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When is a Request a Request? Inadequate Constitutional Protection for Women in Police Interrogations

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NOTE

WHEN IS A REQUEST A REQUEST?: INADEQUATE CONSTITUTIONAL PROTECTION FOR WOMEN IN POLICE INTERROGATIONS

*Alexa Young**

I. INTRODUCTION

In *Davis v. United States*[1] the Supreme Court decided that the standard to be used in determining whether a criminal suspect invoked the Fifth Amendment right to counsel in a police interrogation was threshold of

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* To my family, Tommy, Shelby and Tom, for their love and support, and to my fiancee, Shane, for everything.

1. 512 U.S. 452 (1994).

clarity.[2] Prior to *Davis*, police officers' and courts' treatment of equivocal and ambiguous counsel requests varied among the districts.[3] Lower courts applied three standards—threshold of clarity, clarification, and per se invocation.[4] The Supreme Court of Florida extended the application of the threshold of clarity standard in *State v. Owen*,[5] holding that the standard applied not only to invoking the right to counsel, but also to invoking the right to remain silent.[6]

The threshold of clarity standard favors direct and assertive individuals at the expense of indirect and powerless individuals, often women.[7] Linguistic studies show that women speak in a different register than men,[8] making it less likely that police officers will perceive their statements as unequivocal and unambiguous requests to remain silent or obtain an attorney.[9] The gender bias inherent in this standard jeopardizes the constitutional rights of the more than two million women arrested each year.[10]

This Note recommends analyzing the threshold of clarity standard through feminist legal methods to reveal the gender bias in a seemingly gender-neutral legal doctrine.[11] Courts should interpret their state constitutions as providing more protection than the threshold of clarity standard affords and adopt the per se invocation standard. The per se invocation standard eliminates gender discrimination and is a bright-line test that would be easy for police officers and courts to apply.

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2. *See id.* at 461 (holding that "after a knowing and voluntary waiver of Miranda rights, [questioning may continue] until and unless the suspect *clearly requests* an attorney") (emphasis added).

3. *See id.* at 455.

4. *See* Smith v. Illinois, 469 U.S. 91, 96 n.3 (1984). The per se invocation standard requires "that all questioning must cease upon any request for or reference to counsel." *Id.* The clarification standard "define[s] a threshold standard of clarity for requests," which "trigger the right to counsel." *Id.* The clarification standard requires the termination of interrogation when "an accused makes an equivocal statement that 'arguably' can be construed as a request for counsel." *Id.* The clarification standard permits "narrow questions designed to 'clarify' the earlier statement and the accused's desires respecting counsel." *Id.*

5. 696 So. 2d 715 (Fla. 1997).

6. *See id.* at 717-18.

7. *See* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 261-62 (1993).

8. *See id.* at 274.

9. *See id.* at 290.

10. In 1995, 2,332,213 women were arrested in the United States. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: 1996, at 380 tbl.4.8 (Kathleen Maguire & Ann L. Pastore, eds., 1997).

11. *See generally* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 829 (1990) ("identif[ying] and critically examin[ing] . . . feminist legal methods").

II. GENDER BASED LANGUAGE DIFFERENCES

A. *"Women's Language"*

Variations in male and female speech arose from, and help perpetuate, male dominance and inequality in all aspects of society.[12] A linguistics researcher developed the term "women's language" to describe the dialect that society teaches women to speak.[13] "Women's language" leaves the speaker unable to express herself strongly and injects uncertainty where it may not belong.[14] Women using this type of speech seem less confident than those using male dialects.[15]

Others suggest that the claim that men and women have different languages is an overstatement, but rather certain speech characteristics are gender-linked.[16] Certain situations increase the speech differences, which together form a register, especially when a power gap exists between the speaker and listener.[17] Women's language has been characterized as an arsenal "of speech strategies that women [and other] subordinated speakers[,] have [developed] to [handle] encounters with more powerful [individuals.]"[18]

B. *Elements of the Female Register*

One characteristic that women use more frequently in conversation than men is the tag-question.[19] Tag questions, something between a question and a statement, are formed to evoke a response from the listener.[20] Speakers can use a tag-question when they want to make a declarative claim, but are uncertain of its accuracy.[21] For example: "'I should see a lawyer, shouldn't

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12. *See* Barrie Thorne & Nancy Henley, *Difference and Dominance: An Overview of Language, Gender, and Society, in* LANGUAGE AND SEX: DIFFERENCE AND DOMINANCE 5, 15 (Barrie Thorne & Nancy Henley, eds., 1975).

13. *See* ROBIN LAKOFF, LANGUAGE AND WOMAN'S PLACE 6-7 (1975).

14. *See id.* at 7.

15. *See id.* at 17.

16. Ainsworth, *supra* note 7, at 272-73.

17. *See id.* at 274.

18. Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G. [1990], in* FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 404, 406 (Katharine T. Bartlett & Rosanne Kennedy, eds., 1991).

19. LAKOFF, *supra* note 13, at 14. A tag-question is a statement with a question attached to the end, for instance, "John is here, isn't he?". *See id.* at 15.

20. Janet Holmes, *"Women's Language": A Functional Approach*, 24 GEN. LINGUISTICS 149, 152 (1984).

21. LAKOFF, *supra* note 13, at 15.

I?'"[22] However, that structure can also soften the commanding sound of an indirect request.[23]

Another characteristic is the hedge, which reduces the force of a statement.[24] Hedges—words like "kind of," "well," "maybe," and "sort of"—convey uncertainty, even though the speaker knows the assertion is true.[25] Those hedges, along with "I think" or "I guess" at the beginning of sentences, are likely to appear when speakers are in a situation where they lack confidence.[26]

A third characteristic is using modal verbs such as "could," "should," "may," and "might."[27] These verbs counter the matter-of-fact quality of a declaration by softening the emphasis.[28] A fourth characteristic is substituting interrogative forms for imperatives.[29] Speakers convert commands to requests because commands demand compliance while requests leave the decision to the addressee.[30] Polite qualifiers further weaken the assertiveness of statements. For example: "If you don't mind, could you call me a lawyer?" instead of "Call my lawyer."[31] The final gender-linked trait is using rising intonation in declaratives that are not

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22. Ainsworth, *supra* note 7, at 278.

23. Holmes, *supra* note 20, at 153. Holmes analyzed male and female uses of tag questions finding that both used tags, but for different reason. *Id.* at 154-55 & tbl.1. Women normally used tags to express politeness, facilitate conversation, and soften demands, whereas men were more likely to use tags to express uncertainty. *Id.* This suggests a problem in police interrogations, since male officers may misunderstand a woman's tag as a sign of uncertainty, and, therefore, not an unequivocal and unambiguous request for counsel or to remain silent. The woman may only be using the tag to soften her command for counsel.

24. *Id.* at 152. Hedges have a legitimate use when a speaker wants "to express 'genuine' uncertainty." *Id.* at 156. Hedges serving the uncertainty function are probably used equally by men and women. *See id.* Researchers are concerned with "unjustifiable or 'illegitimate' hedges" where the speaker knows the assertion is true, but is "apolog[izing] for making an assertion at all." *Id.*

25. *See* LAKOFF, *supra* note 13, at 53; Marjorie Swacker, *The Sex of the Speaker as a Sociolinguistic Variable, in* LANGUAGE AND SEX: DIFFERENCE AND DOMINANCE, *supra* note 12, at 76, 79-82 (describing a linguistic study that asked men and women to describe a picture; and finding that women preceded half of their numbers with words of approximation like "about," "around," and "or," whereas, only one male used an estimation).

26. *See* LAKOFF, *supra* note 13, at 54. Lakoff suggests that women use hedges because they fear being too assertive and direct. *See id.* Hedges are a protection mechanism since they allow the speaker to distance herself from a statement that others may disagree with or may later be proved inaccurate. *See id.*

27. *See* Ainsworth, *supra* note 7, at 280.

28. *See id.*

29. *See id.* at 281.

30. *See* LAKOFF, *supra* note 13, at 18. According to Lakoff, "[a]n overt order (as in an imperative) expresses the (often impolite) assumption of the speaker's superior position to the addressee, carrying with it the right to enforce compliance." *Id.*

31. Ainsworth, *supra* note 7, at 281. Women are socialized from childhood to avoid making direct commands because it is considered "unfeminine." *Id.*

intended to express uncertainty.[32] The statements sound hesitant because they have the form of declarations, but they have the inflection of yes-no questions.[33] The combination of the gender elements suggests that "women's speech is devised to prevent the expression of strong statements."[34]

C. *Effect of Context*

Female register elements can emerge in the speech of any group lacking "real-world power."[35] Social status is a variable, in addition to gender, which correlates with the use of female register features.[36] Women with a high social status—"well-educated, professional, [with a] middle class background"—are less likely to exhibit characteristics of the register.[37] Individuals with a lower socioeconomic status, the people most frequently subjected to police interrogation, are more likely to use the female register.[38]

The social context of communication influences the frequency at which these characteristics appear.[39] Relevant factors include: being in public, the formalness of the situation, the "role of the speaker," and the "power of the speaker [compared to that of] the addressee."[40] People who perceive themselves as powerless and "in 'no-win' situations" respond by adopting equivocal speech patterns.[41] For example, women's language characteristics appear more often when people address police officers, than when police

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32. *See id.* at 282. Compare "I need a lawyer," to "I need a lawyer?" *Id.*

33. *See* LAKOFF, *supra* note 13, at 16-17; Ruth M. Brend, *Male-Female Intonation Patterns in American English, in* LANGUAGE AND SEX: DIFFERENCE AND DOMINANCE, *supra* note 12, at 84, 84-86 (finding that men end statements in the lowest possible pitch and reserve final rising intonations for questions, while women frequently vary their pitch and often sound as if they are requesting confirmation).

34. LAKOFF, *supra* note 13, at 19.

35. *See* Holmes, *supra* note 20, at 157. This note only addresses the gender bias in the threshold of clarity standard; however, the same language differences also reveal a cultural bias in the standard.

36. *See* WILLIAM M. O'BARR, LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM 69 (1982). O'Barr suggests the speech phenomenon first observed by Lakoff should be renamed "powerless language" because he found the pattern was primarily due to social status not gender. *See id.* at 70. Women have a greater tendency to use these patterns because they are more likely to hold relatively powerless social positions. *See id.* at 70-71.

37. *See id.* at 69. O'Barr examined taped courtroom testimony from male and female witnesses. *See id.* at 71. O'Barr found witnesses with a low social status used elements of the women's language/female register most often. *See id.* at 69-70.

38. *See* Ainsworth, *supra* note 7, at 286.

39. *See* Holmes, *supra* note 20, at 157.

40. *Id.*

41. Ainsworth, *supra* note 7, at 284-85.

officers address people.[42] The powerless avoid speaking directly because they fear taking responsibility for statements and possible responses from the addressee, but by evading one danger they risk another since indirectness can be misunderstood.[43] Typically, men speak the language of the powerful—direct and clear.[44]

The female register may not be evident when a person is at ease in a familiar setting; however, "when [a] situation is stressful [and] much depends on the outcome," the speech pattern is "likely to affect communication."[45] The listener may draw incorrect conclusions about the person's intentions because listeners interpret speech "according to their own conventions."[46] The greater the power imbalance between speaker and addressee, "the more likely the powerless speaker" will use elements of the female register.[47] The police interrogation context embodies a high degree of power disparity, since the officer controls the situation and the suspect is in an intimidating and unfamiliar environment.[48]

Police are trained to make suspects in interrogations, which are inherently fraught with coercion and anxiety, feel even more threatened.[49] Tactics include: maintaining privacy during the questioning,[50] using formalities to heighten apprehension,[51] close seating arrangements,[52] using

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42. *See* Holmes, *supra* note 20, at 157.

43. *See* ROBIN TOLMACH LAKOFF, TALKING POWER: THE POLITICS OF LANGUAGE IN OUR LIVES 32 (1990). The powerful speak in direct terms because they do not fear being perceived as rude or found incorrect in their assertions. *See id.* Even if their language is ambiguous, society is willing to make greater efforts to interpret the powerful's statements. *See id.* at 32-33.

44. *See id.* at 205. According to Lakoff, men's language is:

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

Id.

45. John J. Gumperz & Jenny Cook-Gumperz, *Introduction: Language and the Communication of Social Identity*, *in* LANGUAGE AND SOCIAL IDENTITY 1, 18 (John J. Gumperz ed., 1982).

46. *Id.*

47. Ainsworth, *supra* note 7, at 285.

48. *See id.* at 287 (stating that police interrogations "may be the paradigmatic context in which one participant . . . feels powerless before the other").

49. *See* Miranda v. Arizona, 384 U.S. 436, 448-55 (1966) (describing the "third degree").

50. *See* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 24 (3d ed. 1986); *Miranda*, 384 U.S. at 449.

51. *See* INBAU ET AL., *supra* note 50, at 37.

52. *See id.* (recommending 4 or 5 feet).

accusatory confrontations,[53] trickery and deception,[54] and taking up to four hours for an interview.[55] The officer's complete control of the conversation combined with the physical power over the suspect leads to a feeling of powerlessness much greater than that found in ordinary life.[56]

III. LEGAL BACKGROUND

A. Miranda v. Arizona *and Fifth Amendment Rights*

Since *Miranda v. Arizona*,[57] officers have had to follow procedural safeguards to ensure that an individual's Fifth Amendment[58] right against self-incrimination is protected in all custodial police interrogations.[59] Before initiating questioning, the officer must advise the suspect that "[s]he has a right to remain silent," that any of her statements can be used against her in court, and that she has the right to have an attorney, retained or appointed, present.[60] The *Miranda* Court found a right to counsel during custodial questioning, distinct from the Sixth Amendment right to counsel, implied in the Fifth Amendment right against self-incrimination.[61] Since custodial questioning is inherently coercive, the atmosphere and the police officers will likely induce unrepresented suspects into confessing during the interrogation.[62] The Sixth Amendment right to counsel attaches automatically once the system initiates adversarial proceedings against the accused.[63] However, the different origin of the *Miranda* right to counsel requires, unlike the Sixth Amendment right, that an individual invoke the Fifth Amendment right affirmatively.[64]

For a prosecutor to use a suspect's statements, the individual must

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53. *See id.* at 91.

54. *See Miranda*, 384 U.S. at 453.

55. *See* INBAU ET AL., *supra* note 50, at 310.

56. *See* Ainsworth, *supra* note 7, at 288.

57. 384 U.S. 436 (1966).

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

59. The Court defined custodial interrogation as "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." *See Miranda*, 384 U.S. at 444.

60. *Id.*

61. *See id.*; McNeil v. Wisconsin, 501 U.S. 171, 176-79 (1991) (discussing the difference between the Sixth Amendment right to counsel and the *Miranda* Fifth Amendment right to counsel).

62. *See Miranda*, 384 U.S. at 455-56.

63. *See* United States v. Gouveia, 467 U.S. 180, 188 (1984).

64. *See Miranda*, 384 U.S. at 458-62 (reviewing the history of the right against self-incrimination).

voluntarily, knowingly, and intelligently waive her constitutional rights.[65] If the individual "indicates in any manner and at any stage of the process" that she does not want to be interrogated or she wants to speak with an attorney, then all questioning must cease.[66] An individual can cut off questioning and invoke the Fifth Amendment privilege, even though she initially waived her rights.[67]

The warnings are necessary to counter the inherently coercive police-dominated atmosphere where officers isolate suspects in unfamiliar surroundings.[68] Through tactics such as trickery, persistence, and exuding confidence in the suspect's guilt, officers leave individuals little choice but to confirm the police officers' preconceived version of events.[69] The pressures of the environment can easily erase the initial security that the warnings provide, however, making the right to have counsel present crucial in protecting the Fifth Amendment right against self-incrimination.[70]

B. Edwards v. Arizona *and the Bright-Line Rule*

Problems arose in the application of *Miranda*. Officers and courts were unsure when questioning could resume after an individual asserted her Fifth Amendment right to counsel. The Supreme Court has distinguished between asserting the right to remain silent and the right to counsel.[71] When a suspect invokes the right to remain silent, the police officer must stop the interrogation, but can continue the questioning after a short period if the officer reads the suspect the *Miranda* rights again.[72] Suspects receive greater protection if they assert the Fifth Amendment right to counsel because police interrogation is more restricted.[73]

In *Edwards v. Arizona*[74] the Court held that once a suspect effectively

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65. *See id.* at 476. The Court developed the knowing and intelligent standard for waiving constitutional rights in *Johnson v. Zerbst*, 304 U.S. 458 (1938). Waivers must be the product of free and deliberate choice, not intimidation, coercion or deception. *See Miranda*, 384 U.S. at 457. In addition to being voluntary, a waiver must be made with a "full awareness" of the nature of the right and the consequences of abandoning that right. *See* Moram v. Burbine, 475 U.S. 412, 421 (1986).

66. *Miranda*, 384 U.S. at 444-45; Ainsworth, *supra* note 7, at 294-95.

67. *See Miranda*, 384 U.S. at 473-74.

68. *See id.* at 448-50.

69. *See id.* at 455.

70. *See id.* at 469.

71. Michigan v. Mosley, 423 U.S. 96, 109-10 (1975) (White, J., concurring); Ainsworth, *supra* note 7, at 295.

72. *See* Ainsworth, *supra* note 7, at 295-96.

73. *See id.* at 296.

74. 451 U.S. 477 (1981). After Edwards' arrest for robbery, burglary, and first-degree murder, he was taken to the police station and read his *Miranda* rights. *Id.* at 478. Edwards claimed he understood his rights and would answer the police officer's questions. *Id.* The police

invoked the right to counsel, police could not reinitiate an interrogation until counsel was made available.[75] The *Edwards* rule protects suspects from police badgering intended to induce a waiver of "previously asserted *Miranda* rights."[76] The prohibition on questioning continues until counsel is present, regardless of consultations with an attorney outside the interrogation room.[77] *Edwards* answered some of the uncertainties surrounding the application of *Miranda*, making the protections easy to implement.[78] The Court created a bright-line rule for law enforcement professionals to follow—no exchanges with a suspect who has invoked her Fifth Amendment rights.[79]

C. Davis v. United States: *Threshold of Clarity*

Before the *Edwards* prohibition on further questioning can apply, an individual must request the assistance of counsel.[80] Conflict quickly arose regarding the requirements for an effective request,[81] splitting courts among

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officer told Edwards another suspect already implicated Edwards in the crime, which prompted Edwards to make a taped denial. *Id.* at 479. Then Edwards wanted to "make a deal." *Id.* The police officer responded by telling Edwards he wanted a statement and giving him the telephone number of an attorney since he was not authorized to make a deal. *Id.* After Edwards called the attorney he said, "I want an attorney before making a deal." *Id.* The next morning two of the interrogating officer's colleagues came to the jail to question Edwards, even though he had invoked his right to counsel. *Id.* Edwards responded that he did not want to talk to anyone, but "[t]he guard told him that 'he had' to talk" to the officers. *Id.* Edwards listened to his accomplice's taped statement and said, "I'll tell you anything you want to know, but I don't want it on tape." *Id.* Edwards then made incriminating statements. *Id.*

75. *See id.* at 484-85. Further communication can occur only once an attorney is present or the suspect initiates conversations with the police. *See id.*

76. Michigan v. Harvey, 494 U.S. 344, 350 (1990).

77. *See* Minnick v. Mississippi, 498 U.S. 146, 153 (1990).

78. *But see Edwards*, 451 U.S. at 489-90 (Powell, J., concurring in the result) (stating that the majority opinion is "unclear").

79. *See id.* at 486. Simply responding to police-initiated conversation after invoking the Fifth Amendment protection is not enough for a valid waiver. *See id.* at 485-86. The requirements to establish a waiver are clearer after *Edwards*; the accused must initiate conversation relevant to the crime being investigated and meet the *Johnson v. Zerbst* knowing and intelligent waiver standard. *See id.* at 485, 486 n.9.

80. *See id.* at 484-85.

81. *See* Smith v. Illinois, 469 U.S. 91, 95 n.3 (1984). Two police officers questioned Smith as follows:

> Q. . . . You have a right to remain silent. You do not have to talk to me unless you want to do so. Do you understand that?
>
> A. Uh. She told me to get my lawyer. She said you guys would railroad me.
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> . . . .
>
> Q. If you do want to talk to me I must advise you that whatever you say can and will be used against you in court. Do you understand that?
>
> A. Yeah.

three approaches. The per se invocation standard demanded that any reference to counsel, despite ambiguity in the request, terminate questioning.[82] The clarification standard required that interrogation stop if an equivocal statement could be considered a request, except for narrow questions to clarify whether the accused was requesting the presence of counsel.[83] The third standard, threshold of clarity, attempted to establish a threshold standard for effective requests: requests which fell below the threshold did not trigger the right to counsel.[84]

The *Davis* Court held that the correct standard to be used is threshold of clarity, and questioning stops only if the individual actually requests an attorney.[85] Officers do not have to clarify an ambiguous request, but can

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> Q. You have a right to consult with a lawyer and to have a lawyer present with you when you're being questioned. Do you understand that?
> A. Uh, yeah. I'd like to do that.
> Q. Okay.
> . . . .
> Q. . . . If you want a lawyer and you're unable to pay for one a lawyer will be appointed to represent you free of cost, do you understand that?
> A. Okay.
> Q. Do you wish to talk to me at this time without a lawyer being present?
> A. Yeah and no, uh, I don't know what's what, really.
> Q. Well. You either have [to agree] to talk to me this time without a lawyer being present and if you do agree to talk with me without a lawyer being present you can stop at any time you want to.
> A. All right. I'll talk to you then.

Id. at 92-93 (footnote & citations omitted).

82. *See id.* at 95 n.3. For cases supporting the per se invocation standard see *United States v. Porter*, 764 F.2d 1, 6 (1st Cir. 1985); *Maglio v. Jago*, 580 F.2d 202, 205 (6th Cir. 1978); *People v. Cerezo*, 635 P.2d 197, 199-200 (Colo. 1981); *People v. Superior Court*, 542 P.2d 1390, 1395 (Cal. 1975).

83. *See Smith*, 469 U.S. at 95 n.3.

84. *Id.* For cases where courts applied the threshold of clarity standard and held that defendant's requests failed to invoke the Fifth Amendment right to counsel see *State v. Campbell*, 367 N.W. 2d 454, 459 (Minn. 1985) ("'[I]f I'm going to be charged with murder maybe I should talk to an attorney.'"); *State v. Moorman*, 744 P.2d 679, 685 (Ariz. 1987) ("'I wonder if I need an attorney.'"); *Bunch v. Commonwealth*, 304 S.E. 2d 271, 275 (Va. 1983) (Individual stated "he felt like he might want to talk to a lawyer.").

85. *See Davis*, 512 U.S. 461. The Naval Investigation Service questioned Davis, a member of the Navy, after connecting him to a murder at a club over an unpaid pool wager. *See id.* at 454. The interviewing agents advised Davis that he was a murder suspect and had the right to remain silent and to counsel and then Davis waived both rights. *See id.* at 454-55. After an hour and a half of questioning, Davis said, "'Maybe I should talk to a lawyer.'" *Id.* at 455. The agents told Davis they were not going to continue the questioning unless they clarified if Davis was asking for counsel or making a comment. *See id.* Davis responded, "'No, I'm not asking for a lawyer, . . . No, I don't want a lawyer.'" *Id.* After another hour of questioning Davis said, "'I think I want a lawyer before I say anything else,'" and then the agents stopped the interview. *Id.*

ignore the individual's statement and continue the questioning.[86] The *Edwards* protection must be affirmatively invoked by a statement that a reasonable police officer in the circumstances would find to be an unambiguous request for counsel.[87]

The Court acknowledged that the threshold of clarity standard will be detrimental to suspects who want a lawyer present, but because of "fear, intimidation, lack of linguistic skills, or a variety of other reasons" will be unable to assert their desire for counsel clearly.[88] In spite of this, the Court reasoned that the threshold standard was needed to maintain the easy application of the *Edwards* rule since that ease would be lost if police officers had to stop questioning after an ambiguous counsel request.[89] According to the Court, a suspect's primary protection is the *Miranda* warnings[90] and a voluntary, knowing waiver is enough to suggest that the suspect will talk to the police without a lawyer.[91]

The *Davis* decision disregards the Fifth Amendment rights of the timid and those who poorly express their request for counsel.[92] The *Miranda* purpose—alleviating the inherently coercive custodial interrogation atmosphere—is subverted.[93] Suspects who think they have asserted their right to counsel will see their requests ignored and may, perceiving further objections as futile, confess, regardless of their guilt, to end the confrontation.[94]

IV. FLORIDA'S APPROACH

A. *Clarifying Equivocal Requests:* Owen v. State

Since 1997, Florida police must end custodial questioning only if the suspect unequivocally invokes the right to remain silent or the right to

86. *See id.* at 461.

87. *See id.*

88. *Id.* at 460.

89. *See id.* at 461.

90. *See id.* at 460.

91. *See id.* at 461.

92. *See id.* at 469-72 (Souter, J., concurring in the judgement). Justice Souter, who was joined by three other justices, maintained that *Miranda* required the Court to adopt the clarification standard, which would give police officers a legal obligation to respond to ambiguous counsel requests with narrow questions designed to verify whether the suspect is asking for counsel. *See id.* at 476 (Souter, J., concurring in the judgment).

93. *See id.* at 471-73 (Souter, J., concurring in the judgment).

94. *See id.* at 472-73. (Souter, J., concurring in the judgement) (citing Escobedo v. Illinois, 378 U.S. 478, 481-86 (1964) (finding Escobedo's confession resulted from his "sense of dilemma" which escalated after his requests to talk to an attorney were denied)).

counsel.[95] The Supreme Court of Florida originally decided *Owen v. State*[96] in 1990. Police officers obtained confessions for burglary, sexual battery, and first degree murder from Owen during the interrogation.[97] The police officers persuaded Owen to confess by presenting their evidence and telling Owen that they already had enough proof to convict him.[98] During the interrogation, Owen replied to a question with "I'd rather not talk about it."[99] The police officers did not clarify whether Owen was invoking either his right to remain silent or requesting counsel, but instead continued urging Owen to respond.[100] In the process, the police officers disregarded another attempt Owen made to assert his rights—"I don't want to talk about it."[101] The Supreme Court of Florida reversed Owen's conviction finding "[t]he responses were, at the least, an equivocal invocation of the *Miranda* right to terminate questioning, which could only be clarified."[102]

B. *The Change After* Davis: State v. Owen

1. The Majority Opinion

Before Owen's retrial, the Supreme Court of Florida reconsidered the case in light of *Davis v. United States*.[103] The court held that the threshold of clarity standard was sufficient to protect an individual's Fifth Amendment right and neither the federal nor the Florida Constitution required clarifying questions.[104] The court explained that past decisions were based on their understanding of the federal law, after *Edwards v. Arizona* but before *Davis*, which seemingly required police officers to end an interrogation or clarify a suspect's desire after an equivocal invocation of *Miranda* rights.[105]

Although *Davis* involved a suspect's request for counsel, the court applied the same rule to Owen's equivocal assertion of his right to remain silent.[106] The court reasoned that the *Davis* concern of creating a bright line rule that police could easily apply without unduly hampering their

95. *See* State v. Owen, 696 So. 2d 715, 719 (Fla. 1997).
96. 560 So. 2d 207 (Fla. 1990).
97. *See id.* at 209-10.
98. *See id.* at 210.
99. *Id.* at 211.
100. *See id.*
101. *Id.*
102. *Id.*
103. *See Owen*, 696 So. 2d at 717.
104. *See id.* at 720.
105. *See id.* at 717.
106. *See id.* at 717-18.

investigation applied in both contexts.[107] According to the court, the ease of application would be sacrificed if officers had to make judgment calls about whether a suspect invoked her Fifth Amendment rights.[108] If police are not certain of the suspect's intentions they are not required to stop the questioning or even ask questions to clarify the request because it "places too great an impediment upon society's interest in thwarting crime."[109]

2. Justice Shaw's Concurrence

In a concurring opinion, Justice Shaw considered language differences, however, among ethnic communities rather than between the genders.[110] Justice Shaw emphasized the need to explain the meaning of "clearly invoke" to ensure the standard is not "used as a 'one glove fits all' criterion."[111] Florida courts should recognize the state's diverse population and use a "reasonable person" standard that accounts for ethnic background, the suspect's education, and English fluency.[112] All suspects cannot invoke their constitutional rights with the same degree of directness and clarity.[113]

3. Chief Justice Kogan's Dissent

Chief Justice Kogan criticized both *Davis* and the majority for placing a hurdle—the "demand of heightened linguistic care"—in front of criminal suspects, the group least able to surmount it.[114] Rather than being a bright-line rule as the majority claimed, the threshold of clarity standard requires police officers to judge when a suspect's invocation is clear.[115] The court failed in balancing the accused's Fifth Amendment rights with law enforcement interests in thwarting crime because the threshold of clarity standard benefits law enforcement while discriminating against the accused.[116] Chief Justice Kogan disapproved of the standard because suspects who are unable to assert themselves clearly because of "physical condition, level of intimidation, level of fear, or lack of linguistic ability" will lose the *Miranda* protection.[117] Since the Florida Constitution gives the

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107. *See id.* at 718.
108. *See id.* at 719.
109. *Id.*
110. *See id.* at 721-22 (Shaw, J., concurring).
111. *Id.* at 722 (Shaw, J., concurring).
112. *Id.* (Shaw, J., concurring).
113. *See id.* (Shaw, J., concurring).
114. *Id.* at 724 (Kogan, C. J., dissenting) (quoting *Davis*, 512 U.S. at 469-70 (Souter, J., concurring in the judgment)).
115. *See id.* at 723 (Kogan, C. J., dissenting).
116. *See id.* at 724 (Kogan, C. J., dissenting).
117. *Id.* at 723 (Kogan, C. J., dissenting).

court the authority to vary from federal law, Justice Kogan would have reaffirmed *Owen* despite the *Davis* decision.[118] The Florida Constitution allows the court, even if the United States Constitution does not, to continue their prior approach and hold that "clarification" is the correct standard.[119]

C. *The Florida Constitution*

Before *State v. Owen*, courts found that the Florida Constitution would not allow officers to ignore a suspect's equivocal request for counsel or to remain silent.[120] In *Kipp v. State*, now overruled pursuant to the *Owen* decision,[121] the Second District Court of Appeal held that the Florida Constitution required officers to end questioning, except to clarify the suspect's wishes, after an equivocal invocation of the right to remain silent.[122] Article I, section 9 of the Florida Constitution is comparable to the United States Constitution's Fifth Amendment right against self-incrimination. Article I, section 9 provides that "[n]o person shall . . . be compelled in any criminal matter to be a witness against himself."[123] The Fifth District Court of Appeal held in *Deck v. State* that under the Florida Constitution, as interpreted by the Supreme Court of Florida in *Traylor v. State*,[124] individuals who ambiguously invoke their right to remain silent receive the same protection as those who make direct requests.[125]

The *Traylor* court found that section 9 required interrogation to immediately stop if a suspect "indicates in any manner" that she does not want to be questioned.[126] In *Owen*, the Supreme Court of Florida re-examined the *Traylor* decision and explained that it "added nothing to federal law" and was not intended to decide appropriate police responses to ambiguous requests.[127] The "in any manner" language meant only that there was no magic formula for invoking the right to remain silent.[128] The court did reaffirm that the Florida Constitution has primacy over the federal constitution, which establishes only the minimum constitutional protection

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118. *See id.* at 725 (Kogan, C. J., dissenting).

119. *See id.* (Kogan, C. J., dissenting).

120. *See* Kipp v. State, 668 So. 2d 214 (Fla. 2d DCA 1996); Deck v. State, 653 So. 2d 435 (Fla. 5th DCA 1995).

121. *See* Kipp v. State, 703 So. 2d 1121, 1121 (Fla. 2d DCA 1997).

122. *See Kipp*, 668 So. 2d at 215.

123. FLA. CONST. art. I, § 9.

124. 596 So. 2d 957 (Fla. 1992).

125. *See Deck*, 653 So. 2d at 436-37. Mr. Deck's statement to the Agent during the interrogation was, "'I can't talk about it anymore.'" *Id.* at 436. The Agent did not inquire as to whether Mr. Deck was asserting his right to remain silent. *See id.*

126. *Traylor*, 596 So. 2d at 966.

127. *Owen*, 696 So. 2d at 719.

128. *See id.*

required.[129] Therefore, the court was free to hold that the Florida Constitution mandated a higher standard than threshold of clarity.

V. THE NEED FOR FEMINIST LEGAL METHODS

A. *Gender Bias in the Criminal Justice System*

The Florida Supreme Court Gender Bias Study Commission found gender bias in nearly every aspect of the Florida legal system.[130] Gender differences in confession rates is a relatively unexplored area of law,[131] and the legal community is not addressing the discriminatory effect the threshold of clarity doctrine has on women. Not only does the standard make it more likely that women will confess, but convictions may have harsher consequences for women. The justice system usually punishes women more severely than men who commit the same crime.[132] The different treatment results from a lack of facilities which causes minimum security offenders to serve their time at facilities designed for maximum security prisoners; the "shortage of rehabilitation programs for women[;]" and less crowded women's facilities which makes women more likely to serve full sentences.[133]

While there are no American studies which examine the role of gender in police interrogations,[134] one limited analysis found a trend indicating that women were more likely to confess.[135] The lack of studies results from the legal community using traditional "masculine" jurisprudence rather than feminist jurisprudence. Legal theory does not reflect women's values or lives "because legal theory . . . is about actual, real life, enacted, legislated, adjudicated law, and women have, from law's inception, lacked the power to make law protect, value, or seriously regard our experience."[136] Traditional jurisprudence ignores women because our laws, which are

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129. *See id.*

130. Robert Craig Waters, *Gender Bias in Florida's Justice System*, FLA. B.J., May 1990, at 10.

131. *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 899 (1996).

132. *See* Waters, *supra* note 130, at 12.

133. *Id.*

134. *See* Cassell & Hayman, *supra* note 131, at 899. One British study found that during police interrogations men were over three times as likely as women to "exercise silence." *Id.* at 899 n.285. However, the small sample size meant the results were not statistically significant. *See id.*

135. *See id.* at 899-900. Since the sample consisted of a small number of women, the results were statistically insignificant. *See id.* at 900.

136. Robin West, *Jurisprudence and Gender [1988]*, *in* FEMINIST LEGAL THEORY, *supra* note 18, at 201, 231.

written by men, are intended to protect men.[137] Feminist legal theory attempts to uncover male norms which are incorporated into the law.[138] Before legal doctrines can be shaped to fit men's and women's lives, lawmakers must take women's lives seriously and stop presupposing that traditional male life patterns and characteristics apply to all people.[139]

B. *The Woman Question*

Feminist legal methods are used to critically analyze the law and reveal aspects of an issue that the traditional approaches overlook.[140] The method attempts to rectify women's "outsider" status in society by creating alternative legal conventions that take women's experiences and needs into account.[141] The importance that the courts have placed on establishing a fixed rule for invoking the *Edwards* protection[142] reflects the emphasis traditional legal methods place on certainty and predictability.[143]

One feminist legal method tool asks "the woman question," which reveals gender implications of rules that appear neutral.[144] The woman question asks whether legal doctrines consider women, how legal standards disadvantage women, and how to correct the omission.[145] The tool analyzes issues beyond the face of a law in order to expose the law's effect and then recommends rules that do not overlook and oppress women.[146] A

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137. *See id.*

138. *See* Ainsworth, *supra* note 7, at 316 n.310.

139. *See* Joan C. Williams, *Deconstructing Gender*, (1989) *in* FEMINIST LEGAL THEORY, *supra* note 18, at 95, 106 (offering a challenge to the "desirability of men's traditional life patterns").

140. *See* Bartlett, *supra* note 11, at 829.

141. *Id.* at 831.

142. *See* Davis v. United States, 512 U.S. 452, 461 (1994); State v. Owen, 696 So. 2d 715, 718 (Fla. 1997).

143. *See* Bartlett, *supra* note 11, at 832.

144. *Id.* at 837.

145. *See id.*

146. *See id.* at 843. Women used the woman question to challenge the Supreme Court's ruling on California's state employee disability plan which singled out pregnancy as virtually the only medical condition not covered. *See id.* at 841. The Supreme Court ignored the connection between gender and pregnancy, claiming the "program divides potential recipients into two groups—pregnant women and nonpregnant persons." *Id.* (quoting Geduldig v. Aiello, 417 U.S. 484, 497 n.20 (1974)). The first group is comprised of only women; however, "the second includes members of both sexes." *Id.* (quoting *Geduldig*, 417 U.S. at 497 n.20). The exclusion of "pregnant persons" was not sex discrimination because both sexes are in the "nonpregnant persons" group who receive benefits. *See id.*

Women made Congress acknowledge the connection between gender and pregnancy in The Pregnancy Discrimination Act by asking "woman questions" including: "Do exclusions based on pregnancy disadvantage women? . . . What are the reasons for singling out pregnancy for exclusion? . . . Are other disabilities costly? . . . Are other covered disabilities voluntary? . . . Are

systematic method is needed because without conscious effort, lawmakers will be unable to recognize and combat an oppression they have not experienced.[147]

C. *Recommendation—Per Se Invocation*

The Supreme Court of Florida failed to consider the effect that the threshold of clarity standard has on women. Justice Shaw's analysis moves in the right direction, but language differences extend beyond the obvious ethnic dialects. The court chose the threshold of clarity standard because other standards placed too great of a hindrance on law enforcement's criminal investigations;[148] however, the court overlooked the threshold of clarity's great burden on individual constitutional rights. It is not enough to use a reasonable person standard, as Justice Shaw suggests, in deciding whether an invocation is clear because that only guides the courts, not the police officers who are making the decision daily. The per se standard provides a better balance between individual liberties and state law enforcement interests.

Per se invocation construes all ambiguous statements, from which a request for counsel or to remain silent can be reasonably inferred, as effective invocations of Fifth Amendment rights.[149] Applying the per se invocation standard, courts would give legal effect to requests using hedges or modal verbs like "maybe," "I think," or "could."[150] The standard also acknowledges requests phrased as tag questions, interrogatives used as polite imperatives, and declarations with rising intonations as effective invocations.[151] Threshold of clarity allows police to ignore all these forms.[152]

The *Miranda* and *Traylor* "in any manner" language supports this standard and implies that officers should not have a lot of discretion in the invocation decision. The threshold of clarity standard allows officers to guess whether the suspect wants an attorney and if she has articulated clearly enough to require one, which results in "difficult judgment calls."[153] Many doubt whether officers will value an individual's constitutional rights if it will frustrate their investigation.[154] Without the per se standard, officers

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there other reasons for treating pregnancy differently?" *Id.*

147. *See id.* at 846-47 (explaining that the "method" forces a "decision-maker" to pay "special attention" to historically overlooked interests and concerns).

148. *See* State v. Owen, 696 So. 2d 715, 719 (Fla. 1997).

149. *See* Ainsworth, *supra* note 7, at 306.

150. *Id.* at 306-07.

151. *See id.* at 307.

152. *See id.* at 304.

153. Davis v. United States, 512 U.S. 452, 474 (1994).

154. *See* Ainsworth, *supra* note 7, at 311.

can manipulate the interrogation process and justify ignoring requests for counsel and to remain silent.[155] The per se standard better fulfills the desire for a bright line rule, which prompted later courts to adopt the threshold standard. Per se invocation is the easiest standard to apply because officers do not have to determine if the statement meets the required threshold.

Since questioning can continue if officers label a request as equivocal, threshold of clarity gives police the power to dissuade suspects from making further attempts to invoke Fifth Amendment protection.[156] When officers see a suspect is considering the need for counsel, they can interject statements suggesting an attorney is unnecessary, obtaining one is not in the suspect's best interest, and the process of getting an attorney is slow and difficult.[157] Threshold of clarity defeats *Miranda's* purpose of informing suspects that police will respect their constitutional rights.[158]

The threshold of clarity doctrine rewards those who speak in direct, assertive language—the presumed norm—at the expense of those who do not conform to that male norm.[159] Gender bias exists because the "framers of the majority doctrine never asked the 'woman question,'" and instead developed a legal standard based on male behavior and experience.[160] By not considering female speech patterns, courts have made it unlikely that the *Edwards* rule—preventing police from continuing interrogations until counsel is present or the suspect initiates relevant conversation—will ever protect women.[161] Only per se invocation provides equal protection for all.

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155. *See id.* at 310-11 (reviewing *Nash v. Estelle*, 597 F.2d 513 (5th Cir.) (en banc) *cert. denied*, 444 U.S. 981 (1979), where the dissent noted that the interrogator used "clarification" to dissuade the defendant from demanding counsel).

156. *See id.*

157. *See id.* at 312.

158. *See id.* at 297. Examples of requests that have been ignored because officers and courts labeled them equivocal include: "Wait a minute. Maybe I ought to have an attorney. You guys are trying to pin a murder rap on me . . . ." *Id.* at 303 (quoting People v. Kreuger, 412 N.E.2d 537, 538 (Ill. 1980)). "Will you supply [a lawyer] now so that I may ask him should I continue with this interview at this moment?" *Id.* at 304 (quoting People v. Santiago, 519 N.Y.S.2d 413, 414-15 (Sup. Ct. 1987), *aff'd*, 530 N.Y.S.2d 546 (1988)). A suspect asking the police to recommend a good lawyer and a suspect stating she is sick of being hassled and wants to call a lawyer were also found to be equivocal. *See id.* at 304-05.

159. *See id.* at 315.

160. *Id.* at 317. Ainsworth questions why the right to counsel in police custodial interrogations must be affirmatively invoked at all. *See id.* at 321. She suggests that suspects should automatically be provided with counsel at the beginning of questioning instead of having to confront the police. *See id.* The requirement of asserting the Fifth Amendment right may be another masculine preference for assertive behavior. *See id.*

161. *See id.* at 320.