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Say It Loud: Indirect Speech and Racial Equality in the Interrogation Room

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SAY IT LOUD: INDIRECT SPEECH AND RACIAL EQUALITY IN THE INTERROGATION ROOM

C. Antoinette Clarke[*]

I. INTRODUCTION

To put it in the simplest of terms, the criminal justice system treats ethnic and cultural minorities differently than it does whites. This disparate treatment is reflected in the end product of the system, that is, the fact that African Americans are vastly over-represented in prisons and jails relative to their numbers in the general population.[1] It extends as far back as the first level of the criminal justice process, the point at which police decide who they will investigate, approach, stop, frisk, and ultimately arrest.[2] Black and Hispanic males are more likely to be stopped by police than any other population group.[3] But perhaps the most pernicious area in which this dissimilar treatment is abundantly evident is in the constitutional protection (or lack thereof) afforded minority suspects.

Constitutional rights can be diminished or endangered in many ways. The most obvious, of course, is a frontal assault in which opponents argue that the right itself does not exist. A right could be attacked less directly as well—from the "flanks" as it were—by adversaries attempting to narrow the scope of the right. However, a much more subtle tactic exists by which opponents of the constitutional right seek to weaken it from the "inside," that is, from the position of the rights-holder's attempts to invoke the right.

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1. *See* MARC MAUER, THE SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM 3 (1990) (one in four young African-American men are under custodial supervision of some kind; the comparable figure for whites is one in 25).

2. *See generally* Robert H. Whorf, *"Coercive Ambiguity" in the Routine Traffic Stop Turned Consent Search*, 30 SUFFOLK U. L. REV. 379 (1997); David A. Harris, *Factors for a Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994); Jennifer A. Larrabee, Note, *"DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice*, 6 J.L. & POL'Y 291 (1997).

3. *See, e.g.*, Harris, *supra* note 2, at 681 (arguing that the aggressive use of *Terry* stops in high crime neighborhoods results in a higher number of stops for African Americans and Hispanic Americans, the people most likely to live in such neighborhoods); Tracey Maclin, *"Black and Blue Encounters" – Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 251-53 (1991) (describing numerous instances of less than legal street encounters between police and black males, concluding that "[b]lack men know they are liable to be stopped at any time, and that when they question the authority of the police, the response from the cops is often swift and violent. This applies to black men of all economic strata, regardless of their level of education, and whatever their job status or place in the community.").

The invocation of the Fifth Amendment right to counsel established under *Miranda v. Arizona*[4] is one such right. *Miranda* has been overruled by Congressional fiat,[5] decimated by judicially crafted qualifications[6] and the public safety exception,[7] and no longer operates as the restraint to overzealous law enforcement that its progenitors intended.[8] *Miranda* has been rendered an abject failure, even when viewed from the limited perspective of providing a "bright-line" rule for police interrogation practices.[9] To a large extent, *Miranda* has produced paradoxes that the Warren Court would never have imagined—circumstances in which *Miranda* has been stripped of its Constitutional status,[10] and the safeguards outlined in the decision have served to protect only the strong and the savvy.[11]

II. THE DEVELOPMENT OF THE RULES OF INVOCATION

The privilege against self-incrimination is firmly ingrained in American popular culture as well as its jurisprudence.[12] Indeed, twenty-five years ago, Chief Justice Rehnquist remarked that "at this point in our history virtually every schoolboy is familiar with the concept, if not the language, of the provision that reads: 'No person . . . shall be compelled in any criminal case to be a witness against himself . . . .'"[13] The irony in *Miranda* lies in the Court's recognition that a suspect who does not ask for counsel is the person most in need of a lawyer's assistance.[14]

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4. 384 U.S. 436 (1966).

5. *See* 18 U.S.C. § 3501 (1994).

6. *See* Charles F. Baird, *The Habeas Corpus Revolution: A New Role for State Courts?*, 27 ST. MARY'S L.J. 197, 209 (1996).

7. *See* Stephen F. Goodman, *Criminal Law—Fifth Amendment* Miranda *Warnings—An Exception to Administering* Miranda *Warnings Exists Where Police Questioning Is Prompted by Concern for Public Safety*, New York v. Quarles, 16 ST. MARY'S L.J. 489, 501 (1985).

8. *See* Nancy M. Kennelly, Note, Davis v. United States: *The Supreme Court Rejects a Third Layer of Prophylaxis*, 26 LOY. U. CHI. L.J. 589, 595 (1995).

9. *See The Supreme Court, 1984 Term - Leading Cases*, 99 HARV. L. REV. 120, 141, 146 (1985).

10. *See* Michigan v. Tucker, 417 U.S. 433, 444 (1974) (recognizing that *Miranda* warnings are merely procedural safeguards against self-incrimination, and therefore not protected by the Constitution, the Court stated: "We cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is currently conducted." (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966))).

11. *See infra* notes 66 through 104 and accompanying text.

12. *See* Michigan v. Tucker, 417 U.S. 433, 439 (1974).

13. *Id.*

14. *See Miranda*, 384 U.S. at 470-71.

The tension between adhering to the rule of law and enforcing order is the fundamental dichotomy confronting police officers.[15] Socio-political factors, in turn, affect police reactions to this tension.[16] As Jerome Skolnick aptly observed, "when prominent members of the community become far more aroused over an apparent rise in criminality than over the fact that African-Americans are frequently subjected to unwarranted police interrogation, detention, and invasions of privacy, the police will continue to engage in such practices."[17] And so they have.[18] Equally apt is the observation that if rights are respected only if asserted in the majority manner, only the majority's rights are protected. And so they are.

A brief view of the social and political backdrop of *Miranda* is warranted here. It is impossible to analyze *Miranda* without the benefit of some of the practical realities that underscore the decision. The majority of Justices who crafted *Miranda* had several alternatives to consider in deciding the scope of the right against self-incrimination.[19] Thus, *Miranda* represents a compromise struck by the majority that reflected the social and political conditions that must have either subtly or consciously affected the majority's reasoning.[20]

The socio-political climate during which *Miranda* was decided was strikingly similar to today's socio-political climate: rising crime rates and increased racial tension. Social conditions in the 1960's were a motivating factor for change. Race riots played a prominent role, fueled in large part by the friction between the police and the black communities in northern ghettos.[21] The civil rights movement had revealed the abuse of power by

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15. *See* SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 222, 226 (1980).

16. *See* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 239-40 (3d ed. 1994).

17. *Id.*

18. *See, e.g.*, Paul W. Valentine, *Maryland Settles Lawsuit Over Racial Profiles; Police Allegedly Targeted Minorities for Searches*, WASH. POST, Jan. 5, 1995, at B1; Michael Schneider, *State Police I-95 Drug Unit Found to Search Black Motorists Four Times More Often Than White: Analysis Raises Questions About Trooper Procedures*, BALTIMORE SUN, May 23, 1996, at 2B; Hart Seely, *Black Males Say It's Normal for Police to Find an Excuse to Stop Their Cars and Hunt for Drugs*, SYRACUSE HERALD A.M., Oct. 22, 1995, at A12; Linn Washington, Jr., *Racism is Driving the War on Drugs in New Jersey*, STAR-LEDGER (Newark, NJ), June 19, 1996, at 99; Patrick O'Driscoll, *Drug Profile Lawsuit Settled; Minority Motorists Stopped*, DENVER POST, Nov. 10, 1995, at A1.

19. *See* Miranda v. Arizona, 384 U.S. 436, 483-90 (1966). Arguably, a more radical approach than that crafted by the majority could have meant the end for confessions as a vital tool of law enforcement. *See* YALE KAMISAR, MODERN CRIMINAL PROCEDURE (8th ed. 1994). A weaker alternative to *Miranda* could have run against the countervailing current of protection for the poor, the underprivileged, and the disempowered, against the overwhelming power of the government. *See Miranda*, 384 U.S. at 457, 472-473.

20. *See Miranda*, 384 U.S. at 479-81.

21. *See* SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE

police as a means of squelching the demand for equal rights.[22] As one prominent historian put it, "the criminal-justice crisis of the 1960's focused on the cops in the ghetto."[23]

Between 1964 and 1968, rioting spread throughout forty-three American cities after a white police officer shot and killed a black teenager.[24] Ultimately, the Kerner Commission, appointed by President Lyndon B. Johnson to investigate these civil disorders, concluded that the root cause of the problem was racism.[25] Significantly, as reflected by the first riot in New York, the police were the primary instigators of the riots.[26] Blacks in northern ghettos, in turn, viewed the then all-white police as a virtual "army of occupation" in their communities.[27] To counterbalance this trend, the Supreme Court, led by Chief Justice Earl Warren, stressed the need to temper police zeal and afford some measure of justice and equality to the disempowered.[28]

Miranda arguably represents the high-water mark of the Warren Court's activism. The decision is the foundation of the evolving case law concerning the Fifth Amendment right to counsel. In *Miranda*, the Supreme Court recognized the need to establish a protective rule in order to safeguard the suspect's Fifth Amendment right to be free from compulsory self-incrimination.[29] The rule has two interrelated objectives: it protects the suspect's constitutional rights and ensures that the confession will not be rendered inadmissible.[30] To this end, the familiar warnings[31] were crafted in the belief that they would be sufficient to overcome the "inherent coerciveness" of the

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222 (1980).

22. *See id.*

23. *Id.*

24. *See id.* at 223.

25. *See id.* at 224.

26. *See id.*

27. *See* WALKER, *supra* note 21, at 222.

28. *See* WALKER, *supra* note 21, at 229-30; Miranda v. Arizona, 384 U.S. 436, 439 (1966).

29. *See generally Miranda*, 384 U.S. at 436 (noting that widespread abuses by police officers, such as beatings, hangings, and whippings were being used to elicit confessions).

30. *See* Moran v. Burbine, 475 U.S. 412, 426 (1985) ("*Miranda* attempted to reconcile [competing] concerns by giving the defendant the power to exert some control over the course of the interrogation.").

31. The *Miranda* court held that a suspect must be clearly advised on his right to remain silent, and that anything he says can be used against him in a court proceeding. The suspect must also be informed of his right to counsel, and must be advised that if he is unable to afford counsel, one must be provided for him at the state's expense. The court went on to hold that after being advised of these rights, the suspect can choose to waive the rights and answer questions. Nevertheless, if during the questioning, the suspect indicates "*in any manner*," that he has decided to reinvoke the right to counsel or silence, the officers must immediately end the interrogation. *See Miranda*, 384 U.S. at 444-45 (emphasis added).

custodial interrogation.[32] The guiding principle behind the decision was to level the playing field with regard to police-controlled investigations.

Some critics argued that the decision was antithetical to law enforcement,[33] while others have asserted that "far from handcuffing the police, the warnings work to liberate the police. *Miranda*'s much maligned rules permit the officer to continue questioning the isolated suspect, the very process the Court found to be in violation of the Fifth Amendment."[34] Still others have offered proposals to "Mirandize" *Miranda*, that is, to demand that all suspects in custody have a "nonwaivable" right to "consult" with an attorney before any police interrogation.[35]

Within one week of issuing *Miranda*, the Court let it be known that, much like politicians and the American public, it was acutely conscious of the insidious effect of crime on the social fabric.[36] Congress was likewise motivated by the "tough on crime" clarion call, and responded by enacting the Omnibus Crime Control and Safe Streets Act of 1968. Section 3501 of the Act overruled *Miranda*.[37]

Although the provision overruled *Miranda*, Section 3501 did not reject *Miranda* outright. It did, after all, recognize that the warnings played an important role in determining the voluntariness of a confession.[38] The statute merely refused to accord the warnings the talismanic status conferred by *Miranda*.[39] The relevant provision states that in any federal jurisdiction or in the District of Columbia, a confession "shall be admissible in evidence if it is voluntarily given."[40] It also sets forth a list of factors to be taken into account in assessing the voluntariness of the confession,[41] including whether the defendant knew about the right to remain silent and that anything he said could be used against him;[42] whether he was advised of the right to counsel

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32. *See id.*

33. *See* DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 211 (1991).

34. Steven J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 454 (1987).

35. *See* Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1842 (1987).

36. *Johnson v. New Jersey*, the case in which the Court held that *Miranda* would not apply retroactively, was decided one week after *Miranda*. *See* Johnson v. New Jersey, 384 U.S. 719 (1966). Reluctant to release numerous prisoners by applying *Miranda* retroactively, the majority noted that such a ruling "would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards." *See id.* at 731.

37. *See* 18 U.S.C. § 3501 (1994).

38. *See* 18 U.S.C. § 3501(a) (1994).

39. *See id.*

40. *Id.*

41. *See* 18 U.S.C. § 3501(b) (1998).

42. *See* 18 U.S.C. § 3501(b)(3) (1994).

before being interrogated;[43] and whether the confession was given in the absence of counsel.[44] The presence or absence of any of these factors—including the *Miranda* warnings—is not dispositive on the issue of the voluntariness of the confession.[45]

The enactment itself amply illustrates the legislative response to the Court's activism. The public clamor for "tough on crime" legislation was overwhelming.[46] The Bill was not only popular with Congress, it also echoed public sentiment.[47] However, "it sat there unused by prosecutors for 30 years."[48] In early February, the Fourth Circuit Court of Appeals revived the constitutional status of Section 3501 when a three-judge panel declared that in federal cases, investigators and officers need not advise suspects of their right to remain silent and consult a lawyer in order for a confession to be admissible.[49] Commentators and legal scholars believe that the decision "sets the stage for a significant Supreme Court decision revisiting the status of *Miranda*."[50]

Within three years of the enactment of Section 3501, the Supreme Court launched its own *Miranda* counterrevolution. The changing composition of the Supreme Court altered *Miranda's* latitude, resulting in a retrenchment that restricted the opinion's reach[51] and ultimately divested it of its constitutional status.[52] Despite the erosion of the opinion's effect, however, one facet of *Miranda* withstood dilution for many years—the seemingly absolute prohibition of interrogation when a suspect invokes her right not to be questioned without an attorney. In *Edwards v. Arizona*,[53] the Court held that once the accused expresses the desire not to be questioned without an attorney

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43. *See* 18 U.S.C. § 3501(b)(4) (1998).

44. *See* 18 U.S.C. § 3501(b)(5) (1998).

45. *See* 18 U.S.C. § 3501(b) (1998).

46. *See* JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITES STATES, 1945-1974, 651 (1996).

47. *See id.* at 650-51.

48. William Glaberson, *After 33 Years of Controversy*, Miranda *Ruling Faces Its Most Serious Challenge*, THE N. Y. TIMES, Feb. 11, 1999, at A24.

49. *See* Brooke A. Masters, *Ruling on "*Miranda*" Appears Headed for High Court*, THE WASH. POST, Feb. 11, 1999, at B09.

50. Glaberson, *supra* note 48, at A24 (quoting A.E. Dick Howard, Professor of Constitutional Law, University of Virginia Law School).

51. *See* Harris v. New York, 401 U.S. 222 (1971) (holding that statements taken in violation of *Miranda* could be used to impeach the defendant's testimony at trial, despite *Miranda*'s dicta to the contrary); Oregon v. Hass, 420 U.S. 714 (1975) (same).

52. *See* Michigan v. Tucker, 417 U.S. 433 (1974) (declaring that the "procedural safeguards" erected by *Miranda* were not constitutional mandates, but rather prophylactic measures adopted to insure that the Fifth Amendment right against compulsory self-incrimination was protected.).

53. 451 U.S. 477 (1981).

present, he "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."[54]

Extending *Edwards* to its logical limit, the majority in *Minnick v. Mississippi*[55] seemed satisfied with the apparent clarity and certainty of the *Edwards* rule.[56] Mere consultation with an attorney is not sufficient to protect the suspect once she has invoked her right to counsel under *Edwards*.[57] Rather, when the suspect asks for an attorney, "interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney."[58] It is evident, therefore, that a suspect who unequivocally demands an attorney before being questioned receives the full panoply of *Miranda's* "prophylactic" safeguards.

It is the equivocal request for counsel that has provided the final death-blow for *Miranda*. Despite the language in *Miranda* that seems to hold that interrogators must recognize a request for an attorney if made "in any manner,"[59] state and lower federal courts faced with equivocal requests for counsel have adopted one of three different approaches. Some jurisdictions require that the invocation of the right to counsel be direct and unambiguous before it is given any legal effect.[60] Other jurisdictions allow police to continue questioning a suspect whose invocation is ambiguous or equivocal, but only to determine if the suspect in fact desires an attorney.[61] Still others treat any recognizable invocation as legally sufficient to bar further interrogation.[62]

For years, the Supreme Court was able to sidestep the issue.[63] However, in *Davis v. United States*,[64] the Court was finally forced to take a stand on

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54. *See id.* at 484-85.
55. 498 U.S. 146 (1990).
56. *See id.* at 151.
57. *See id.* at 153.
58. *Id.*
59. Miranda v. Arizona, 384 U.S. 436, 444 (1966).
60. *See id.*
61. *See* United States v. Cherry, 733 F.2d 1124 (5th Cir. 1984), *cert. denied*, 479 U.S. 1056 (1987).
62. *See* Howard v. Pung, 862 F.2d 1348 (8th Cir. 1988), *cert. denied*, 492 U.S. 920 (1989) (adopting cessation upon reference approach); People v. Kreuger, 412 N.E.2d 537 (Ill. 1980) (same).
63. For example, in *Smith v. Illinois*, 469 U.S. 91 (1984), the Supreme Court recognized that lower courts had "conflicting standards for determining the consequences of such ambiguities," but that the Court did not have to confront the issue of ambiguous requests for counsel because the judgment of that case had to "be reversed, irrespective of which standard is applied." *Id.* at 95-96, 96 n.3. The issue arose again in *Connecticut v. Barrett*, and was disposed of similarly. *See* Connecticut v. Barrett, 479 U.S. 523 (1987).
64. 512 U.S. 452 (1994).

which of the approaches was correct and came up with an answer that no one could have foreseen: none of these doctrinal approaches was correct. According to the court in *Davis*, police have no duty to clarify an ambiguous request for counsel. The burden is therefore placed on the suspect to ensure that her rights are protected. This decision dictates that the police need only offer a suspect access to his *Miranda* rights—the suspect must use the correct words and degree of clarity in order to actually invoke these rights. If a suspect thinks he is invoking his right to an attorney, but the police interrogators do not, then the failure to respect that right is the fault of the suspect. According to the Court, "[t]he right to counsel established in *Miranda* was one of a 'series of recommended "procedural safeguards" . . . [that] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.'"[65]

But the objective of promoting effective law enforcement is never served by valuing the form of invocation over the substance of the right itself. The invocation standard adopted by the Supreme Court, although intended to protect the individual from the abuse of power by police, in practice provides significantly inferior protection to the least powerful in society. The rules protect the shrewd criminal, not the powerless suspect.[66]

III. THE DISCRIMINATORY IMPACT OF THE *DAVIS* REQUIREMENTS

The current law concerning the invocation of Fifth Amendment rights provides enhanced constitutional protection from police interrogation for those who use direct and assertive modes of expression, but penalizes those who adopt indirect or qualified ways of speaking.[67] The degree of protection

65. *Id.* at 457 (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

66. David Simon describes the tale of two professional hit men who "matched" each other corpse for corpse, as Baltimore's "premier contact killers." *See* SIMON, *supra* note 33, at 210. Every instance in which they were brought into police headquarters for questioning yielded the same result. *See* SIMON, *supra* note 33, at 210. These consummate criminals knew exactly what to do during a custodial interrogation. They would be read *Miranda*, they would immediately invoke the right to an attorney, and the process would unceremoniously end. *See* SIMON, *supra* note 33, at 210. *Miranda* was their staunchest ally. The close quarters and police-dominated ambiance failed to threaten these men into submission. *See* SIMON, *supra* note 33, at 210. What is ironic about all of this is that *Miranda* wound up protecting not the poor, indigent, intimidated suspect that the Warren Court sought so fervently to shield from police domination. *See* SIMON, *supra* note 33, at 211. Rather, it became the sword of the tough, hardened criminal who has the requisite emotional make-up to resist the "inherent" pressures of custodial interrogation. *See* SIMON, *supra* note 33, at 210.

67. Janet Ainsworth has identified several linguistic behaviors that are characteristic of an indirect or deferential manner of speaking, including: (1) use of hedges (expressions that make a statement less precise or emphatic, such as "kind of," or "perhaps", (2) use of tag questions (used when the speaker is seeking to solicit agreement, corroboration, or acquiescence, or when

afforded the varying groups clearly rests on the assumption that people naturally do and should use direct and unqualified ways of speaking. However, this linguistic behavior is most typical of white American males.[68] Females, ethnic, and cultural minorities more often adopt indirect and deferential speech patterns. Because the legal doctrine governing a person's rights during police interrogation treats prototypically *male* behavior and experience (confident, assertive, powerful) as synonymous with *human* behavior and experience, this ostensibly gender- and race-neutral doctrine contains a hidden bias. The real world repercussions of such a bias are by no means inconsequential. If minorities are indeed disadvantaged by this doctrine, then the law has compromised the ability of millions of arrestees to exercise their constitutional rights.

By stressing the need for an "unequivocal" assertion of the need for an attorney as a prerequisite for a suspect to terminate custodial interrogation, the court in *Davis* practically insured that these groups would be unduly disadvantaged.[69] By rewarding the "direct and assertive" speech patterns of the powerful,[70] the Court discriminates against the indirect speech patterns characteristic of the powerless,[71] the very persons these prophylactic rules were intended to protect.

Davis' command is stringent: absent an unequivocal request for counsel, *Miranda*'s safeguards are illusory.[72] Expressions such as: "Maybe I should talk to a lawyer" simply won't suffice.[73] In fact, such a statement will not even require the interrogators to stop questioning the suspect in order to clarify what she meant or desired.[74] The standard as set forth in *Davis* instead puts the burden on the suspect to "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."[75] The arbiter of

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the speaker wishes to avoid confronting the listener with an unqualified assertion, for example, "I should see a lawyer, shouldn't I?;") (3) use of modal verbs (such as "may," "might," "could," or "ought," again used to soften emphasis); and (4) avoidance of imperatives and the use of indirect interrogatives as a substitute for the imperative (for example "Would you call my lawyer?" instead of "Call my lawyer."). The interrogatives are less presumptive and more tactfully deferential than baldly stated imperatives.). Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L. J. 259, 275-82 (1993).

68. *See id.* at 315-16.
69. *See Davis*, 512 U.S. at 459-60.
70. *See* Ainsworth, *supra* note 67, at 315.
71. *See* Ainsworth, *supra* note 67, at 316-19.
72. *See Davis*, 512 U.S. at 462.
73. *See id.*
74. *See id.*
75. *See id.* at 459.

whether the suspect made an unequivocal request is the officer at the station,[76] that is, the person in control of the inherently compulsive interrogation process.[77]

Clearly, what constitutes a request according to one person may not be considered such by another. The Supreme Court itself recognized this danger when it stated:

> We recognize 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.[78]

According to Justice Souter, many suspects "lack anything like a confident command of the English language," and many people "will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that the ability to speak assertively will abandon them."[79] But isn't it the powerless—those subject to fear, intimidation, poor language skills—who are most in need of the protections of the Fifth Amendment? Recognizing the problem without remedying it sends a clear message to the affected class. At best, it represents indifference to our cultural differences; at worst, antipathy: "We will accord you the protection of our laws, so long as you think and act as we do."

Legal scholars have examined the role of gender, race, and cultural background in language and mode of expression, and have found that all three factors can have a profound effect upon the invocation of the right to counsel.[80] And lest we fall into the trap of believing that this problem is simply bi-chromatic—and therefore easier to ignore—of the many societies that differ from the Anglo-European structure, Asian societies display the greatest conflict with the Supreme Court's assumptions regarding the assertion of individual rights.[81] While the assertion of individuality is endorsed and

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76. *See id.* at 461.

77. *See id.* at 460.

78. *Davis*, 512 U.S. at 460. Despite recognizing these concerns, Justice O'Connor nevertheless found that a recitation of the *Miranda* warnings is the only constitutional responsibility police officers have prior to and during interrogation. *See id.*

79. *See id.* at 469-70 (Souter, J., concurring in the judgment).

80. *See generally* Ainsworth, *supra* note 67; Thurman Garner, *Cooperative Communication Strategies: Observations in a Black Community*, 14 J. BLACK STUD. 233 (1983). For a complete discussion of speech communication and the differences between the sexes in the workplace, *see* DEBORAH TANNEN, TALKING FROM 9 TO 5: HOW WOMEN'S AND MEN'S CONVERSATIONAL STYLES AFFECT WHO GETS HEARD, WHO GETS CREDIT, AND WHAT GETS DONE AT WORK (1994).

81. *See* HARU YAMADA, AMERICAN AND JAPANESE BUSINESS DISCOURSE: A COMPARISON

encouraged in American society, Asian societies operate to the contrary. Members of an Asian community, regardless of whether they are in the country of origin of their culture or in American society, are taught to respect and support the good of the group over the good of the individual.[82] This outlook translates into a greater deference to authority and a predisposition to maintain silence when faced with a problem.[83] As one commentator observed:

> Each American individual has rights, expresses these rights, and expects others to listen to such requests. When a right is abused, it is equally as important for the abused to "stand up for his or her rights," as it is for others to try to correct the unjustified situation. Thus rights are a critical criteria for individuality . . . . For Japanese, the proverb "The nail that sticks out gets hammered back in" reflects how [a person] should not stand out.[84]

Consequently, a member of an Asian society would be much less likely to assert his individual rights. To do so would be to disregard a societal paradigm that is firmly entrenched within the Asian culture.

Another aspect of the cultural differences that affect an Asian American's invocation of the right to counsel is the mode of speech used. While Americans are noted for their direct manner of speech, equating directness with power and intelligence, many other cultures utilize varieties of indirectness as the norm in communication.[85] The use of an indirect method of speech is preferred in Asian society and is considered sophisticated.[86] Furthermore, a greater value is placed on silence than speech in Asian societies, and ideas are believed best communicated without being explicitly stated.[87] Transferring this idea into the Fifth Amendment context, it is easy to see how this cultural pressure and indirect method of speech would inhibit a direct and unequivocal invocation of the right to counsel.

OF INTERACTIONAL STYLES 28 (1992).

82. *See id.* at 29-33.

83. *See id.*

84. Adam Geoffrey Finger, Comment, *How Do You Get a Lawyer Around Here? The Ambiguous Invocation of a Defendant's Right to Counsel Under* Miranda v. Arizona, 79 MARQ. L. REV. 1041, 1061 (1996).

85. *See* TANNEN, *supra* note 80, at 85. *See also* Ainsworth, *supra* note 67, at 261 ("An indirect mode of expression is characteristic of the language used by powerless persons, both those who are members of certain groups that have historically been powerless within society, as well as those who are powerless because of the particular situation in which they find themselves.").

86. *See* TANNEN, *supra* note 80, at 96.

87. *See* TANNEN, *supra* note 80, at 96.

Another consideration that must be taken into account in this context is the importance of authority in the Asian culture.[88] Nowhere else in the world is authority, whether familial or societal, more respected and promoted than in Asian cultures.[89] One sociologist stated, "[A]lthough Asians have traditionally tended to crave stronger authority . . . the West has . . . an enthusiasm for checking authority."[90] As a result, respect for authority is likely to compel an Asian-American suspect to answer questions posed by the police to a greater degree than a non-Asian-American suspect. Although an Asian-American may not directly assert his Fifth Amendment right to counsel because of societal influences, he will nevertheless answer questions from an authoritative figure because of those same influences. Further, Asian norms of behavior may require initially refusing an offer, with the expectation that the offeror should and will make the offer again.[91] To accept an offer the first time it is offered is considered impolite and impertinent.[92] Obviously, someone whose cultural conventions include this rule of first refusal would be unlikely to invoke the right to counsel directly and unambiguously upon being read *Miranda* rights, despite the desire for the assistance of counsel. Thus, current legal doctrine does not serve the interests of those communities whose speech and behavior patterns deviate from implicitly white male normative speech and behavior patterns.

Even in cultures whose speech is not characterized by indirect modes of expression, individual speakers who are socially or situationally powerless frequently adopt indirect speech patterns.[93] Feelings of powerlessness may motivate a criminal suspect to use indirect rather than direct or assertive speech when attempting to invoke their rights, speech patterns that the law currently refuses to recognize. The dynamics of the police interrogation setting inherently involve a disparity of power between the suspect, who is situationally powerless, and the interrogator, whose role demands the exercise of power. An imbalance of power in the interrogation session increases the likelihood that a particular suspect will adopt an indirect, and thus seemingly equivocal, mode of expression. If suspects are unsure of themselves or their rights, they may not want to do or say anything that will exacerbate their problems. In such situations, the suspect might revert to a form of speech pattern called "hedging," in which the suspect tries to make his desires clear,

88. *See* LUCIEN W. PYE, ASIAN POWER AND POLITICS: THE CULTURAL DIMENSIONS OF AUTHORITY 31-54 (1985).

89. *See id.* at 38.

90. *Id.*

91. *See* MURIEL SAVILLE-TROIKE, THE ETHNOGRAPHY OF COMMUNICATION 33-34 (2d ed. 1989).

92. *See id.*

93. *See* Ainsworth, *supra* note 67, at 263.

but is afraid of making any bold demands. For example, a suspect might say "I suppose I should get a lawyer," rather than "I want a lawyer."[94]

Historically disempowered communities manifest similar linguistic characteristics. In his analysis of Black English, Thurmon Garner describes what he termed a "strategy of indirection" by speakers as a linguistic mechanism to avoid conflict.[95] The speaker's "message is delivered as suggestions, innuendos, implications, insinuations, or inferences."[96] This use of indirect speech patterns typifies the rhetoric of persons without power; these patterns can easily be found in the adaptive speech patterns of African Americans forced to deal with white authority figures. Feelings of powerlessness in the African-American community are not only situational, but are social as well. False accusations,[97] behavioral stereotypes,[98] pretextual stops,[99] criminal profiles,[100] and *Terry* abuses[101] all operate to emphasize the

94. Ainsworth, *supra* note 67, at 276.

95. *See* Garner, *supra* note 80.

96. *See* Garner, *supra* note 80, at 234-48.

97. On October 25, 1994, Susan Smith falsely claimed that an armed black man had stolen her car with her two children inside. After police launched a massive manhunt affecting local African Americans in the community, she later admitting to drowning her children in a local lake. *See* Gary Lee, *Black Residents Angered by Reaction to False Story: "No One Has Rushed Forward to Apologize,"* WASH. POST, Nov. 7, 1994, at A15; Rick Bragg, *Police Say Woman Admits to Killings As Bodies of 2 Children Are Found Inside Her Car*, N.Y. TIMES, Nov. 4, 1994, at A1, A30. The Susan Smith case bears a striking resemblance to the 1989 Charles Stuart case, in which Stuart, a white male from Boston, Massachusetts, alleged that a black man had shot and killed his pregnant wife as they drove home from a childbirth class. Police responded by raiding local housing projects, stopping numerous black men, and eventually charging a black man with the murder. When Stuart's brother later told authorities that Stuart had confessed to killing his wife, Stuart leaped to his death from a bridge. *See id.* at A30; *see also* Don Terry, *A Woman's False Accusations Pains Many Blacks*, N.Y. TIMES, Nov. 6, 1994, at A32; Eric Harrison, *South Carolina Case of Deceptions Also a Case of Perceptions: Crime: A Mother's Tale of a Carjacker is Now Seen as Another Example of Vilifying Black Men*, L.A. TIMES, Nov. 8, 1994, at A27.

98. Black criminality is viewed as being a more serious problem than many other forms of criminality. *See, e.g.*, Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears – On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994). For example, crimes primarily associated with the black community are seen as being more threatening than those largely associated with the white community. Street crimes, such as robbery, drug dealing, and mugging, typically associated with the black community, are considered menaces to society, while white-collar crimes such as embezzlement, price fixing, and insider trading, usually associated with the white community, have been overlooked or ignored. *See id.* at 519.

99. *See generally* Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); Robert H. Whorf, *"Coercive Ambiguity" in The Routine Traffic Stop Turned Consent Search*, 30 SUFFOLK U. L. REV. 379 (1997); Larrabee, *supra* note 2, at 291.

100. *See, e.g.*, Erika L. Johnson, *"A Menace To Society:" The Use of Criminal Profiles and Its Effects on Black Males*, 38 HOW. L.J. 629 (1995) (addressing the origin, use, and discriminatory effects of the criminal profile).

101. *See, generally*, Harris, *supra* note 2 (arguing that the "reasonable suspicion" standard articulated in *Terry v. Ohio*, 392 U.S. 1 (1968), permits police officers to stop an individual

imbalance of power between African American citizens and law enforcement. According to one commentator:

> [W]ith reason, African Americans tend to grow up believing that the law is the enemy, because those who are sworn to uphold the law so often enforce it in a biased way." Black males learn at an early age that confrontations with the police should be avoided; black teenagers are advised never to challenge a police officer, even when the officer is wrong.[102]

Under the current standards requiring a clear and unambiguous invocation of the right to counsel, a speaker from a group that uses more indirect speech conventions is likely to be misunderstood as having declined to invoke that right. Such cross-cultural misunderstandings are perhaps inevitable, but the consequences flowing from them can be minimized. The law simply needs to take into account differing speech patterns and recognize a variety of forms of invocation.

The Supreme Court's failure to provide equivalent protection to both assertive and deferential speakers creates yet another problem: it has engendered contempt for the law and has furthered the perception that separate standards exist for majority and minority suspects. When a suspect is told that he has a right to an attorney before or during questioning, he is led to believe that he has a substantive right to an attorney. A suspect does not care whether this is a "prophylactic" right or a "constitutional" right; his main concern is if he asks for an attorney, one will be provided for him. Further, when a suspect makes a request for an attorney, he expects questioning to stop. If questioning does not stop because the police officer believes the request for counsel was equivocal—leaving police free to continue questioning—the suspect will believe that police interrogators are not prepared to recognize his privilege against self-incrimination. The *Miranda* Court explained that the primary way in which the required warnings act to dispel the inherent coercion of the custodial setting is by "showing the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it."[103] However, when a suspect has said something that an objective listener could reasonably, although not necessarily, take to be a request for counsel, and yet his wishes have been ignored, "he may well see further objection as futile and confession (true or not) as the only way to end

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based on presence in a high crime area and evasive behavior).

102. Maclin, *supra* note 3, at 255 (quoting Brent Staples, *Growing Up To Fear the Law*, N.Y. TIMES, March 28, 1991, at A25).

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

the interrogation."[104] But he certainly will not feel as though he has been given the protection of the rights he was just told he had.

IV. CONCLUSION

Rigid adherence to a formal mode of invocation of rights disadvantages a significant portion of our society. The Supreme Court recognizes the problem, but the rule remains. In the name of equal justice and color blindness, minorities are required to set aside their own cultural norms and historical lessons in order to invoke their constitutional rights. They must learn to behave as the majority does. When persons of color experience injustices that are tolerated and even sanctioned by courts and other criminal justice officials, they develop distrust and disrespect for the justice system. That lack of faith translates into hopelessness, frustration, and even violence. The 1992 Los Angeles riots following the acquittal of the police officers charged with the beating of Rodney King[105] offer an example of what may happen when that frustration is ignored. Nondiscriminatory law enforcement policies and effective legal remedies accessible to all aggrieved citizens must be developed to restore the integrity of the legal process and the trust of all citizens.

Unless and until the Supreme Court fashions a rule that will protect the rights of those who frame their Fifth Amendment invocation in a softer and less emphatic way than male normative speech patterns, the Court is not color blind. It is blind to all colors but one.

104. *Davis*, 512 U.S. at 472-73 (Souter, J., concurring in the judgment).

105. *See* Stephen J. Sansweet, *LAPD Officers are Adquitted in King Beating, Mayor Declares Emergency Amid Rise in Violence; National Guard is Called*, WALL ST. J., Apr. 30, 1992, at A14.