirements of legal language would allow these individuals to effectively communicate in a new language environment without relying on societal norms for conversation while still allowing the law to maintain affirmative language expectations.

I. LINGUISTIC PHILOSOPHY REGARDING PRAGMATIC MEANING AND INDIRECT SPEECH ACTS

Judge Learned Hand said that "words are chameleons, which reflect the color of their environment."³⁵ In recognizing both semantic and pragmatic meaning, as shown by the writing of linguistic scholars, linguistic philosophy agrees. This Part reviews key linguistic principles including direct speech acts, indirect speech acts, how these types of acts pragmatically affect conversation, and what can happen when that pragmatic exchange fails during conversation.

A. Direct Speech Acts

Semantic, or literal, language meaning can exist on a word or phrasal level, but in both cases it represents the facial meaning of the word or phrase as contained in the word or phrase's direct definition and direct form.³⁶ One example of a semantically based phrase is the direct performative speech act.³⁷ "Performative utterances are speech acts that, by being uttered, accomplish the

34. See *infra* Part IV.

35. *Comm'r v. Nat'l Carbide Corp.*, 167 F.2d 304, 306 (2d Cir. 1948); see also *Yates v. United States*, 135 S. Ct. 1074, 1083 (2015) (Justice Ginsburg citing Judge Learned Hand).

36. See Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 487 (2013); Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1631 (2017) [hereinafter Solum, *Triangulating Public Meaning*].

37. Ainsworth, *Different Register*, *supra* note 13, at 265 n.18.

state of affairs to which they refer,”³⁸ and “[d]irect performatives are those in which the speaker utters a performative utterance and ‘means exactly and literally what he says.’”³⁹ Direct speech acts convey a message concisely and directly because the very words spoken contain both the form and meaning on the surface.⁴⁰ Direct speech acts can often be identified by inserting an “adverbial ‘hereby’” that emphasizes what act the language is performing.⁴¹

For example, a medical patient might directly object to a proposed treatment by saying, “I [hereby] reject your offer for medical services and [hereby] retain my consent for performing the services.” A restaurant patron might directly order a meal by stating, “I [hereby] choose and [hereby] request the steak as the order for my meal.” The interrogation subject could say, “I [hereby] invoke my right to a lawyer and [hereby] invoke my right to remain silent, and I [hereby] declare that I will not speak with you until I have a lawyer with me.” In each of the direct speech acts, the words in themselves conveyed the message and performed the act the speaker desired to perform by using language.⁴² Further, the direct speech was able to convey these messages independent of the conversational context of the speakers.⁴³ “Law abounds with instances in which performative utterances create legally significant consequences,” including “offering and accepting in contractual relations, bequeathing property in a will, and reciting marriage vows.”⁴⁴ When an utterance—an isolated instance of verbal speech—is a direct speech act, analyzing meaning is simple because both the message and the result are self-contained within the form and the semantic meaning of words used in the utterance.⁴⁵ But, while direct phrases may be commonly expected in settings with legal consequences, they are observably not a primary means of communication in lay settings.

38. *Id.* at 265.

39. *Id.* at 265 n.18 (quoting John R. Searle, *Indirect Speech Acts*, in *THE PHILOSOPHY OF LANGUAGE* 171, 171 (A.P. Martinich ed., 1985)).

40. *Id.* at 265.

41. *Id.* at 266.

42. Whether the speech act ultimately obtains the desired result of its declared performance will sometimes depend on the hearer. For example, the restaurant patron by so speaking performs the act of choosing the steak, but whether the choice results in a steak being brought will, of course, depend on the hearer.

43. Ainsworth, *Different Register*, *supra* note 13, at 265–66.

44. *Id.* at 266.

45. *See id.* at 265.

B. Indirect Speech Acts

Often “[t]he full communicative content of [an utterance] is not reducible to its literal meaning . . . because of the role that context plays in clarifying and enriching the communicative content conveyed by [the utterance].”⁴⁶ “In the philosophy of language and . . . linguistics, the role of context” and social factors that influence the meaning of an utterance is known as “pragmatics” or pragmatic meaning.⁴⁷ Reliance on contextual and social factors allows speakers to communicate without embedding a strict and direct meaning in every utterance.⁴⁸ In other words, by relying on pragmatic meaning, speakers can communicate indirectly.⁴⁹

Indirect speech acts are those utterances in which the surface meaning and surface form differ from the primary intended communicative content and ultimate function of the language.⁵⁰ Generally, these speech acts do two things, one which is represented by the surface form, and a second, more primary purpose, which is represented by the underlying intention as derived from the context of the situation.⁵¹ These phrases contain two important but distinct features: form and function.⁵² For example, while the question “‘Can you pass the salt?’ . . . is literally a question about the addressee’s physical abilities, most would take it as a request to pass the salt. . . . Since the request is indirectly performed through the direct question, this utterance is an indirect speech act.”⁵³ Because the primary purpose of the speech act is to obtain the desired underlying goal rather than a direct response to the surface form of the utterance, the indirect communication imbedded in the utterance—the indirect speech act—“is more important than the direct one.”⁵⁴ Function over form.

The process of negotiating the understanding of indirect meaning through context and social factors occurs through

46. Solum, *Triangulating Public Meaning*, *supra* note 36, at 1632.

47. *Id.*

48. *Id.* at 1634.

49. *See id.*

50. Mary Kate McGowan, Shan Shan Tam & Margaret Hall, *On Indirect Speech Acts and Linguistic Communication: A Response to Bertolet*, 84 PHIL. 495, 496 (2009).

51. *Id.*

52. *See id.*

53. *Id.* Note that at least one linguist, Bertolet, rejects traditional notions of indirect speech act theory. *See generally id.*

54. *Id.* at 496.

“conversational implicature, the reading into spoken discourse of a meaning beyond the literal meaning of the words used in the utterance.”⁵⁵ While “speakers and hearers alike are seldom consciously aware of having made the leaps of meaning that conversational implicature entails[,]” it “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.”⁵⁶ The context of the utterance creates motivation for the speaker; through that context, the hearer can intuit the speaker’s primary purpose in speaking.⁵⁷

While direct speech act analysis is simple, if the utterance is indirect—often indicated by a surface form or meaning, different from its function, that does not indicate a desire or appear to be a meaningful response to the speaker—then the analysis must include a review of the surrounding context in order to properly unpack the intended meaning.⁵⁸ And, in everyday conversation, the determination of this function is conducted through a negotiation between the speakers in which the intended communicative content is revealed through context and throughout the interaction. Where a person is, what a person is doing, and to whom a person is speaking will all indicate the proper lens through which to interpret the utterances in a given language exchange.⁵⁹ Pragmatic meaning and indirect speech acts are culturally pervasive and thus create conversational norms, or scripts, on which people rely.⁶⁰

C. Conversational Application of Pragmatics and Speech Acts

Judge Easterbrook recognized that “[y]ou don’t have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by

55. Ainsworth, *Different Register*, *supra* note 13, at 268.

56. *Id.* at 268–69.

57. See *id.* at 268 nn.23 & 25 (citing Paul Grice, *Logic and Conversation*, in *STUDIES IN THE WAY OF WORDS* 22, 26–27 (1989)) (“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, unambiguous, and brief.”).

58. See McGowan et al., *supra* note 50, at 496–97.

59. See generally *id.*

60. See generally *id.* (suggesting that some indirect speech acts are such cemented scripts that they *always* represent the indirect meaning).

interpretive communities.”⁶¹ This includes meanings implied in indirect speech. In everyday conversation, the ability to interpret indirect speech acts and to intuit pragmatic meaning is predicated on the mutual cooperation of the speakers.⁶² Janet Ainsworth, a prominent linguist and a professor of law at Seattle University School of Law, suggested that

the accepted norms of expression in any given speech community determine the application of the rules of conversational implicature. . . . [I]n 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.⁶³

But, because indirect speech acts are so ingrained into regular societal communication, speakers often rely on their use in order to convey meaning.⁶⁴ In this act, speakers presume their conversation partner will be cooperative.⁶⁵

Beyond customary reliance on indirect speech scripts, scholars have shown that speakers often adapt their language to reflect the environment they are in, the people they are with, and the situation in which they find themselves.⁶⁶ For example, in order to be polite, respectful, or unimposing, a speaker will alter their speech.⁶⁷ When speakers recognize an authority-based power disparity between themselves and their speech partner they often use indirect language in order to gain favor by appearing more polite and submissive.⁶⁸ Scholars have documented that these attempts to be polite often take different forms. These forms include conditionalization, in which a speaker predicates language on a certain contingency with the use of if/then statements; hedging, in which a speaker softens the language with words such as “should,” “could,” or “I think . . .”; or reformation, such as when a speaker

61. *Cont’l Can Co. v. Chi. Truck Drivers*, 916 F.2d 1154, 1157 (7th Cir. 1990).

62. Ainsworth, *Different Register*, *supra* note 13, at 268–69.

63. *Id.* at 270.

64. *See id.* at 268–71.

65. *Id.*

66. Harold Anthony Lloyd, *Law’s Way of Words: Pragmatics and Textualist Error*, 49 CREIGHTON L. REV. 221, 254–64 (2016).

67. Mason, *supra* note 21, at 217.

68. Ainsworth, *Right to Remain Silent*, *supra* note 21, at 6–7.

presents the request in question form,⁶⁹ changes intonation,⁷⁰ or uses tag questions.⁷¹ Linguists have suggested that often, the more indirect the language, the more polite the language is meant to be.⁷² “These are qualities speakers have been socialized to believe may assist them in [reputation-]threatening contexts.”⁷³ The disparities resulting from variance in authority between conversation participants are known as power dynamics, or power asymmetry.⁷⁴ Research shows that the greater the perceived disparity in status between conversation participants, the greater the likelihood that the less powerful participant will seek to communicate their intent or meanings through indirect means.⁷⁵ These documented mechanisms for politeness, whether seeking help indirectly through a question, or through an up-tone in intonation, can be, to use Ainsworth’s description, “fatal”⁷⁶ when the hearer is expecting the speaker to be direct.⁷⁷

D. Cross-Cultural Pragmatic Failure

This reliance on cooperative conversation and the assumed understanding of indirect speech acts is not fool-proof.⁷⁸ Pragmatic failure occurs when one conversation participant misunderstands, or entirely misses the intended meaning of another speaker.⁷⁹ In other words, pragmatic failure occurs when one participant is unable “to understand ‘what is meant by what is said.’”⁸⁰ In the best of situations, pragmatic failure results in a re-negotiation between the speakers in order to establish mutual understanding regarding the communication.⁸¹ In the worst of situations, pragmatic failure

69. See Ainsworth, *Different Register*, *supra* note 13, at 271–83; Ainsworth, *Right to Remain Silent*, *supra* note 21; Mason, *supra* note 21.

70. ALAN CRUTTENDEN, *GIMSON’S PRONUNCIATION OF ENGLISH* 335 (8th ed. 2014).

71. See Ainsworth, *Different Register*, *supra* note 13, at 271–83; Ainsworth, *Right to Remain Silent*, *supra* note 21.

72. See Mason, *supra* note 21, at 217.

73. *Id.* at 219.

74. See Ainsworth, *Right to Remain Silent*, *supra* note 21, at 6–7.

75. *Id.* at 7.

76. *Id.* at 9.

77. See *infra* Part III.

78. See generally Jenny Thomas, *Cross-Cultural Pragmatic Failure*, 4 *APPLIED LINGUISTICS* 91 (1983).

79. *Id.*

80. *Id.*

81. See Ainsworth, *Different Register*, *supra* note 13, at 269–71.

results in each speaker entirely missing the other speaker's point, or assuming that the speech partner is rude, unintelligent, stubborn, or uncooperative.⁸²

The potential for pragmatic failure is significantly increased when conversation partners do not share the same speech culture.⁸³ The communication breakdown that occurs when there is "communication between two people who, in any particular domain, do not share a common linguistic or cultural background" is known as "cross-cultural pragmatic failure."⁸⁴ This distinction is not limited to speakers of different languages or from different countries but "might include workers and management, members of ethnic minorities and the police, or (when the domain of discourse is academic writing) university lecturers and new undergraduate students."⁸⁵ Cross-cultural pragmatic failure results from an inability of one or both participants to properly appreciate the situational context as perceived by their conversation partner, and thus the hearer can misunderstand the speaker's intended meaning. Because assumptions and expectations about language use are not shared, meaning-negotiation breaks down.⁸⁶

Different language cultures (or ideologies) result in differing speech-scripts (or common speech patterns), assumptions about language, and expectations about language use. These ideologies have been defined as "'shared bodies of commonsense notions about the nature of language in the world,' or . . . 'the ideas with

82. See Thomas, *supra* note 78, at 101–02. Thomas shares an example of potential cross-cultural pragmatic failure in which a form of "yes" in Russian, most similar to English "of course" doesn't always translate with the appropriate meaning in English:

A Are you coming to my party?

B Of course. [Gloss: Yes, indeed/it goes without saying/I wouldn't miss it for the world!]

Id. at 102. However, as she points out, "of course" is used in English to answer questions whose answer is already self-evident. Thus, if used to answer a "'genuine' question" the response "can sound at best peremptory and at worst insulting." *Id.* For example:

A Is it a good restaurant?

B Of course. [Gloss (for Russian S): Yes, (indeed) it is. (For English H): What a stupid question!]

A Is it open on Sundays?

B Of course. [Gloss (for Russian S): Yes, (indeed) it is. (For English H): Only an idiotic foreigner would ask!]

Id.

83. *Id.* at 91–92.

84. *Id.* at 91.

85. *Id.*

86. See generally *id.*

which participants and observers frame their understanding of linguistic varieties and map those understandings onto people, events, and activities that are significant to them.”⁸⁷ For example, the “polyglotism of . . . Aboriginal Australia . . . gives rise to one set of ideologies. The insistent . . . legislated monoglot standard of . . . the U.S. judicial system . . . spawns a very different set of ideological principles about what counts as ‘language’ in the first place”⁸⁸ Indeed, terms such as “legalese,” and book chapter titles such as *The Language of Lawyers and the Language of Plumbers* indicate a widely recognized distinction between the language culture of lay society and that of the law.⁸⁹ These observable distinctions between lay language and legal language ought to raise serious questions about the justifiability of holding a lay speaker, with a lay-language culture, to the often exacting standards of the legal-language culture.

The speech phenomena documented by Ainsworth and other scholars⁹⁰ mirror this same pattern in which the conversation participants—the suspects, and the investigators—do not share mutual language expectations. The inability of custodial interrogation subjects to invoke their rights is caused by cross-cultural differences in the pragmatic use of language—that of a lay speaker on one hand, and that of one expecting legally specific and determinative language on the other—and thus these interactions are a representation of cross-cultural pragmatic failure.

II. LEGAL PRECEDENT SURROUNDING LANGUAGE-IDEOLOGY AND

87. John B. Haviland, *Ideologies of Language: Some Reflections on Language and U.S. Law*, 105 AM. ANTHROPOLOGIST 764, 764 (2003) (citations omitted).

88. *Id.* at 765.

89. Edward Finegan, *The Language of Lawyers and the Language of Plumbers*, in SPEAKING OF LANGUAGE AND LAW: CONVERSATIONS ON THE WORK OF PETER TIERSMA 56 (Lawrence M. Solan et al. eds., 2015). This disparity has caused at least one linguist to conceptualize the law’s language ideology in this way:

People have an obligation to use language transparently and bear the responsibility if they fail to use language precisely and appropriately. . . . Therefore, it is fair to hold people to the objective meaning entailed by the language that they use, irrespective of what they subjectively intended that language to mean.

Ainsworth, *Right to Remain Silent*, *supra* note 21, at 15–16.

90. See, e.g., Ainsworth, *Different Register*, *supra* note 13, at 271–83; Ainsworth, *Right to Remain Silent*, *supra* note 21; Mason, *supra* note 21.

CUSTODIAL INTERROGATIONS

Any law student struggling through the refiner's fire of a first-year legal writing class can confirm that the law's expectation for language clarity differs from other speech arenas. Because the law consistently relies on the notion of "ordinary meaning," and other principles of surface clarity in language,⁹¹ the law's language ideology also holds individuals to an exacting communication standard. Thus, if a person's intent is not apparent in the "ordinary meaning" of the text, then the person risks a court overwriting that intent with what it judges to be the objectively ordinary meaning of what the person said or wrote.⁹² In this sense, in multiple legal arenas, courts have rejected the idea of underlying communicative intent in favor of relying on the language's surface meaning.⁹³ This Part reviews legal language ideology, the legal standards regarding custodial interrogation and *Miranda* warnings, and some courts' meager attempts to reconcile legal speech with lay speech.

A. Legal Linguistic-Ideology

One linguist has suggested that "[w]hen comparing the observed directives [used in the language of the law] to directives observed in everyday conversations, . . . [l]egislative texts and simple contracts of English Contract Law show a predominance of direct strategies . . . whereas conversational English favours conventionally indirect strategies."⁹⁴ The law displays its expectations for clarity, and correspondingly requisite patterns in legal language interpretation, in many branches of the legal profession.⁹⁵

91. See *infra* Section II.A.

92. *Infra* Section II.A; *infra* Part III.

93. *Infra* Section II.A; *infra* Part III.

94. Anna Trosborg, *Statutes and Contracts: An Analysis of Legal Speech Acts in the English Language of the Law*, 23 J. PRAGMATICS 31, 52 (1995).

95. For example, criminal law also contains clarity expectations. Criminal issues of rape have often hinged on the issue of consent. In the past the standard for consent was based on a "no-means-no" philosophy, in which, in order to demonstrate that she had been raped, a woman had to show that she had either given sufficient verbal or sufficient physical resistance to show that she did not consent. As this area of law has evolved, the burden has shifted towards a "yes-means-yes" standard in which the defendant bears the burden of showing that the victim did consent to the encounter. Both of these standards assume that the law can clearly identify intent through the surface meaning of language and body language. While it goes beyond the scope of this Note to argue one way or the other, the vast

One overarching feature of the courts' interpretation of language is a reluctance to investigate the context or underlying intent of a text or utterance. This general standard applies across multiple legal forums including statutory interpretation, contract law, and tort law. In terms of statutory interpretation, the Supreme Court has adopted the "plain meaning rule," stating that "where the language . . . is clear[,] . . . the words employed are to be taken as the final expression of the meaning intended" — the analysis ends there.⁹⁶ While it would be a misrepresentation to ignore the numerous canons judges use to interpret discerned ambiguities in statutes, oral speech, arguably, does not receive the same interpretive treatment. While judges vary in the extent to which they will look beyond the text and into underlying context such as legislative intent, Justice Kagan on the Supreme Court made it clear that judges all start with the text when she said, "We're all textualists now."⁹⁷ In contract law the expectation is that the parties manifest their intent in the language of the contract.⁹⁸ "In so far as their intention is an influential element, it is only such intention as the words or acts of the parties indicate; not one secretly cherished which is inconsistent with those words or acts."⁹⁹ In tort law, when a party's representations regarding consent are in question, at least one court has held that "whatever [the] unexpressed feelings may have been[,] [i]n determining whether [there was] consent[] [the hearer] could be guided only by . . . overt acts and [overt] manifestations of . . . feelings."¹⁰⁰

number of cases dealing with consent should be sufficient to demonstrate a gap between legal language expectations and that language standard enacted by the parties involved. *See, e.g.,* Nicholas J. Little, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VANDERBILT L. REV. 1321 (2005).

96. *United States v. Missouri Pac. R.R. Co.*, 278 U.S. 269, 278 (1929); *see also* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L. J. 788 (2018). Without agreeing or supporting a thesis that suggests that the plain meaning standard is a justified standard, Lee and Mouritsen show that the standard exists and that others have justified it on grounds of reliability, determinacy, and the rule of law. Lee & Mouritsen, *supra*.

97. Lee & Mouritsen, *supra* note 96, at 793 nn.10–11 (citing Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, HARV. L. TODAY (Nov. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation> [<http://perma.cc/3BCF-FEFR>]).

98. *Embry v. Hargadine, McKittrick Dry Goods Co.*, 105 S.W. 777, 778 (Mo. Ct. App. 1907) (cited in Ainsworth, *Right to Remain Silent*, *supra* note 21).

99. *Id.*

100. *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266, 266 (Mass. 1891).

In each of these different (but individually nuanced) legal forums, the same pattern prevails—surface meaning over contextual meaning. This language ideology, expecting meaning to reside primarily at the surface level, has also manifested itself in the standards required to invoke relevant rights during custodial interrogation.

*B. Legal Standards Regarding Communication in
Custodial Interrogation*

The law has established a robust set of procedural expectations surrounding custodial interrogations.¹⁰¹ These procedures have been instituted as a prophylactic protection against the violation of a suspect's constitutional rights.¹⁰² The Fifth Amendment right against self-incrimination and right to counsel¹⁰³ and the Fourteenth Amendment right to due process of law¹⁰⁴ all set constitutional standards regarding the process of dealing with a suspect of a criminal offense. The well-known and seminal case regarding application of constitutional rights during custodial interrogation is *Miranda v. Arizona*.¹⁰⁵ The Supreme Court made the procedural standard for protecting a suspect's constitutional rights very clear, stating that

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. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. 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. The defendant may waive

101. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

102. *Id.* at 463.

103. U.S. CONST. amend. V.

104. U.S. CONST. amend. XIV, § 1.

105. See *Miranda*, 384 U.S. 436.

effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, 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. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.¹⁰⁶

Thereby, the Court created what has commonly become known as the *Miranda* warning.¹⁰⁷ The Court admitted that these procedural rights extended beyond the boundaries of the Constitution but suggested that the nature of interrogation justified the overprotection of the constitutional rights, and throughout the opinion, the Court justified each explicit procedural requirement.

In *Dickerson v. United States*, the Court reaffirmed its decision in *Miranda*, declared that the decision setting procedural requirements as a prophylactic protection of constitutional right was, in fact, a constitutional decision that could not be “overruled by an Act of Congress,” and held that *Miranda* and the related cases continued to “govern the admissibility of statements made during custodial interrogation in both state and federal courts.”¹⁰⁸ While scholars debate whether the protections were legitimately constitutional or auxiliary and overbearing, the Supreme Court’s standard remains.¹⁰⁹

Since that time, the Court’s broad statement that indication in “any manner” of a desire to invoke the right required a cessation of the interrogation has been significantly narrowed.¹¹⁰ But the essential rights guaranteed by *Miranda* still stand.

106. *Id.* at 444–45.

107. A traditional representation of the *Miranda* warnings is as follows:

You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand the rights I have just read to you? With these rights in mind, do you wish to speak to me?

Miranda Warning, MIRANDAWARNING.ORG, <http://www.mirandawarning.org/mirandawarning.pdf> (last visited Apr. 4, 2021).

108. *Dickerson v. United States*, 530 U.S. 428, 432 (2000).

109. *Id.* at 444 (Scalia, J., dissenting).

110. *See generally* *Davis v. United States*, 512 U.S. 452 (1994).

1. Invoking the Miranda rights

In *Edwards v. Arizona*, the Court again faced the question of whether statements made during a custodial interrogation were admissible in court following an attempted invocation of the *Miranda* rights.¹¹¹ The interrogation subject in this case was initially successful in invoking his right to counsel when he said, "I want an attorney before making a deal."¹¹² While the questioning ceased at that time, a different officer came later, told him he "had to" talk, and continued the interrogation in which the subject eventually confessed to his involvement in the crime.¹¹³ The Court held that the interrogation subject's rights had been violated and specified "that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, 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."¹¹⁴ But still, what does it mean to express a desire to deal with the police only through counsel?

In *Davis v. United States*, the Supreme Court clarified the standards established by *Miranda* and *Edwards* and "decide[d] how law enforcement officers should respond when a suspect makes a reference to counsel that is insufficiently clear to invoke the *Edwards* prohibition on further questioning."¹¹⁵ At the outset of his interview, the suspect in *Davis* said, "Maybe I should talk to a lawyer."¹¹⁶ The interrogating officers sought to clarify the statement.¹¹⁷ The suspect indicated that he was not yet requesting a lawyer.¹¹⁸ The interrogation continued until the suspect said, "I think I want a lawyer," at which point investigators terminated

111. *Edwards v. Arizona*, 451 U.S. 477 (1981).

112. *Id.* at 479. Note that this is likely an indirect request for an attorney which the Court recognized as such. Why this indirect statement is sufficient and other similar statements are not sufficient to invoke rights is a question for future scholarship. This Note circumvents that bridge by eventually proposing a solution which would eliminate the potential for these types of inconsistencies or minute distinctions.

113. *Id.*

114. *Id.* at 484–85.

115. *Davis*, 512 U.S. at 454.

116. *Id.* at 455.

117. *Id.*

118. *Id.*

the interview.¹¹⁹ The Court took this opportunity to clarify the threshold at which a suspect attains the protections guaranteed by *Edwards*.¹²⁰

The Court acknowledged that before *Edwards* can effectively be applied, there must be an initial determination of whether rights were ever invoked.¹²¹ Seeming to ignore the language in *Miranda* that an invocation can occur in “any manner,”¹²² the Court stated:

Invocation of the *Miranda* right to counsel “requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.” But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. . . . Rather, the suspect must unambiguously request counsel. . . . “[A] statement either is such an assertion of the right to counsel or it is not.”¹²³

In essence, the Court defined these rights as passive rights, which cannot be surpassed until waived, and which cannot come to fruition until invoked.¹²⁴ In an attempt to clarify their language

119. *Id.* Note that interrogators decided to terminate the interview. The Court did not rule whether this subsequent attempt to invoke right was ambiguous or not. Further, this Note does not analyze whether the Court’s determination regarding the language was appropriate in this instance, but only argues that without additional steps to ensure the linguistic capability of interrogation suspects that the standard established by the Supreme Court is unworkable in terms of protecting a suspect’s constitutional rights. It should also be noted that throughout the opinion, the Supreme Court isolated the phrase “Maybe I should talk to a lawyer” in such a way as to appear as if the phrase itself was insufficient language to result in an invocation of right notwithstanding the surrounding context. Regardless of whether this was the Court’s intent, courts and government entities have used this argument as a way to suggest that similar phrases, independent of context, were insufficient to invoke rights. See, e.g., *United States v. Vanwaart*, No. 17-CR-4063-LTS, 2018 U.S. Dist. LEXIS 72062, at *9 (N.D. Iowa Apr. 10, 2018); *Matthews v. McKee*, No. 06-CV-15253, 2009 U.S. Dist. LEXIS 4454, at *23 (E.D. Mich. Jan. 22, 2009).

120. See *Davis*, 512 U.S. at 454. The Court also discussed the different standards applied by other courts including (1) that any request for a lawyer required cessation of the interrogation, (2) that some courts required a certain threshold before an invocation of right was deemed clear, and (3) that upon mention of a lawyer, interrogators were required to ask clarifying questions to determine the subject’s intentions. *Id.* at 456.

121. *Id.* at 458.

122. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

123. *Davis*, 512 U.S. at 459 (citations omitted).

124. See *id.* at 458–60. It seems to be a strange right which cannot be ignored by the one who would violate it, and yet is not immediately available to the holder until it is

clarity standards, the Court specified that “a suspect need not ‘speak with the discrimination of an Oxford don,’” but “must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning”¹²⁵ Since *Davis*, courts have been undecided about what “clear” and “unambiguous” mean.¹²⁶ As linguists have pointed out, the meaning of “plain meaning” is ambiguous, and so is the meaning of “ambiguity.”¹²⁷ Ambiguity is in the eye of the beholder.¹²⁸ Courts attempting to follow the Supreme Court’s instruction from *Davis* have proven that.¹²⁹

For example, in *United States v. Mohr*, the person in custody said, “I want my lawyer. . . . [I]f you want this recorded, I want a lawyer present.”¹³⁰ The court heightened the standard expected by *Davis* and agreed with the district court, which held that “this request was conditioned on whether the interview was recorded, and that since the interview was not recorded, Mohr’s condition for requiring counsel was not met.”¹³¹ Requests for an attorney need not only be clear but also unconditional.¹³²

In *Marr v. State*, the Maryland Court of Special Appeals held that the *Miranda* rights can only be claimed after the suspect is in a custodial setting, and because the defendant in that instance had sought to invoke his rights after he was arrested but before he was actually in an interrogational setting, the invocation was invalid.¹³³

unequivocally claimed and enacted. Note also that this same standard is applied to the other rights affirmed by the *Miranda* warnings.

125. *Id.* at 459.

126. *See infra* Part III.

127. *See* Lee & Mouritsen, *supra* note 96, at 793 nn.10–11, 797 n.28 (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 299 (2012)); *id.* at 798 n.31 (citing WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 792–93 (4th ed. 2007)).

128. *See id.* at 797 n.28.

129. *See infra* Part III.

130. *United States v. Mohr*, 772 F.3d 1143, 1145 (8th Cir. 2014).

131. *Id.* at 1146.

132. *See id.*

133. *Marr v. State*, 759 A.2d 327, 338 (Md. Ct. Spec. App. 2000) (dicta reaffirming that the *Miranda* rights can only be invoked in context of a custodial interrogation). However, it’s difficult to see how this difference is very significant to a person who has been arrested — likely a person in this scenario does not make a distinction between the arrest and the actual

A quick Lexis search shows courts of appeals are rife with questions about whether an alleged invocation of right was clear. When it comes to invoking a *Miranda* right, what is “clear” is remarkably unclear.¹³⁴

2. *Waiving the Miranda rights*

The Court has set a standard, albeit an ironically ambiguous one, regarding how to invoke the *Miranda* rights, and case law also governs the standards regarding effective waiver of those rights. Waiver has been elicited through speech and through signing forms signifying an assent to talk with the police notwithstanding the understood *Miranda* warning.¹³⁵

North Carolina v. Butler contains the overarching standard regarding whether a suspect has effectively waived the *Miranda* rights. In *Butler*, the interrogation subject was informed of his rights but refused to sign a form waiving them. “He was told that he need neither speak nor sign the form, but that the agents would like him to talk to them. The respondent replied: ‘I will talk to you but I am not signing any form.’”¹³⁶ The Court considered this a waiver of right and stated that

an express statement can constitute a waiver, and that silence alone after such warnings cannot do so. But . . . an express statement is [not] indispensable to a finding of waiver. An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. . . . [M]ere silence is not enough. That does not mean that the defendant’s silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. . . . [I]n at least some cases waiver can be clearly inferred from the actions and words of the

interrogation. Rather, throughout the process, the suspect is beholden to the police the entire time, so it is reasonable, especially considering the exposure to the rights through popular media, that they might expect the rights to apply as soon as they are arrested.

134. See *infra* Part III.

135. See, e.g., *North Carolina v. Butler*, 441 U.S. 369, 375–76 (1979); *State v. Jackson*, 19 P.3d 121, 124–25 (Kan. 2001).

136. *Butler*, 441 U.S. at 371.

person interrogated[.] . . . an explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent or the right to counsel¹³⁷

The idea that suspects can waive their rights through implied waiver—a course of conduct indicating waiver—has been well heeded by courts.¹³⁸ In *United States v. Acosta*, the suspect explicitly refused to waive his rights but agreed to talk.¹³⁹ The court noted the instruction from *Butler*, that a refusal to waive rights is not an invocation, and, based upon the suspect's cooperation in speaking, ruled that the suspect had waived his rights sufficiently to disable his subsequent motion to suppress based on the premise that he had explicitly refused to waive his rights.¹⁴⁰ This creates a dichotomy in which it is linguistically difficult to invoke rights, yet behaviorally simple to waive the same rights.¹⁴¹

Miranda held that rights can be invoked post waiver.¹⁴² And *Edwards* confirms that there can be waiver post invocation but that the standard is higher: "[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."¹⁴³ Even so, these standards generally go back to the initial question of what invocation of right actually is.

137. *Id.* at 373–76.

138. See Ainsworth, *Right to Remain Silent*, *supra* note 21, at 12–14 (describing a number of cases where the courts found implied waiver of rights).

139. *United States v. Acosta*, 363 F.3d 1141, 1143–44, 1152–55 (11th Cir. 2004).

140. *Id.* at 1154.

141. Compare *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266, 266 (Mass. 1891), in which the plaintiff alleged she had been vaccinated against her will. The court record suggested she said she had already received a vaccination but held out her arm to the inoculating doctor anyways. *Id.* The court held that they could not rely on unexpressed feelings but could only operate from her affirmative behaviors, and thus she had consented to the vaccination by the act of holding out her arm. *Id.* Whether holding the arm out actually indicated intent to be vaccinated could be, of course, the hotly debated subject of any given torts class. See also Ainsworth, *Right to Remain Silent*, *supra* note 21.

142. See *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966).

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

C. The Court's Warranty

The Court acknowledged that this standard would put some linguistically unsophisticated individuals at a disadvantage, stating that

requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present. But the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves. “[F]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process.”¹⁴⁴

This statement is either a warranty that the Court does not view the *Miranda* warnings as important enough to ensure accessibility through generally accessible language use, or it contains a significant misassumption about language: that understanding the warning will be sufficient to indicate to listeners the language required in order to avail themselves of the protection of the rights.

In either case, the *Miranda* warnings fail to fulfill their purpose of legitimately protecting constitutional rights. The Court suggested that the linguistic ability of an “Oxford don” would not be necessary to invoke the right.¹⁴⁵ Janet Ainsworth argues that not even an Oxford don *could* efficaciously invoke his rights.¹⁴⁶ And if that Oxford don was operating under the most common assumptions about communication in English—in other words, under a lay-language ideology—Ainsworth would certainly be right.

III. THE COMMUNICATIVE CHASM BETWEEN SUSPECT AND INTERROGATOR IN CUSTODIAL INTERROGATIONS

Succinctly put, lay language has an indirect language ideology and culture, and legal language has a direct language ideology and

144. *Davis v. United States*, 512 U.S. 452, 460 (1994) (citing *Moran v. Burbine*, 475 U. S. 412, 427 (1986)).

145. *Id.* at 459.

146. Ainsworth, *Right to Remain Silent*, *supra* note 21, at 19.

culture.¹⁴⁷ Although the legal profession embraces indirect speech acts in certain arenas,¹⁴⁸ in other arenas—such as custodial interrogation—the law is not such a cooperative speech partner.¹⁴⁹ Rather, the law has, in essence, established its own linguistic culture, in which language is often viewed with precision, and the idea of interpreting subjective context is considered an unreliable means of creating the rule of law.¹⁵⁰ This results in a legal standard for language that requires language that is direct, affirmative, and unequivocal.¹⁵¹

Linguistic scholars have documented that this difference between lay and legal language is significant because the indirect scripts relied upon in a lay setting cannot be relied upon in a legal setting in order to effectively communicate intent.¹⁵² This Note builds from those observations, suggesting that when language is the critical element dictating the potential consequences of a high-stakes interaction, such as an interrogation, this difference in language ideology and culture—between societal conversational norms predicated on indirect speech acts and the law's expectation for precision or directness—creates a chasm that must be bridged in order to avoid an injustice-inducing, cross-cultural pragmatic failure. In custodial interrogation, this cross-cultural pragmatic gap has not yet been bridged.

Although, ideologically speaking, lay individuals come from a different linguistic culture from that in which the law operates, the law still holds individuals to its expectations for direct language use.¹⁵³ Because lay people come from a different linguistic culture than the law's, Ainsworth documents that they often lack the knowledge of legal scripts necessary to employ appropriately

147. See Trosborg, *supra* note 94, at 52. Further, this present Note is not discussing the arguable double standard regarding the courts' rejection of implied invocation of right and acceptance of implied waiver or the double standard regarding the courts' expectation for express invocation of right but rejection of express non-waiver.

148. Consider, for example, the use of a casebook to teach a principle of law instead of teaching the principle upfront, or the use of a Socratic teaching method as a way to indirectly help a law student reach a particular conclusion.

149. See *infra* Part III.

150. See Ainsworth, *Right to Remain Silent*, *supra* note 21, at 14–19; Haviland, *supra* note 87.

151. See *Edwards v. Arizona*, 451 U.S. 477 (1981).

152. See Ainsworth, *Different Register*, *supra* note 13; Ainsworth, *Right to Remain Silent*, *supra* note 21; Mason, *supra* note 21.

153. See *supra* Section II.A; see *infra* Section III.C.

affirmative, direct, unequivocal, or efficacious language.¹⁵⁴ This results in an uneven playing field in which one conversant has power and knowledge, and the other has neither the power nor knowledge needed to successfully navigate the linguistic environment that is thrust upon them.¹⁵⁵

Even since *Davis*, litigation abounds regarding whether a suspect has clearly invoked these rights.¹⁵⁶ Why? Because the Supreme Court's standard is not based on the linguistic reality of indirect lay speech. Recognizing indirect lay-speech behaviors reveals that interrogation subjects frequently use indirect speech acts as a means to invoke or to attempt to invoke these rights.¹⁵⁷ In an unfamiliar or uncomfortable environment supervised by significant authority figures,¹⁵⁸ a layperson's language culture would naturally lean toward conveying otherwise direct desires by communicating through indirect speech acts such as conditionalizing, hedging, and reformation.¹⁵⁹

Linguistic scholars have documented suspects' use of indirect speech during custodial interrogations and have discovered a variety of indirect speech mechanisms employed by suspects in their attempts to invoke their rights.¹⁶⁰ Scholars have also identified the linguistic underpinnings of indirect speech and the obvious contradiction with strict language standards of the law¹⁶¹ and have presented a number of examples showing both the indirect speech of custodial interrogation subjects and the courts' response to their language.¹⁶² While some authors have presented specific

154. Ainsworth, *Right to Remain Silent*, *supra* note 21, at 2.

155. *See generally id.*

156. *See infra* Section III.C.

157. *Id.* Further, if the confession is used, a defendant's best option is to claim that their attempts to invoke a right were actually clear. This Note expects that a linguistic analysis would find the invocations likely are clear, even so, clarifying a standard would ensure that the matters could be dealt with much more quickly. If the suspect is provided a language standard to attain, the court only need to look at the instructions given to the suspect and see whether the suspect followed those instructions to invoke rights.

158. *See supra* Section I.C.

159. *See* Ainsworth, *Different Register*, *supra* note 13, at 271-83; Ainsworth, *Right to Remain Silent*, *supra* note 21; Mason, *supra* note 21.

160. *See* Ainsworth, *Different Register*, *supra* note 13, at 271-83; Ainsworth, *Right to Remain Silent*, *supra* note 21; Mason, *supra* note 21.

161. Ainsworth, *Different Register*, *supra* note 13, at 271-83; Ainsworth, *Right to Remain Silent*, *supra* note 21; Mason, *supra* note 21.

162. Ainsworth, *Different Register*, *supra* note 13, at 271-83; Ainsworth, *Right to Remain Silent*, *supra* note 21; Mason, *supra* note 21.

analyses,¹⁶³ many of these examples have been presented with little context and little analysis.¹⁶⁴ This Part of the Note reviews the scenario identified by other scholars. From the variety of language mechanisms employed by custodial interrogation subjects which have been identified by linguists, this Note focuses on three types: conditionalization, hedging, and reformation.¹⁶⁵ This Note seeks to put these examples in greater context and through deeper analysis than previous scholarship.¹⁶⁶ This Part then considers the law's own justification for its expectations of language use and submits that these justifications are not sufficient to outweigh the need to avoid linguistic injustice through additional protective measures that will allow suspects to take advantage of the rights promised to them by law.¹⁶⁷

A. The Standard Scene of Custodial Interrogation

The standard scene¹⁶⁸ for custodial interrogation involves a lay speaker, who, according to the standards of commonly accepted linguistics, is likely to rely on a lay-language ideology containing scripts of language that call for indirect indications of intent and presumption of cooperation that suggests the conversation partner should not resist intuiting the intended meaning of whatever communication is produced.¹⁶⁹ This lay speaker, equipped with all the lay-language skill culturally ingrained throughout the speaker's lifetime, is hauled, presumably against the speaker's will, to a new and situationally hostile environment. Because police are in a position of inherent authority, and because much of the suspect's agency has been taken from them, the suspect is likely to perceive a significant power asymmetry between the suspect and the police,¹⁷⁰ and the greater the perceived power asymmetry

163. See Ainsworth, *Different Register*, *supra* note 13; Mason, *supra* note 21.

164. See Ainsworth, *Right to Remain Silent*, *supra* note 21.

165. See *supra* Part I.

166. See *infra* Section III.C.

167. See *infra* Section III.D.

168. While they are certainly *significant* factors, this scene will not account for how many times a suspect has been privy to a custodial interrogation, whether or not the suspect is a native English speaker, or whether the suspect even speaks English at all. In any given interview, when judging the breadth of the cross-cultural pragmatic gap, these are relevant issues. Any of the disparities arising from these "cultural" differences can be significantly exacerbated if the suspect is a minority. See generally Haviland, *supra* note 87.

169. See *supra* Section I.C.

170. Ainsworth, *Right to Remain Silent*, *supra* note 21, at 6-7.

between the conversation participants, the greater the likelihood that there will be indirect language in the interaction.¹⁷¹ A suspect is likely to presume this will help gain needed favor in the police's eyes.¹⁷² In order to gain this favor, the suspects are likely to choose indirect speech by, among other things, qualifying their statements, softening their language, and choosing a less direct sentence formation in which to convey their messages.¹⁷³ This perceived power asymmetry is likely to continue throughout the interaction as the police exercise authority over the interrogation's location, the interrogation's tone, the interrogation's focus, other aspects of the setting, the suspect's behavior, and the interaction's potential consequences, which are unignorably significant to the suspect.¹⁷⁴ In short, equipped with linguistic scripts of indirectness, and in a setting where the power dynamic suggests an additional need for indirectness, suspects are entering an environment with an extremely heightened and exacting requirement for direct language use. But they don't know it yet. Even so, most of these individuals assume their traditional language mechanisms will be capable of communicating their intent.¹⁷⁵

In a situation where the stakes are high, the expectations for invoking rights are stringent, and the threshold for waiving the rights is simple, justice requires a second look at whether fairness allows the law to hold a lay speaker to a legal speech standard. If the standard remains as it is, people are likely to continue to assume indirect ways of speaking are acceptable in these circumstances. As has been the case since *Davis*, invocation of rights will be rare, and waiver of rights will abound.¹⁷⁶ In terms of custodial interrogation, many confessions will be tainted by motions to suppress and appeals about equivocal invocations of the right to remain silent or the right to counsel.¹⁷⁷ The law must decide whether it is seeking to perpetuate these confessions, or whether it will remain true to the principles established in the Constitution and protected by the *Miranda* warnings, which are in danger of

171. *Id.* at 7.

172. Mason, *supra* note 21, at 219.

173. See *supra* Section I.C; *infra* Section III.C.

174. Ainsworth, *Right to Remain Silent*, *supra* note 21, at 7.

175. See *infra* Section III.C; see generally Ainsworth, *Right to Remain Silent*, *supra* note 21.

176. See generally Ainsworth, *Right to Remain Silent*, *supra* note 21.

177. See *id.*

becoming ineffectual for many individuals due to cross-cultural pragmatic failure.¹⁷⁸

B. The Communicative Contradiction in Action

Janet Ainsworth framed the problem poignantly:

A linguistically informed judge would recognize that speakers in powerless positions are quite likely to resort to indirect and hedged syntactic forms in lieu of using unmodified imperatives, but that utterances in a “powerless” register are intended by their users to be no less unequivocal than those that are syntactically more direct. . . . Yet, all too frequently, reviewing courts, applying hyper-literal readings to these replies, have 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.¹⁷⁹

One possible reason for this disconnect is that the law is choosing to be an obstinate conversation partner by, in a sense, exercising willful blindness to the communicative intent of the suspect.¹⁸⁰ This choice to be uncooperative would mean ignoring otherwise obvious indirect communicative intent in favor of the unintended facial meaning of the language contrary to lay-conversational behaviors and assumptions.¹⁸¹ In this application of understanding, the hearer is left with only the surface meaning of the words, and the speaker is unable to communicate intent indirectly. However, this same conclusion regarding the final communicative result can be analyzed in a less cynical way.

An alternative conclusion to the idea that the law is simply being a stubborn and willfully blind speech partner is that a different linguistic ideology or culture is at play. As has been described,¹⁸² lay speakers communicate using a plethora of indirect

178. See *infra* Section IV.A.

179. Ainsworth, *Right to Remain Silent*, *supra* note 21, at 11.

180. One could suggest that this is a very real possibility given the police’s desire to solve a crime and the potential pressures to obtain convictions in the justice system. Whether or not it is legitimate is irrelevant if the correct protective procedures are implemented as suggested by this Note.

181. See *supra* Section I.C.

182. See *supra* Sections I.C, II.A.

scripts and mannerisms, while on the other hand, the law has established consistent precedent requiring direct speech. When speakers from these two distinct language ideologies interact, the stage is set for cross-cultural pragmatic failure.¹⁸³ Regardless of whether the law is choosing to be uncooperative or whether the speakers are operating from different language cultures, in the end the surface meaning is the only communication that the hearer accepts.¹⁸⁴

C. Indirect Mechanisms Employed in Attempts to Invoke Rights During Custodial Interrogation

Different linguists have pointed out a number of different indirect mechanisms employed by custodial interrogation subjects, including conditionalization, hedging, tag-questions, modal verb usage, use of questions instead of imperatives, and rising intonation.¹⁸⁵ This section presents and analyzes in-context examples of three of these: conditionalization, hedging, and reformation—or the transformation of an imperative into an interrogative.¹⁸⁶

1. Conditionalization

Conditionalization occurs when a speaker's statement is linked with a conditional phrase.¹⁸⁷ For example, "if" is a conditional in which the speaker essentially says, "If X state of the world exists, then Y." However, in indirect speech, conditionalized statements are not always meant to be taken literally.¹⁸⁸ Thus, when a speaker employs a conditional in order to soften their statement, a

183. See *supra* Section I.D.

184. Ainsworth, *Right to Remain Silent*, *supra* note 21. It should also be mentioned that the courts do get it right as well. See, e.g., *Edwards v. Arizona*, 451 U.S. 477 (1981); *United States v. Vanwaart*, No. 17-CR-4063-LTS, 2018 U.S. Dist. LEXIS 72062, (N.D. Iowa Apr. 10 2018). Even so, the contribution made in this Note will reduce any inconsistencies presently occurring in jurisprudence.

185. See Ainsworth, *Different Register*, *supra* note 13, at 271–83; Ainsworth, *Right to Remain Silent*, *supra* note 21; Mason, *supra* note 21.

186. As far as this Note's author has been able to tell, no one has yet conducted a *comprehensive* empirical study of the case law to determine the specific statistics regarding successful invocations of right.

187. Ainsworth, *Right to Remain Silent*, *supra* note 21, at 9.

188. *Id.*

conversation partner expecting unequivocal language might see the conditional as pivotal to the meaning of the sentence, even though actual conditionality was unintended.¹⁸⁹ This section presents examples from three cases: *United States v. Mohr*, a recent case;¹⁹⁰ *Kibler v. Kirkland*,¹⁹¹ an example brought to attention, although not deeply analyzed, by Ainsworth;¹⁹² and *State v. Effler*, a case found through independent research.¹⁹³ The section then reviews some additional examples.

a. *United States v. Mohr*. In *United States v. Mohr*, the interrogation subject alleged that during his interrogation he said, "Should I get a lawyer at this time? . . . I think I should get one."¹⁹⁴ Subsequently, when the officers asked to record the interrogation, he alleged that he said, "I want my lawyer. . . . [I]f you want this recorded, I want a lawyer present."¹⁹⁵ While the court did not credit the first statement with having actually been said, it did analyze the second statement, agreeing with the district court "that this request was conditioned on whether the interview was recorded, and that since the interview was not recorded, Mohr's condition for requiring counsel was not met."¹⁹⁶ In so doing, the court inadvertently heightened the standard required for assertions of right in that the assertion now needs to be not only clear, but also unqualified, in order to warrant efficacy. Under an indirect speech act analysis, the condition placed on the statement—"if you want this recorded"—is not relevant to the actual contextual intent to invoke the right to counsel.

b. *Kibler v. Kirkland*. In *Kibler v. Kirkland*,¹⁹⁷ as the police approached the topic of the *Miranda* rights, the suspect, Kibler, stated, "If I'm going to jail on anything, I want to have my attorney present before I start speaking about whatever it is you guys are talking about I really would like my attorney if I'm going to be

189. *See id.*

190. *United States v. Mohr*, 772 F.3d 1143 (8th Cir. 2014).

191. *Kibler v. Kirkland*, No. C 05-0347 JF, 2006 U.S. Dist. LEXIS 55719 (N.D. Cal. July 27, 2006).

192. Ainsworth, *Right to Remain Silent*, *supra* note 21, at 9.

193. *State v. Effler*, 769 N.W.2d 880 (Iowa 2009).

194. *Mohr*, 772 F.3d at 1145.

195. *Id.* (alterations in original).

196. *Id.* at 1147.

197. *Kibler v. Kirkland*, No. C 05-0347 JF, 2006 U.S. Dist. LEXIS 55719 (N.D. Cal. July 27, 2006) (cited in Ainsworth, *Right to Remain Silent*, *supra* note 21, at 9).

questioned because I don't really know what's going on."¹⁹⁸ The interrogators responded to his statement suggesting that they were also trying to figure out what was going on.¹⁹⁹ Again Kibler reiterated his point stating that "I have no problem with you guys questioning me . . . I just, if I'm going to jail, I just want my attorney around before I answer any questions."²⁰⁰ The interrogators persisted with the reading of the *Miranda* warning and Kibler agreed to talk "because [he] want[ed] to know what [was] going on."²⁰¹ The court stated that Kibler never mentioned a lawyer post-*Miranda*, and that before the *Miranda* had been fully given the right could not be invoked, even though Kibler made clear in his interrogation that he was familiar with what he identified as the "*Miranda* rights."²⁰² A linguistic view of this exchange raises the question as to whether Kibler would have successfully asserted his right if he had used un-conditionalized, direct language.

c. *State v. Effler*. The concurring opinion in *State v. Effler* analyzed Effler's behavior explicitly in terms of its conditionality.²⁰³ During the course of Effler's *Miranda*, the following exchange occurred:

EFFLER: I do want a court-appointed lawyer.

DETECTIVE: Okay.

EFFLER: If I go to jail.²⁰⁴

The police officer insisted on finishing the *Miranda*, and then, when Effler had agreed to talk, proceeded to engage Effler in an interrogation.²⁰⁵ The concurring opinion analyzing the exchange stated that "other state courts have interpreted similar conditional requests for counsel as ambiguous. . . . [T]he side that would reverse the trial court fails to recognize the inherent ambiguity in Effler's statement."²⁰⁶ The judge pointed out the multiplicity of meanings that could be derived from Effler's "conditional clause" and stated that under one meaning, "Effler's statement was conditional and ambiguous. He wanted a lawyer *if* and *when* he went to jail. . . . As the condition of going to jail had not been

198. *Id.* at *3-6.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at *16.

203. *State v. Effler*, 769 N.W.2d 880 (Iowa 2009).

204. *Id.* at 885.

205. *Id.*

206. *Id.* at 888.

fulfilled, the conditional nature of the request rendered it ambiguous.”²⁰⁷ But the judge did not stop there. He continued:

Another interpretation of Effler’s statement is “I want a lawyer if I *am* going to jail.” Even under this interpretation, it is arguable whether the condition had been fulfilled. . . . It could be argued the condition “if I’m going to jail” had been satisfied at the time Effler requested counsel, since Effler was indeed going to jail after the conclusion of the interview. However, to establish the condition of Effler’s request for an attorney (i.e. jail) had been satisfied requires changing the word “go” to “going.” Such a change expands the meaning of Effler’s statement.²⁰⁸

While it is questionable whether a suspect would reasonably distinguish between having a lawyer while with the police and having a lawyer after being in jail, it is almost certain that Effler did not analyze his own language with such scrutiny as he attempted to invoke his right to counsel.

d. Additional examples. The idea that conditional language is meant to be explicit is widely shared between courts. The California Supreme Court held that a defendant’s statement that he wanted a lawyer *if* he was going to be charged was conditional and thus ambiguous.²⁰⁹ The concurring justice in *Effler* also cites and describes cases in Arizona and in Louisiana in which the courts determined that conditionalized invocations of the right to counsel were equivocal and thus ineffectual.²¹⁰ On the other hand, one linguist reported her experience as an expert witness in which the interrogation of the suspect ended when he said, “Uh, you know what. . . . Yeah, I think I better. If I’m going to jail, I think I better talk to a lawyer first. I think, I think, I better talk to a lawyer.”²¹¹ It should be noted, though, that the decision to deem this as an acceptable invocation of right was made by the interrogating officers and not by the courts.

207. *Id.*

208. *Id.*

209. *People v. Gonzalez*, 104 P.3d 98, 105–07 (Cal. 2005).

210. *Effler*, 769 N.W.2d 880 (Appel, J., concurring) (first citing *State v. Newell*, 132 P.3d 833, 842 (Ariz. 2006) (holding that “If I’m going to jail, I want to talk to my lawyer,” was ineffectual); then citing *State v. Genter*, 872 So. 2d 552, 571 (La. Ct. App. 2004) (holding that “I already told you everything and if this is gonna continue I’ll just wait for a lawyer” was insufficient to avail a suspect of his rights)).

211. *Mason*, *supra* note 21, at 213.

2. Hedging

Hedging occurs when a speaker uses softening language, such as “I think,” “maybe,” or conditionals like “could,” “would,” and “should” in their language.²¹² Softening language can decrease the impact of the words and appear more polite because it lessens the imposition on the hearer.²¹³ Such language is an intent muffler when the hearer has an expectation for direct speech. This section reviews three cases: *State v. Jennings*,²¹⁴ an example used, but not heavily contextualized or analyzed, by Ainsworth,²¹⁵ and two cases found from independent research, *State v. Broussard*,²¹⁶ and *Matthews v. McKee*.²¹⁷ The section then highlights additional examples provided by Ainsworth.²¹⁸

a. State v. Jennings. In *State v. Jennings*, during the interrogation, Jennings said, “I think maybe I need to talk to a lawyer.”²¹⁹ The detective sought to clarify and Jennings repeated, “I think maybe I need to talk to a lawyer.”²²⁰ The detective stopped questioning, but subsequently a different detective continued the interrogation.²²¹ The Wisconsin Supreme Court refused to continue to allow for a more lenient standard than the U.S. Supreme Court²²² and heightened its expectation for direct language to match *Davis*,²²³ stating that the language was similar to that used in *Davis* and “[a]s such, it was ‘ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel.’ Therefore, Jennings’ statement was insufficient to invoke his right to counsel”²²⁴ In that case, the court explained that it was the

212. See Ainsworth, *Different Register*, *supra* note 13, at 276–77; Ainsworth, *Right to Remain Silent*, *supra* note 21; Mason, *supra* note 21.

213. Mason, *supra* note 21, at 218–19.

214. *State v. Jennings*, 647 N.W.2d 142 (Wis. 2002).

215. Ainsworth, *Right to Remain Silent*, *supra* note 21, at 17.

216. *State v. Broussard*, 224 So. 3d 23 (La. Ct. App. 2017).

217. *Matthews v. McKee*, No. 06-CV-15253, 2009 U.S. Dist. LEXIS 4454 (E.D. Mich. Jan. 22, 2009).

218. Ainsworth, *Right to Remain Silent*, *supra* note 21, at 9.

219. *Jennings*, 647 N.W.2d at 145.

220. *Id.*

221. *Id.*

222. *Id.* at 153. Note that the dissent in this case wrote a thorough argument defending the previous liberal standard regarding whether suspects had efficaciously invoked rights. *Id.*

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

224. *Jennings*, 647 N.W.2d at 151 (citation omitted).

ambiguity in the statement that made the language inefficacious.²²⁵ That ambiguity is contained in the softening words “I think” and “maybe.”²²⁶ Had Jennings used unsoftened, bald language, his invocation likely would have been efficacious.

b. State v. Broussard. In *State v. Broussard*, the reviewing court refused to correct the trial court’s denial of a motion to suppress when during the interrogation the suspect said, “I really—I really would like—I think I want a lawyer on . . . This is not right . . .”²²⁷ On examination the interrogating officer specified that she did not terminate the interview because “he continued to talk,” and “he did not say I want an attorney.”²²⁸ The difference between the language that interrogating officer testified would have caused her to stop the interview and the language that the suspect actually used is the softening language.²²⁹ In his request the suspect said “I really,” “I really,” “would like,” “I think,” and “I think.” After those words, the language of the suspect, “I want a lawyer,” are semantically identical to the language the interrogating officer said would have been enough for her to terminate the interrogation.²³⁰

c. Matthews v. McKee. In *Matthews v. McKee*, the interrogating officers insisted that the interrogation was the suspect’s only chance to really tell his side of the story—otherwise they would not know what it was and could not send his side of the story to the prosecutor.²³¹ Subsequently, Matthews, the interrogation subject, stated, “I get a chance to speak to a lawyer . . .”²³² The officer said, “Do you? Sure. If that’s what you want, but if you say that to me now . . . I’m not gonna hear what your side of the story is.”²³³ The exchange continued back and forth including one statement from Matthews that “I want you to understand that I want—But the last time I went through this, . . . [the detective] said that it’s best to talk to a lawyer. It’s best to have a lawyer present, and I’m pretty sure you’ll tell me the same thing.”²³⁴ The court stated “that while

225. *Id.* at 153.

226. Mason, *supra* note 21, at 218–19.

227. *State v. Broussard*, 224 So. 3d 23, 33 (La. Ct. App. 2017).

228. *Id.* at 32.

229. *See id.* at 32–33.

230. *Id.*

231. *Matthews v. McKee*, No. 06-CV-15253, 2009 U.S. Dist. LEXIS 4454, at *8–9 (E.D. Mich. Jan. 22, 2009).

232. *Id.* at *9.

233. *Id.*

234. *Id.* at *9–10.

Petitioner made references to speaking with a lawyer, he did not make an unequivocal request for counsel during that interview,” and that the comments that he did make were “not clear and unambiguous requests for counsel,”²³⁵ after which they cited a long list of cases in which the softening language of the suspect had sterilized the request for counsel.²³⁶

d. Additional examples. Janet Ainsworth cites a laundry list of cases in which softening language was used to reduce the “harshness of a bald demand for a lawyer.”²³⁷ Applying indirect speech act theory liberally, Ainsworth claims that in each instance the hedging caused the request for a lawyer to be deemed “ambiguous or equivocal.”²³⁸ These included the following statements: “I think I would like to talk to a lawyer,”²³⁹ “I think I will talk to a lawyer,”²⁴⁰ “it seems like what I need is a lawyer . . . I do want a lawyer,”²⁴¹ and “actually, you know what, I’m gonna call my lawyer. I don’t feel comfortable.”²⁴² Ainsworth asserts that these “are examples of the kind of attempted invocations held to be legal nullities” due to “softening language.”²⁴³

235. *Id.* at *23 (internal quotes omitted). Of course, the court’s explanation is always longer. In this case there was a thorough pattern of the petitioner initiating contact with the interrogator, potentially to inquire further about being able to speak to him with a lawyer present, which the interrogator consistently denied.

236. *Id.* at *23–24. The court’s list of softened language in full reads:

See Davis, 512 U.S. at 461–62 (suspect’s statement that “maybe I should talk to a lawyer” was ambiguous and not a clear request for counsel); *Ledbetter v. Edwards*, 35 F.3d 1062, 1070 (6th Cir. 1994) (statement that “it would be nice” to have an attorney was not a clear request for counsel); *see also Clark v. Murphy*, 331 F.3d 1062, 1071–72 (9th Cir. 2003) (state court determination that statements “I think I would like to talk to a lawyer” and “should I be telling you, or should I talk to an attorney” were ambiguous was not unreasonable); *Burket v. Angelone*, 208 F.3d 172, 198 (4th Cir. 2000) (“I think I need a lawyer” was not a clear request for counsel); *Diaz v. Senkowski*, 76 F.3d 61, 63–65 (2d Cir. 1996) (“I think I want a lawyer” and “Do you think I need a lawyer?” were not clear requests for counsel); *but cf. Abela v. Martin*, 380 F.3d 915, 926 (6th Cir. 2004) (statement “maybe I should talk to an attorney by the name of William Evans” was an unequivocal request for counsel where the suspect specifically named his attorney and gave the police officer the attorney’s business card).

Id.

237. Ainsworth, *Right to Remain Silent*, *supra* note 21, at 9.

238. *Id.*

239. *Id.* (citing *Clark v. Murphy*, 331 F.3d 1062 (9th Cir. 2003)).

240. *Id.* (citing *State v. Farrah*, 735 N.W.2d 336 (Minn. 2007)).

241. *Id.* (citing *Oliver v. Runnels*, No. CIV S-02-1147 GEB DAD P, 2006 U.S. Dist. LEXIS 50704 (E.D. Cal. July 25, 2006)).

242. *Id.* (citing *People v. McMahon*, 31 Cal. Rptr. 3d 256 (Cal. Ct. App. 2005)).

243. *Id.*

3. Reformation

Reformation occurs when commands or requests are reshaped syntactically to bear the form of a question.²⁴⁴ Questions are a common way to couch a direct command or request in more polite terms.²⁴⁵ The classic linguistics example “Can you pass the salt?”, although formed as a question, is not an inquiry regarding the theoretical physical ability of the hearer to pass the salt; rather, this is an utterance whose function is to command or request, but is merely couched in, or syntactically formed as, a question.²⁴⁶ While linguistically there is both a question and a request, the primary purpose is the request.²⁴⁷ Indirect speech act analysis says the same is true for requests for counsel.²⁴⁸ This section reviews three cases: two cases brought to attention but not heavily contextualized or analyzed by Ainsworth,²⁴⁹ *Dormire v. Wilkinson*²⁵⁰ and *Commonwealth v. Redmond*,²⁵¹ and one case found through independent research, *United States v. Hawkins*.²⁵² The section then presents some additional examples originally cited by Ainsworth.²⁵³

a. *Dormire v. Wilkinson*. In *Dormire v. Wilkinson*,²⁵⁴ during interrogation the suspect asked if he could call his girlfriend and was told no.²⁵⁵ He then asked “Could I call my lawyer?”²⁵⁶ The court concluded “that Wilkinson’s question ‘Could I call my lawyer?’ was not an unambiguous request for counsel,” and justified their finding, stating that “[o]ther courts have come to the same conclusion when presented with similarly worded statements.”²⁵⁷ One is left to wonder whether, had he phrased his request in an imperative rather than an interrogative, or even indicated the

244. See McGowan et al., *supra* note 50, at 497.

245. See Mason, *supra* note 21, at 218–19.

246. See McGowan et al., *supra* note 50, at 496.

247. *Id.*

248. Ainsworth, *Right to Remain Silent*, *supra* note 21, at 8.

249. *Id.* at 8, 17.

250. *Dormire v. Wilkinson*, 249 F.3d 801, 803 (8th Cir. 2001).

251. *Commonwealth v. Redmond*, 568 S.E.2d 695 (Va. 2002).

252. *United States v. Hawkins*, 554 F. Supp. 2d 675, 678 (N.D. Tex. 2008).

253. Ainsworth, *Right to Remain Silent*, *supra* note 21, at 8.

254. *Dormire*, 249 F.3d 801 (cited in Ainsworth, *Right to Remain Silent*, *supra* note 21, at 8).

255. *Id.* at 803.

256. *Id.*

257. *Id.* at 805.

nature of the language as a request by adding “please,”²⁵⁸ if the result would have been different.

b. *Commonwealth v. Redmond*. In *Commonwealth v. Redmond*, the interrogator ignored the suspect’s constitutional rights to due process and a trial, instead assuring Redmond that this would be the “only opportunity you’re ever going to talk and give your side.”²⁵⁹ Redmond responded, saying, “Can I speak to my lawyer? I can’t even talk to [a] lawyer before I make any kinds of comments or anything?”²⁶⁰ In response to the limited opportunities he would have to make *his* story known, these comments, when recognized as what they are—requests for counsel—appear almost desperate in their attempts to convey the intent to invoke the right to counsel. However, when discussing context, the court totally ignored the lay-language ideology that allows for requests formed as questions, and held that Redmond’s words “were not a clear and unambiguous assertion of his right to counsel. . . . At best, the defendant’s questions may be construed as a desire on his part to obtain more information about his *Miranda* rights.”²⁶¹ Curiously, the court did not give credence to the Commonwealth’s argument that Redmond had known how to invoke his right based on other aspects of the conversation.²⁶² For the court, all the evidence regarding this utterance was self-contained.

c. *United States v. Hawkins*. In *United States v. Hawkins*, following the suspect’s request “could I get my lawyer to come now or [inaudible]?”, the interrogating agent worked at Hawkins until he engaged in the interrogation.²⁶³ When the court discussed whether Hawkins’s rights had been violated, it stated that “analyzed without considering its intonational context, [the utterance] could be interpreted either as an informational request or as invoking the right to counsel.”²⁶⁴ But the court agreed with the testimony of the interrogating agent who suggested that “he understood Hawkins to be asking him whether ‘it was okay for him to call his attorney to come down, to be present.’”²⁶⁵ The court went

258. See McGowan et al., *supra* note 50, at 498.

259. *Commonwealth v. Redmond*, 568 S.E.2d 695, 697 (Va. 2002) (emphasis added).

260. *Id.*

261. *Id.* at 700.

262. *Id.* at 698.

263. *United States v. Hawkins*, 554 F. Supp. 2d 675, 678 (N.D. Tex. 2008).

264. *Id.* at 680–81.

265. *Id.* at 681.

further stating that video evidence allowed the court “to listen to the intonation of Hawkins’s question and to observe his demeanor in posing the question.”²⁶⁶ The court felt that “[b]ased on this critical assessment of more than the verbal formulation of Hawkins’s question . . . Hawkins did not articulate his desire to have counsel present sufficiently clearly.”²⁶⁷ The court failed to realize that intonation is not necessarily linked to the syntactic formulation of a phrase and its intent to inquire or to direct, but rather intonation is often linked to politeness.²⁶⁸ In this case, two features of polite speech, the reformation of the request as a question, and, presumably, a polite up-tone, sounded the death knell for this suspect’s attempt to invoke his right.

d. Additional examples. Regarding invocations of right in the form of a question, Ainsworth, liberally applying indirect speech act theory, provided another list of examples where the court interpreted the requests to be “merely questions about the theoretical availability of counsel rather than as requests for counsel.”²⁶⁹ She points out that the courts somehow compartmentalize the “preceding *Miranda* warnings telling [the interrogation subjects] that they had the right to assistance of a lawyer during questioning” as distinct from the actual attempts to invoke rights and instead interpret the “literal meaning of the arrestees’ utterances as though they were unrelated in meaning.”²⁷⁰ Examples of assertions of right held to be inefficacious because they were framed in a question include “Can I get my lawyer?”²⁷¹ “May I call a lawyer? Can I call a lawyer?”²⁷² “Do you mind if I have my lawyer with me?”²⁷³ “Could I get a lawyer?”²⁷⁴ and “Can I speak to an attorney before I answer the question to find out what he would have to tell me?”²⁷⁵ Positing that every one of these suspects

266. *Id.*

267. *Id.* (internal quotations omitted).

268. CRUTTENDEN, *supra* note 70, at 335.

269. Ainsworth, *Right to Remain Silent*, *supra* note 21, at 8.

270. *Id.* (italics added).

271. *Id.* (citing *State v. Nixon*, 687 So. 2d 114 (La. Ct. App. 1996)).

272. *Id.* (citing *State v. Payne*, 833 So. 2d 927 (La. 2002)).

273. *Id.* (citing *United States v. Whitefeather*, Crim. No. 05-388 (DWF/RLE), 2006 U.S. Dist. LEXIS 17239 (D. Minn. Jan. 17, 2006)).

274. *Id.* (citing *United States v. Wesela*, 223 F.3d 656 (7th Cir. 2000)).

275. *Id.* (citing *Taylor v. Carey*, No. CIV S-03-0477 MCE KJM P, 2007 U.S. Dist. LEXIS 12686 (E.D. Cal. Feb. 22, 2007)).

was only inquiring about the “theoretical availability of counsel”²⁷⁶ is almost too much to swallow.

While the courts retain the “reasonable police officer” standard for interpreting ambiguous, or indirect, invocations of right, they continue to ignore what any linguist would emphatically proclaim: any “reasonable speaker of English”²⁷⁷ would surely recognize these utterances as intended to invoke the referenced right. This collision between indirect speech and the expectations for directness contained in legal settings results in many frustrated suspects, implied waivers of rights, confessions, and appeals—all because of a cross-cultural pragmatic failure in which one party’s tendency for indirect speech is not recognized as legally efficacious by a speech-culture with expectations of directness.²⁷⁸

D. Justification for the Legal-Ideology of Language

While the impact of the legal-language ideology on custodial interrogation subjects is real, the caselaw defining this ideology seeks to justify the law’s stringent expectations of language. In *Davis*, the Court sought to justify its rule stating that

[t]he rationale underlying *Edwards* is that the police must respect a suspect’s wishes regarding his right to have an attorney present during custodial interrogation. But when the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning “would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity,” because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present.²⁷⁹

276. *Id.*

277. See SCALIA & GARNER, *supra* note 127, at 55. This is an unfortunate standard by which a police officer may be a reasonable police officer, but not a reasonable speaker of English.

278. The author has conducted one beta-study on this topic placing native English speakers in role-play situations to determine whether they would be able to use speech sufficiently efficacious to invoke their rights. In this study, of the four subjects, three were unable to invoke their rights, at least one confessed, and the fourth unequivocally invoked his right to counsel. The research also suggested that women may have greater difficulty using appropriately direct language than men. This research report is on file with the author. See also Ainsworth, *Different Register*, *supra* note 13; Ainsworth, *Right to Remain Silent*, *supra* note 21; Mason, *supra* note 21.

279. *Davis v. United States*, 512 U.S. 452, 460 (1994) (citation omitted).

The Court went on to justify the decision further, stating that because police officers were the ones who would have to apply this ruling, a bright-line rule could “be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information.”²⁸⁰ To make the rule more simple, the Court refused to accept statements that “might” be an invocation of right as efficacious.²⁸¹ Otherwise “[p]olice officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong.”²⁸²

While this prosecutorial mindset for enforcing a higher standard of legally efficacious speech in these scenarios increases the availability of confessionary evidence, these standards fail to account for the language customs on which interrogation subjects are relying in order to communicate their intent to invoke their Supreme Court-promised rights.²⁸³ However, beyond the law’s acceptance of lay speaker pragmatic meaning (the contextual, underlying, indirect intent of the speech), other linguistic principles can nevertheless bridge the gap between these two disparate and highly consequential ideologies.

IV. BRIDGING THE GAP, CLOSING THE CHASM, AND RECTIFYING CROSS-CULTURAL PRAGMATIC FAILURE

The examples of suspects attempting to use indirect language in order to invoke rights, and the judiciary’s consistent interpretation of these attempts as if they had no more than surface meaning is symptomatic of the cross-cultural pragmatic failure that occurs when speakers from different language ideologies fail to actually communicate.²⁸⁴ Linguistic principles such as indirect speech acts and cross-cultural pragmatic failure can be used as tools to prevent these linguistic injustices and to support and buttress the rule of law in a new way through bridging the gap between lay language and legal language.²⁸⁵ This Part considers the ramifications of a legal acceptance of indirect speech acts, examines

280. *Id.* at 461.

281. *Id.*

282. *Id.*

283. *See supra* Parts I, III.

284. *Supra* Parts I, III.

285. *See infra* Section IV.B.

the merits of cross-cultural pragmatic education, and presents a new *Miranda* that can help close the current chasm between legal language and lay language in custodial interrogation settings.

A. Total Recognition of Pragmatic Meaning and Indirect Speech Acts

Linguistic scholars have summarized different approaches courts have taken in responding to allegedly ambiguous invocations of right.²⁸⁶

First, the threshold standard requires that suspects attempting to invoke rights attain a certain level of clarity in their speech.²⁸⁷ This standard most closely reflects the standard established by *Davis*.²⁸⁸ However, linguists have rejected this standard because it would present a linguistic injustice in which speakers are unable to invoke rights because they are unaware of the clarity expectations established by the legal system.²⁸⁹

Second, the clarification standard, which was expressly rejected by the Supreme Court in *Davis*, requires investigating officers to clarify with a suspect when the suspect offers what could arguably be an ambiguous invocation of right.²⁹⁰

Third, the voluntariness standard, most often applied to determine if rights were waived, reviews the context in an attempt to discern if the confession appeared voluntary.²⁹¹

Fourth, the per se standard holds that any and all references to a lawyer are sufficient to warrant invocation of the rights.²⁹² Although at least one scholar suggests that this standard would go the farthest in protecting lay speakers of English from the disadvantage that occurs when interacting with the law,²⁹³ the Supreme Court expressly disavowed this as a viable standard,

286. See Ainsworth, *Different Register*, *supra* note 13; Ainsworth, *Right to Remain Silent*, *supra* note 21; Mason, *supra* note 21.

287. Ainsworth, *Different Register*, *supra* note 13, at 302–06; Mason, *supra* note 21, at 220–21.

288. See *Davis v. United States*, 512 U.S. 452 (1994).

289. See Ainsworth, *Different Register*, *supra* note 13, at 302–06; Mason, *supra* note 21, at 220–21. It could be argued that the solution proposed in this paper is similar to the threshold standard. However, this categorization would omit the critical offering from this Note: that lay speakers must be educated as to what the acceptable standards for effective legal speech actually are.

290. *Davis*, 512 U.S. at 460; Ainsworth, *Different Register*, *supra* note 13, at 308–15; Mason, *supra* note 21, at 220–21.

291. Mason, *supra* note 21, at 220.

292. Ainsworth, *Different Register*, *supra* note 13, at 306–08; Mason, *supra* note 21, at 221.

293. Ainsworth, *Different Register*, *supra* note 13, at 306–08.

refusing to “require law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney . . . because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present.”²⁹⁴ In one article, Ainsworth suggested that the law depart entirely from its strict linguistic ideology in favor of an interpretive standard more embracing of ambiguity and contextual pragmatic meaning.²⁹⁵ While other minds grapple with the overarching linguistic ideology that should govern law, this Note attempts to provide an instant solution to bridge the gap between legal language and lay language. The conflict between such exacting legal standards on one hand and blanket acceptances of indirect speech on the other resolves itself when the linguistic playing field is leveled through cross-cultural pragmatic education.

One potential solution is to propose that the legal system adjust its language expectations to take into account indirect speech acts.²⁹⁶ *Miranda* warnings are written for a lay audience, so the argument that lay language should be the standard for interpreting responses to them does have merit. Further, because indirect speech is so ingrained in conversational English culture, it appears downright uncooperative when legal actors resist applying a lay-language interpretation to the speech provided by non-legal actors in legal settings. The disparity between the socially assumable meaning and the superficial interpretation gleaned by the legal actor could be termed, in a sense, willful blindness.²⁹⁷

Perhaps the strongest argument in favor of interpreting lay speech in a legal setting by using a lay-language standard instead of imposing a legal-language standard is the principle of estoppel. Estoppel generally connotes the idea that when a person has relied on a particular state of facts or representations in order to make a decision with significant consequences, it would be unjust not to satisfy the expectations created by the reliance.²⁹⁸ When a person

294. *Davis*, 512 U.S. at 459–60.

295. Ainsworth, *Right to Remain Silent*, *supra* note 21, at 14–19.

296. This is the approach that Janet Ainsworth suggests in *id.*

297. Carrying the metaphor forward, the resulting tort would be something akin to negligent denial of constitutional right.

298. See, e.g., *Kirksey v. Kirksey*, 41 Ala. 626 (Ala. 1868), a case commonly used to demonstrate a scenario where modern-day estoppel principles would render enforceable

has acted in significant reliance, with a reasonable perception of particular expectations, the law has determined that it is just to respect those expectations and hold that the person's reliance was justified and ought to protect them from harm.²⁹⁹ In terms of language, it would follow that because lay individuals have relied upon culturally ingrained linguistic scripts allowing indirectness as an acceptable means of communication, it would be unjust not to satisfy that person's expectation that indirect communication would be understood by the conversation partner. In other words, if a person, in forming their attempts to create legally efficacious language, is relying on societal expectations that indirect speech will be sufficient to communicate that intent, then it would be unjust not to satisfy that expectation by instead holding that person to a legal-speech standard. Even though this principle of linguistic estoppel may be an appealing solution in an ideal world, it may not be realistic.

An unequivocal proposal that the law recognize and interpret indirect speech acts encountered in different scenarios is admittedly problematic. Interpretation of pragmatic meaning requires at least some level of interpreting the surrounding context. But, as has been described, the law intentionally avoids situations and areas where an investigation of context will be required to ascertain the appropriate outcome. This is true for statutory interpretation's "plain meaning rule," contract law's "four corners" doctrine, and tort law's view of affirmative behavior as the governing factor over unexpressed intention.³⁰⁰ While reluctance to apply contextual interpretation is not a bright-line rule, and is somewhat contingent upon the philosophy of the judge,³⁰¹ without a more robust willingness to negotiate the information that can be derived from context, navigating the world of pragmatic meaning may be somewhat out of reach. This may continue to be true until there is a defined, objective way to interpret subjective context

what otherwise would not be a contract. See Search Results for "Kirksey v Kirksey promissory estoppel," GOOGLE, <http://google.com> (enter "Kirksey v Kirksey promissory estoppel" into search bar and execute search).

299. *Kirksey*, 41 Ala. 626. While *Kirksey* itself rendered the "contract" unenforceable, it is fairly accepted that the same circumstances today would render the promise at issue enforceable under the promissory estoppel doctrine.

300. See *supra* Section II.A.

301. See generally John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70 (2006).

(something that may not be possible, or desirable).³⁰² So, absent an objective method for judges to interpret subjective context,³⁰³ a different solution will have to bridge the cultural gap.

B. Cross-Cultural Pragmatic Education

While the following proposed solution may not solve each and every area of law where cross-cultural pragmatic failure results in a breakdown of communication, educating suspects on how to speak with the appropriate level of directness during custodial interrogations could, at least in the arena of custodial interrogations, bridge the gap between the lay- and legal-language ideologies at play. Legislators are well aware of the scrutiny with which laws will be read, and parties to a contract understand that many courts will not look beyond the four corners of the document in order to discern intent – they understand that they must put their intent clearly in writing. But the same is not always true for lay speakers, who lack this nuanced pragmatic education about the law's language expectations. Although expecting the law to bend its linguistic culture to match society's linguistic culture is not necessarily realistic, helping create a ladder for lay people to reach and understand the law's language expectations is a workable solution that would have significant impacts.

Janet Ainsworth points out that when speakers do not know the appropriate way to create legally efficacious speech, they may "fail to achieve their desired legal outcomes and instead expose

302. An objective way to interpret subjective context would be the gold-standard way to apply pragmatic meaning to the law. But the idea seems to be a missing link, the discovery of which could transform the interaction between language and the law. However, given that language perpetually evolves with society, this may not be possible, or even desirable as it would likely be constantly changing and could limit language development and progression.

303. One alternative solution would be to place questions of linguistic intent before a jury. Presumably, if the standards for English communication are as ascertainable as linguists say (note that claiming too far to the contrary, that language is not a negotiation of meaning between speakers who share mutual assumptions about language use, eventually results in the argument that, because language is not definite, no one can understand anyone – this is simply not true), then the question of what was meant by what was said could be viewed as a factual determination most appropriate for the jury. Certainly, a jury would be more willing to navigate the corridors of a contextual negotiation in interpreting meaning than a court, but regardless of how straightforwardly linguistics might deal with some of these issues, the sheer number of questions riding on this issue could make giving the question to the jury economically unreasonable. Further, it is unlikely that such a standard would satisfy or conform with the law's expectations for reliability and determinacy.

them[selves] to unintended and unforeseen legal consequences. These unfortunate results are particularly likely when the speaker lacks the legal training needed to know how to shape legally felicitous speech acts.”³⁰⁴ Because “[l]egally naive speakers are often unaware that a script exists prescribing the language needed for legal efficacy,” they are often “unable to achieve their desired legal ends.”³⁰⁵ Rather than interpreting the potentially subjective lay language rampant in suspects’ attempts to invoke their *Miranda* rights, the law could implement simple procedures to educate individuals on the pragmatic expectations of the new language culture in which they find themselves.

Subjects of custodial interrogation are already informed of their *Miranda* rights. But the barrier to their exercise of those rights is an inability to meet the linguistic threshold required to invoke them.³⁰⁶ Rather than announcing the rights and leaving the path to obtain them obscure, the law should reinforce the importance of those rights by adding an additional protection that indicates to custodial interrogation subjects the language threshold required to invoke them or waive them. In other words, the law should educate these suspects on the pragmatic expectations of the new language culture—the law’s language culture—so that these suspects do not try to communicate using scripts that were reliable in a lay-language setting but that are ineffectual in a legal setting.

One linguistic scholar argues that cross-cultural pragmatic failure, like the failure apparent in custodial interrogation settings, can be overcome through express pragmatic education.³⁰⁷ She argues that “we do a grave disservice . . . if we expect [speakers of a differing language-culture] simply to ‘absorb’ pragmatic norms without explicit formalization.”³⁰⁸ But “this problem can be overcome only by giving the [speaker] the tools to make the processes of pragmatic decision-making explicit.”³⁰⁹ She suggests that “[s]ensitizing learners to expect cross-cultural differences in the linguistic realizations of politeness, truthfulness, etc.,” is essential to helping speakers of other language ideologies bridge the pragmatic gap and actually reach a level of effective

304. Ainsworth, *Right to Remain Silent*, *supra* note 21, at 2.

305. *Id.*

306. *See supra* Section II.A, Part III.

307. *See* Thomas, *supra* note 78, at 91.

308. *Id.* at 109.

309. *Id.* at 110.

communication and understanding.³¹⁰ In this way she argues that speakers can seek to “eliminat[e] simplistic and ungenerous interpretations of people whose linguistic behaviour is superficially different from their own.”³¹¹

Because suspects (lay-language speakers in legal settings) are unlikely to divine this linguistic disparity on their own, education is essential in order to eliminate the cross-cultural gap between the lay- and legal-linguistic ideologies. Otherwise, the law will continue to be perceived as an uncooperative conversation partner by those who are unable to successfully communicate their intent, and by those who recognize the reasons the disparity is occurring.³¹² Suspects’ constitutional rights, protected by the *Miranda* warning, will continue to erode simply because the *Miranda* rights themselves will be made inefficacious and moot through their inaccessibility to individuals untrained in legal linguistic ideology.

In order to bridge this gap, the legislature through statute, the executive branch through regulation of policy and procedure, or the judiciary through prophylactic protection of constitutional right, must implement a new standard to ensure the continued protection of the *Miranda* rights as a legitimate barrier between the inherent due-process dangers of custodial interrogation and suspects’ constitutional rights.³¹³ Regardless of whether the legislature, the executive, or the judiciary is the impetus for the solution, one of these bodies in the law should implement what could be termed an “additional *Miranda*.” This additional procedure is a requirement that interrogators inform custodial interrogation subjects not only of their rights, but (1) the type, or directness, of language the interrogators expect to hear in order to invoke the rights that have been listed, and (2) the types of language and behaviors that will indicate to the interrogators that

310. *Id.*

311. *Id.*

312. See, e.g., Ainsworth, *Different Register*, *supra* note 13; Ainsworth, *Right to Remain Silent*, *supra* note 21; McGowan et al., *supra* note 50; Mason, *supra* note 21; Thomas, *supra* note 78.

313. See *Miranda v. Arizona*, 384 U.S. 436, 463 (1966). The *Miranda* has already been termed a prophylactic protection of constitutional right. In other words, the Supreme Court has raised the floor in order to protect underlying constitutional rights. As the *Miranda* itself is already extra-constitutional, memorializing it likely wouldn’t be problematic (though, a discussion to this effect is beyond this Note’s scope). Further, amending the prophylactic requirement to actually effectuate its intent is even less problematic as it would serve to justify the existence of extra-constitutional rights in the first place.

the suspect is waiving their rights and is willing to have what they say used against them in a court of law.

Currently, the *Miranda* warning includes the following:

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to an attorney.
4. If you cannot afford an attorney, one will be provided for you.
5. Do you understand the rights I have just read to you?
6. With these rights in mind, do you wish to speak to me?³¹⁴

Often, interrogators will check for understanding between each warning, and they are required to obtain a confirmation of general understanding in the fifth part of the warning. This pattern is likely effective in terms of informing suspects about their rights and putting them on notice as to the significance of the conversation. However, as is, the *Miranda* warning fails to ensure its own accessibility because it either (1) incorrectly presumes that speakers will be capable of using the appropriate language necessary to invoke the right simply by virtue of having been put on notice, or (2) it ignores that people may not understand the linguistic clarity necessary in order to take advantage of the rights.

The rights could be made more effective and become a greater protection to constitutional rights through the addition of two warnings: one that educates the suspect on the appropriate standard of clarity in speech and behavior necessary to invoke the rights, and a second that educates the suspect on what speech and behavior will be considered a waiver of right. This new set of warnings could take the following form:

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to an attorney.
4. If you cannot afford an attorney, one will be provided for you.

314. *Miranda Warning*, *supra* note 107.

5. In order to invoke any of these rights, you must do so by clear, unambiguous, unequivocal, and direct language.
 - 5.A Silence will not be sufficient to invoke the right to silence.
 - 5.B Asking about whether an attorney is available will not invoke the right to have counsel present.
 - 5.C In order to invoke these rights, you must inform us explicitly that you are invoking the particular right.
6. In order to waive these rights, you may sign the form we are about to present to you, or you may continue to answer our questions without invoking these rights.
 - 6.A Even if you do not sign the waiver, if you continue to answer our questions voluntarily it may be considered a waiver of your rights.
 - 6.B If you contact us to offer additional details regarding this case without expressly invoking your rights it may be considered a waiver of your rights.
7. Do you understand the rights I have just read to you?
8. With these rights in mind, do you wish to speak to me?

The standard for clear speech has been expressed in this formulation. If this was the chosen method, investigators could also offer examples of effective speech by explaining to the suspect that phrases such as "Can I have a lawyer?" or "I think I might want a lawyer" would not be sufficiently clear to invoke right, but that phrases such as "I invoke my right to have an attorney with me" or "I invoke my right to silence and won't say anything to you" are sufficient to invoke the rights.

A different set of investigators may not require such an exacting standard. In that case, the warning might look more like this:

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to an attorney.
4. If you cannot afford an attorney, one will be provided for you.
5. **If you make any statement that suggests to us that you might want a lawyer, or that you do not want to speak with us, then we will end this conversation.**

6. If you sign the waiver, or if you continue to speak to us, we will assume you have waived your rights and agree to speak to us without invoking your rights.

7. Do you understand the rights I have just read to you?

8. With these rights in mind, do you wish to speak to me?

Regardless of whether the requirement instituted comes from the legislature, the executive, or the judiciary, the rule need not be a specific requirement for a specific set of words as long as the requirement necessitates that suspects are informed of the type of language that will effectively communicate to the investigators the suspect's intent to invoke the right. Regardless of which language standards the Supreme Court has or has not accepted as effective, different investigators could apply different thresholds for clarity and thus meet the requirement, as long as they communicated to the interrogation subject what the applicable threshold for invoking the right actually is. This removes any need to interpret context or ambiguity because the understood threshold, and the investigators' adherence to that threshold, would, in and of themselves, demonstrate the appropriate standard for any court to whom the question was presented. Assuming the threshold had been properly conveyed and understood,³¹⁵ the language then would not need to be interpreted but would, on its surface, either fall above or below the threshold. Because the suspect understood the appropriate language requirements, there would be no question as to what was meant by what was said; rather, if the instructions to invoking the right were followed, then the rights would apply. Likely, any question raised regarding whether the right had been invoked could be answered in summary judgement.

This would seem to be an extreme solution if the goal of custodial interrogation is to get a confession; however, if the goal is not simply to provoke a confession but to do so within the confines of the constitutional rights granted to the suspect, then the measure protects not only the suspect but the investigators as well. In addition to ensuring that the investigators do not violate constitutional rights in their investigation methods, the solution would also ensure that any confession received by the investigators would be acceptable for use before a subsequent

315. The idea that the threshold might not be properly conveyed or understood has some merit but is beyond the scope of this Note.

tribunal without question as to whether it ought to be suppressed as inadmissible evidence.

An interrogator could inform a suspect that only explicit direct language—such as “I am invoking my right to counsel”—will be sufficient to invoke the right, or that any mention of an attorney will result in a termination of the interrogation. An interrogator could tell the suspect that the suspect must verbally and in signature agree to the waiver of rights before the interrogation will continue, or that any cooperation in answering questions will serve as a waiver of the rights. An interrogator could do something different than is mentioned here. The exact standard is not so important as the fact that the custodian has explained the required threshold so that the lay speaker understands what type of language or behavior is required to invoke or waive the right. Of course, the interrogator will also be under the obligation to respect the invocation of those rights when the designated linguistic threshold has been met.

While the interrogators do not need to guide the suspect through every step of avoiding the interrogation, the linguistic disparity must be reduced such that the suspect can, through their speech, interact within a shared legal-language culture. This will level the linguistic playing field from which both parties are operating, it will inform the suspect how to be a viable player in the legal-language arena, and it will reduce the impacts of power asymmetry and politeness mannerisms because the interrogators will have effectively communicated that such considerations are linguistically irrelevant and potentially fatal when the suspect attempts to assert a right.

This will help the suspect understand that reliance upon societal norms for indirectness in communication is not effective and that with this new environment comes a different threshold for clear communication. The instruction will have explained what threshold for clarity and directness is acceptable as an invocation of rights and will essentially allow an interrogation suspect to requisitely translate their lay-language phrases into approved legal speech, should they choose to do so. If people are not linguistically capable of invoking the rights in the first place, trying to protect constitutional rights with *Miranda* procedures will continue to be ineffective.

As has been shown, this type of solution would satisfy the multiplicity of players involved in this discussion. The solution

would fit in with linguistic scholarship regarding cross-cultural pragmatic communication and speech act theory. It would follow the pattern established by the Supreme Court and other governmental branches in creating procedural barriers in the form of prophylactic rights, statutes, or regulations as a way to buttress the protection of important constitutional rights. And it would cater to both lay-language ideology, in that it would prevent reliance on indirect forms of speech, and to legal-language ideology by supporting the law's desire to hold firmly to definitive language and avoid the interpretation of intent. Surely, if there is a clear language standard expressed between the parties involved in the exchange, then the courts will be relieved of their duty to review context and conversation in order to interpret intent. Rather, the threshold for invoking and waiving the rights will have been explained and either have been attained or waived.³¹⁶ This solution would increase the law's justification in presuming the directness and affirmative nature of language, while respecting the existence of language ideologies less precise or exacting than itself, thus reconciling the gap between lay language and legal language so as to reduce cross-cultural pragmatic failure.³¹⁷

CONCLUSION

The Supreme Court instituted the *Miranda* warnings as a prophylactic protection of criminal suspects' constitutional rights: the Fifth Amendment rights to counsel and against self-incrimination and the Fourteenth Amendment right to due process of law. But because the legal speech standard for invoking these rights requires an exacting amount of directness, most lay speakers are incapable of availing themselves of these rights. The language ideology of the law requires directness and surface-level meaning. The language ideology of society at large is often anchored in indirectness and, subsurface, underlying indications of communicative intent that are not supplied on

316. In this regard the statement in *Davis* that "a statement either is such an assertion of the right to counsel or it is not" will actually be true, because regardless of what standard is set within a particular interrogation, the standard will be clear and whether it was met will be seen because the language used will be readily comparable to that preestablished standard. See *Davis v. United States*, 512 U.S. 452, 459 (1994) (internal quotes and citations omitted).

317. Further, this would satisfy concerns of linguists, legal scholars, judges, suspects, subpoena-riddled interrogators, other interrogators, and defense attorneys.

the face of an utterance. This disparity between the language expectations of the law and lay society often results in cross-cultural pragmatic failure in which laypersons attempt to enact legally efficacious speech without success because the law relies on the surface meaning of their statements while ignoring the underlying communicative intent.

This disparity is particularly well illustrated in the domain of custodial interrogation where lay suspects often implement what linguistic scholarship has termed indirect speech acts in order to invoke the *Miranda* rights promulgated by the Supreme Court as prophylactic protections of constitutional rights. Because indirect speech acts contain their primary function beneath the surface meaning of the phrase, these attempts to invoke the *Miranda* rights are often infelicitous because the law does not intuit the intended communicative content underlying the utterance but only gives credence to the surface meaning of the phrase. This means that suspects' attempts to invoke their rights, when phrased indirectly as questions or softened with qualifiers (such as "I think" or "maybe"), often fail. Courts erroneously interpret these as a theoretic inquisition regarding the availability of a lawyer or an ambiguous reference to a potential feeling that it might be good to have a lawyer. Linguistic theory, on the other hand, recognizes these as efficacious rights invocations couched in socially acceptable, albeit indirect, intent communication forms.³¹⁸

The disparity between lay language and legal language must be reconciled to avoid the continued cross-cultural pragmatic failure which so often occurs. While an unequivocal recognition that indirect speech acts exist may not be the most reasonable solution for a law that generally avoids the interpretation of subjective contexts, this gap could be bridged by providing pragmatic language education to interrogation suspects regarding the required threshold for invoking or waving relevant rights. This explanation need not be an aid to help the suspect through the entire process of interrogation, but it should be just enough to make

318. As shown, linguistic theory requires an investigation into the context of the speech and a reliance on presumed conversational mannerisms. If this Note were arguing for the law to accept this theory and begin investigating the true meaning of these statements, then it would be prudent to propose some means of objectively interpreting subjective contexts (which provides the linguist's interpretation of these statements). However, because this Note is only arguing that the law set expectations regarding language use, thereby eliminating the need to interpret the subjective context in these statements, such a proposal is beyond the scope of this Note. See *supra* Part I.

the linguistic expectations clear, make the *Miranda* rights effectively accessible, and level the linguistic playing field. In this way, the law can prevent the injustice that so often results when, in high stakes situations, individuals rely to their detriment on legally unacceptable conversational norms allowing indirectness.

The potential applications of indirect speech act theory to law are many, including statutory interpretation, investigation of informed consent in a medical setting, investigation of consent to sexual encounters, and contract law, but this Note has attempted to appropriately treat only one—indirect speech during custodial interrogation. Because, after all, if an Oxford don, operating under the most common assumptions about conversational English, is not capable of efficaciously invoking the *Miranda* rights,³¹⁹ then who is?

319. Ainsworth, *Right to Remain Silent*, *supra* note 21, at 19.

