Cops and Robbers: Selective Literalism in American Criminal Law

Peter M. Tiersma Lawrence M. Solan

Police often ask people to consent to a search of their person or possessions. Many people agree to allow such searches because they interpret the officers' ostensible "requests" as indirect commands. Yet courts routinely interpret police utterances in this situation as requests. A similar issue arises in the context of custodial interrogation. People being interrogated are inclined to invoke their right to counsel in relatively indirect or tentative terms. Yet courts often conclude that the suspect did not really "request" the presence of counsel. We refer to this inconsistency as "selective literalism," by which we mean that courts selectively consider pragmatic circumstances in interpreting the speech of suspects. Using analytical tools from linguistic theory, this article explores how courts employ selective literalism. It further examines some of the consequences of this inconsistent use of interpretive devices, both practically and jurisprudentially.

Introduction

Consensual searches are one of the most mystifying areas of American criminal law. Lacking a warrant or other legal authority, police officers typically ask someone to agree to a search of her automobile, clothing, or belongings. The person who is carrying contraband or evidence of an illegal activity has nothing to gain, and potentially much to lose, by consenting. Even if she has done nothing illegal, having the police rummage through her personal possessions is inconvenient and degrading. Nonetheless, a surprising number of people agree to allow such searches.

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Consider a recent Supreme Court case, *United States v. Drayton* (2002). The defendants were sitting in a bus when three police officers entered. One of them sat in the driver's seat, another positioned himself at the back, and the third then moved from the back of the bus to the front, as he approached various passengers in an effort to find drugs. Defendants Brown and Drayton were sitting next to each other. The officer asked Brown if he had any luggage, and then asked, "Do you mind if I check it?" After the officer found nothing, he continued, "Do you mind if I check your person?" Brown agreed. The officer found drugs strapped to his body and arrested him. This scenario was repeated with Drayton.

The Court determined that the defendants "consented" to let the officer search their bodies, even though they must have known that they were carrying drugs and would almost certainly be arrested and convicted. Surely they would not have consented if they believed that they had a real choice in the matter. Nonetheless, the Supreme Court held the consent to be voluntary and expressly rejected any requirement that police advise people in this situation that they are free to decline. The holding follows a line of cases dating back thirty years to the seminal case of *Schneckloth v. Bustamonte* (1973).

Why do so many people "agree" to these searches? No doubt most people like to see themselves as cooperative, law-abiding citizens, a point made by the majority opinion in *Drayton*, as well as in the scholarly literature (Tyler 1990). They may also believe that if they cooperate, the police will let them be on their way, and if they do not, they will be inconvenienced further. Yet, at least in some circumstances, they may agree because they believe that they have no choice. Normally, when a police officer stops a car for a traffic infraction, the driver must follow the officer's instructions or risk some serious consequences. It can be very difficult for drivers without legal training to know which of the officer's utterances should be interpreted as instructions or commands, which they disobey at their peril, and which are merely requests—such as a request to search—that can legally be refused. "May I see your driver's license?" is effectively an order, while "May I look in your trunk?" is, legally speaking, a mere request.

Especially when requests to search are made in such coercive contexts (Midgley 1997), an important part of the reason people consent, we believe, is to be found in the words that officers use to make their "requests" and the pragmatic context in which those words are uttered. Speech act theory teaches us that people use words to carry out a large variety of actions, and that they often perform speech acts indirectly. Thus, in *Bustamonte*, when a police officer detained a group of young men in an automobile and asked, "Does the trunk open?" the Supreme Court intuitively understood this not as a question about the capabilities of the trunk, but as a

request to open it and to allow them to search its contents. The response of one of the young men—to answer in the affirmative and open the trunk—was deemed to constitute voluntary consent to the search, even though he never said a word about consenting. Courts are very willing to take pragmatic cues into account in such situations, and do so almost without reflection. This is a critical point, because police are allowed to conduct a consent search only after the suspect has freely "consented" to their "request."

What complicates the situation is that another type of speech act, commands, are very similar to requests. Both of these speech acts aim to induce the hearer to do something. The critical difference is that someone who issues an order or command expects the hearer to comply by virtue of his authority over that person. In contrast, the recipient of a request has the right to say no. Speakers can make it clear that an utterance is one or the other. But in most cases, we tend for reasons of politeness to make requests and commands indirectly, making it very hard to distinguish one from the other. In such situations, we decide whether a speech act is a request or a command by taking into account pragmatic information, such as the relationship between the parties and whether the speaker has the authority to issue commands to the hearer. What counts as a request by an equal may be taken as a command when issued by one's superior.

As noted above, courts have little trouble using pragmatic information to determine that an officer's informational question ("Does the trunk open?") can function as a request or command. Yet when it comes to distinguishing requests from commands, courts suddenly become much more reluctant to take pragmatics into account. As long as a police officer's utterance to a suspect sounds in isolation like a request, most courts tend to assume that it is one, effectively ignoring any pragmatic factors to the contrary. At the same time, suspects tend to interpret such utterances as commands, especially because they are seldom informed that saying no is an option. This is the most sensible explanation of the suspects' behavior.

This "selective literalism" is evident not just in the law of consent searches, but is also present when defendants try to invoke their constitutional right to counsel during interrogation. Many suspects in custody make what are viewed legally as ambiguous invocations of this right. Once again, courts often overlook pragmatic information such as the hierarchical relationship between the parties and notions of deference and politeness, which cause people to make requests for a lawyer indirectly. As a result, police are deemed free to ignore them.

These practices bring into focus the interpretive practices of judges, who must construe the meaning of ordinary speech in

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these situations. There has been a great deal of discussion about how judges interpret the language of statutes, and the extent to which they should use pragmatic information from context to draw inferences about the intent of the drafters. The tension between Justice Scalia's (1997) textualist approach and Justice Breyer's (1992) defense of using legislative history as a tool for gleaning legislative intent illustrates how this debate has pervaded the discourse of statutory interpretation. Even the most ardent textualists, however, acknowledge the importance of some extra-textual information, such as the use of similar language elsewhere in the code, the decisions of courts, and even dictionaries. Moreover, courts at times selectively choose from among the available pragmatic information to reach particular results. (See Solan 1993 for a linguistically oriented discussion of this long-studied phenomenon).

Far less has been written about courts' selective use of contextual information in deciding the constitutionality of encounters between the police and suspects. This article attempts to fill some of that gap. It begins by using speech act theory to explore the differences between requests and commands generally, and applies this learning to cases involving so-called consensual searches. It continues with a similar analysis of suspects' attempting to invoke their right to counsel. It turns out that courts are more likely to consider the pragmatic context when it benefits the prosecution (by deeming indirect or ambiguous utterances by law enforcement officers to be "requests" to search), than when it benefits the accused (by holding, for example, that indirect or ambiguous utterances by suspects during interrogation do not count as "requests" for counsel). This is particularly troubling because those people most likely to make "polite" or "indirect" utterances in such situations tend to be socially and economically disadvantaged.

We conclude that in both of these contexts, courts should take pragmatic context and circumstances into account. It is clear that judges consider pragmatic information to interpret utterances when it suits their purposes. We believe that justice requires that they do so more evenhandedly.

Selective Literalism and the Fourth Amendment

The Bustamonte Case

Joe Gonzales, accompanied by Robert Bustamonte, Joe Alcala, and a couple of other young men, was driving an automobile in northern California during the wee hours of the morning. A police officer stopped the car, having observed that a headlamp and license plate light were not operating properly. Gonzales could not

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produce a driver's license; in fact, only Joe Alcala, one of the passengers, had a license with him. The automobile, it turned out, belonged to Alcala's brother.

By then, the occupants of the car had stepped outside and two additional officers had arrived on the scene. For reasons that are not entirely clear, the police were interested in searching the trunk of the car. Perhaps they had a hunch that the occupants of the car had been up to no good. They may have had previous encounters with the car's occupants. Or maybe they routinely attempted to search the automobiles of people who fit a particular profile; for example, young Latino men driving an older car in the middle of the night.

The police had no warrant, nor were there any grounds for a warrantless search. The prohibition of the Fourth Amendment of the Constitution against "unreasonable searches and seizures" generally requires the police to obtain a warrant issued upon a showing of probable cause, unless there are extraordinary circumstances, such as evidence that a crime is in progress. Although the Supreme Court has recognized an "automobile exception" to the warrant requirement (*Carroll v. United States* 1925; *California v. Acevedo* 1991), probable cause of a crime is required to trigger the exception. Neither the lack of a driver's license nor a hunch or vague suspicion is enough to overcome the probable cause requirement. The police therefore did what they often do in these situations: they asked the occupants of the car if they might have a look in the trunk. Alcala said yes and opened it. The officers found three stolen checks. Largely on the basis of this evidence, Bustamonte was later convicted of possessing a check with intent to defraud (*Schneckloth v. Bustamonte* 1973).

Bustamonte appealed, arguing that the search of the trunk violated the Fourth Amendment. The case eventually wended its way to the U.S. Supreme Court, which upheld the constitutionality of the search. The Court emphasized that even when there is no other legal basis for conducting a search, law enforcement officers are free to seek consent. If the person who controls the property (Alcala, in this case) "freely and voluntarily"[1] consents to a search, it is valid.

Addressing the requirement that the consent be "voluntary," the Court deemed it self-evident that "neither linguistics nor epistemology will provide a ready definition" of what it means for consent to be voluntary (1973:224). Instead, it drew inspiration from the law of confessions, which must also be voluntary, and adopted the test set forth in *Culombe v. Connecticut* (1961): "Is the confession the product of an essentially free and unconstrained

[1] The *Bustamonte* court adopted this standard from *Bumper v. North Carolina* (1968).

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choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self–determination critically impaired, the use of his confession offends due process" (1961:602).

To decide whether a suspect's will had been overborne, the Court held in *Bustamonte* that judges should examine the totality of the surrounding circumstances, such as the suspect's age, education, and intelligence, and whether he had been advised of his rights. Knowledge of the right to refuse consent was one of the factors that should be considered, according to the opinion, but it was not a dispositive issue (1973:226). The Court therefore affirmed the decision of the lower courts that consent to search had indeed been freely and voluntarily given. Both a police officer and the car's driver testified that Alcala's consent to the search seemed voluntary, perhaps even casual. The officer described the atmosphere as "congenital" (no doubt meaning "congenial"), and Alcala, who most likely had no knowledge of Bustamonte's stolen checks, even aided the officers in the search. At no point, however, were the car's occupants informed that they could refuse, and there was apparently no evidence in the record that they realized they had this right (1973:221).

Whether Alcala knew that Bustamonte had stolen checks in the car's trunk is unclear. But most people who consent, like Drayton, know that they are carrying contraband and nonetheless "voluntarily" consent to police requests to search their belongings. Assuming that they genuinely and voluntarily consent to a search, the abiding mystery of this case—and many others like it—is why they would do so. Why, indeed, would *any* rational person carrying contraband or evidence of illegal activity *ever* voluntarily agree to let the police search his possessions? Despite the Supreme Court's comment that linguistics has little to do with the matter, we believe that the answer to this riddle is very much a linguistic one. To understand why, we need to examine a number of speech acts more closely.

Speech Acts and Pragmatics

Speech act theory attempts to explain how people use language in order to accomplish certain goals. A common speech act is *promising*, by which the speaker commits himself to perform a particular act in the future. The clearest way to make a promise is to use the word itself: "I *promise* to buy you dinner tomorrow." Many speech acts can be performed by using a specific verb in the first person, present tense ("I promise" or "we promise"). Speech act theorists call these *performatives*. One indicator that a sentence is being used as a performative is that it allows for the insertion of

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"hereby" before the verb. Thus, it is possible to say, "I *hereby* promise to buy you dinner." The interesting thing about performative speech acts is that they enable the speaker to perform an act simply by saying so. Thus, a person can promise you to go fishing by saying "I promise to take you fishing." Someone cannot bake cookies, however, simply by saying "I bake cookies" (Austin 1962; Searle 1969).

Lawyers use a lot of performative verbs in legal documents. In contracts, wills, and other legal documents it is usually wise to make yourself as clear as possible, so legal texts are full of explicit performative phrases such as "I hereby promise" or "we hereby warrant" (Tiersma 1999:104–06). In ordinary speech, however, we tend to express ourselves more indirectly. We often commit ourselves without using the word *promise* itself: "I will take you fishing tomorrow—you can count on it." In other words, we can promise directly by saying "I promise," or we can do so indirectly by intentionally communicating to the hearer in some other way that we are committing ourselves to do something in the future.

More relevant to the issue of consent searches are the speech acts of *requesting* and *consenting*. The purpose of a request is to induce the hearer to do something. In the context of searches, the police officers wish to induce the hearer to consent to a search. Both of these speech acts, then, must occur before there can be a valid consensual search. The officers must make a request, and the suspect must consent.

According to the testimony in *Bustamonte*, one of the officers, after searching the inside of the car, asked the occupants, "Does the trunk open?" Alcala replied "Yes," got the keys, and opened the trunk (1973:220–22). It is important to observe that literally, the officer merely inquired whether the trunk was capable of being opened. In other words, he merely asked a question, the point of which is usually to obtain information. He did not directly request permission to search the trunk. Yet Alcala's response—finding the key and opening the trunk—indicates that he understood this ostensible question as at least a request, and probably a command, to open the trunk. The Supreme Court assumed that the police officer had requested consent to search, never pausing to observe that the officer did nothing more than ask a question about the capabilities of the car's trunk. This is a natural interpretation under the pragmatic circumstances. We highlight it here to emphasize that courts are quite capable of integrating pragmatic information into their interpretation of speech events, and often do so unself-consciously.

There has been substantial linguistic research on indirect requests and commands. A commonly cited illustration is that when a person asks a fellow diner, "Can you pass the salt," it is usually not

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taken as a question about the addressee's ability to pass the salt but as a request or command to do so (Searle 1991). If the addressee says yes but does nothing, she has acted inappropriately, or perhaps made a rather juvenile joke by playing on the literal meaning of the words. One of us, as a child, was often asked by his mother whether he "would like" to wash the dishes. This was never intended to be taken literally as a question about his desires but was obviously intended as a command. Or consider a "question" by an officer to a private in the army: "Don't you think it would be a good idea to shine those shoes, private?"[2] A historical example is the offhanded remark attributed to King Henry II regarding his enemy, Thomas Becket: "Who will free me from this turbulent priest?" (Bartlett 1980:137). On the surface, this is merely a question. But not long afterward, four of Henry's knights took it upon themselves to assassinate Becket.

Because people often speak indirectly, deciding what type of speech act a person is performing is not always easy. As we have seen, a person can promise without using the word *promise*. And a person can use the word *promise* even though not performing the act of promising ("I promise you'll be sorry if you scratch up my car!"). To decide what type of speech act a person is really performing, we use pragmatic information.

Linguists and philosophers of language have studied ways in which pragmatic information contributes to understanding in everyday speech. Roughly speaking, the term refers to just about any information available to the hearer beyond the actual language of an utterance. The Court in *Bustamonte* intuitively took pragmatic information into account in deciding whether officers were making a request for consent to search. A literal interpretation of a sentence such as "Does the trunk open?" makes little sense unless the officer wishes to look inside, so the addressee logically understands that the officer is asking him to open the trunk.

The philosopher Paul Grice (1975) proposed a number of pragmatic considerations that are routinely used in everyday speech. At the core is the "cooperative principle," which says that we understand the intended meanings of others and believe that others will understand our intended meaning, in light of the shared purpose or direction of the conversational exchange. For instance, the meaning of a question beginning with "Can you" (e.g., "Can you pass the salt?") depends on a critical piece of pragmatic information: whether the addressee is evidently able to perform the act. If so, the question is probably a polite request to

[2] Ordinary assertions can also function as commands or requests. An oft-cited example is when the king says to a lackey, "It's cold in here," which will usually be viewed as a request or command to close the windows.

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perform the act, because otherwise the question would be senseless. But when the addressee's ability is uncertain ("*Can you* lift 100 pounds with one arm?"), the question will probably be taken as relating to ability.

Although "Can I" is used to express a number of related concepts, we tend to regard its literal meaning as asking whether the speaker has the ability to do something.[3] Yet courts tend not to focus on ability when considering utterances that begin with "Can I":

> *Can I* have a look in your truck? (*United States v. Rich* 1993:504).
> Well, if there is nothing important [in the bag], *can I* look in it? (*United States v. Aloi* 1993:440).
> *Can I* have permission to search your vehicle? (*United States v. McGill* 1997:643).

In each of these cases, the suspect nodded or responded with "yes," which was deemed to be voluntary consent to the search despite the traditional view that "can" refers to ability and "may" to permission.[4] The proverbial high school teacher might suggest that the officer was only questioning his own ability to look in the trunk or bag. In reality, linguists have pointed out that the meaning of modal verbs such as "can" is not limited to its "literal" sense relating to ability, but that in actual usage "Can I" is often equivalent to "May I" (Quirk et al. 1985:219–21). As the above examples indicate, judges do not hesitate to recognize this point.

Courts also consider pragmatic information in determining whether a suspect has consented. In one instance, a man placed his briefcase on a conveyer belt that led to an x-ray machine at an airport. Operators of the machine spotted an object in the briefcase that turned out to be cocaine; the man was arrested. At trial he challenged the constitutionality of the search, arguing that he had never expressly consented. The lower court agreed and suppressed the evidence. The court of appeals reversed, however, holding that the act of placing luggage on an x-ray conveyer belt at a security station in an airport constitutes implied consent to a search of the luggage by the machine, as well as a limited hand search if the x-ray scan is inconclusive (*United States v. Pulido-Baquerizo* 1986:899). Several other cases involving airport security have reached similar conclusions.[5]

Likewise, in *United States v. Benitez*, a man in a car appeared somewhat suspicious to officials at a border crossing. An officer

[3] For discussion of how we understand a particular use of an expression to be the "literal" meaning, see Glucksberg & McGlone (2000).

[4] Many mothers have been known to say to their children, when they ask "Can I have an ice cream?" that the correct way to make a request is to say "May I."

[5] See, e.g., *United States v. Herzbrun* (1984); *United States v. Skipwith* (1973).

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asked if he could look in the trunk, in response to which the man said nothing but opened the trunk. Eventually, the officer found marijuana. On appeal, the court held that Benitez's actions signaled voluntary consent (1990:997–99).

In another case, *United States v. Griffin* (1976), the police came to the defendant's apartment and asked to be allowed inside. The defendant slammed the door in their faces. When they requested entry a second time, the defendant opened the door, turned around, and walked inside; the officers followed him in. By these actions, the court held, he had consented to a search of the apartment.[6] This case is especially troublesome because the defendant had clearly denied permission at first, relenting only when the police persisted. One can imagine many situations in which the police can obtain "consent" by outlasting an intimidated suspect who quite clearly said no the first time.

In *United States v. Wilson*, an officer asked the defendant if he "minded" if the officer searched his person. In response, the defendant shrugged his shoulders and raised his arms (1990:171–72). Though shrugging one's shoulders often indicates an equivocal or uncertain attitude, or perhaps resignation, the court held that the defendant's actions constituted consent. On the other hand, at least two other courts have recognized that merely shrugging the shoulders, without more, does not indicate an affirmative response, especially when the suspect speaks little English (*United States v. Gallego-Zapata* 1986; *United States v. Benitez-Arreguin* 1992). Perhaps the critical factor in *Wilson* was that the suspect also raised his arms to facilitate being patted down.

Judges are obviously capable of understanding that people often speak or communicate indirectly. As we noted above, they commonly find that the mere action of placing one's luggage on a conveyer belt leading to an x-ray machine at an airport security checkpoint is equivalent to an officer asking permission to scan the bag via x-ray and the passenger agreeing to the search. Whether they realize it or not, courts use pragmatic information to reach this result. In particular, passengers are deemed to be aware of security procedures and thus to know that all luggage placed on the belt will be subject to an x-ray scan. Conversely, we would not suppose that driving our automobile into an ordinary parking lot would constitute consent to having our cars x-rayed as we drive in, or that placing a suitcase in an airport locker would constitute implicit consent to having the locker opened at night and the contents searched by hand. Pragmatic information regarding the circum-

[6] Alternatively, the court held that he consented only to the officers' entry, but that once inside, they could search what was in plain view.

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stances of an act or utterance is essential to understanding its meaning.

Requests versus Commands

Requests and commands are closely related speech acts. Both are attempts to induce the addressee to do or not to do some act. Linguists and philosophers of language therefore classify them both as *directive speech acts.* Yet despite the great similarity between them, there is a critical distinction. As Daniel Vanderveken has written, "[a] request is a directive [speech act] that allows the option of refusal" (1990:189). In contrast, to "order" or "command" someone does not suggest that the recipient has this option (1990:193–4).

This distinction is critical to the voluntariness of consent to a search, and thus to its constitutionality. When a uniformed police officer orders a car's driver to open the trunk, any subsequent "consent" can hardly be termed voluntary, because the driver will assume that the officer has the authority to insure compliance and that she therefore has no choice in the matter. Following the commands of a uniformed and armed officer ("Pull over" or "Place your hands on the car") is never voluntary in any real sense (*Bumper v. North Carolina* 1968:548–49). The Supreme Court acknowledged this point in *United States v. Drayton* by emphasizing that when the officers boarded the bus, they made "no command" and did not use "an authoritative tone of voice" (2002:2112). According to the Court:

> Nothing Officer Lang said indicated a command to consent to the search. Rather, when respondents informed Lang that they had a bag on the bus, he asked for their permission to check it. And when Lang requested to search Brown and Drayton's persons, he asked first if they objected, thus indicating to a reasonable person that he or she was free to refuse. Even after arresting Brown, Lang provided Drayton with no indication that he was required to consent to a search. To the contrary, Lang asked for Drayton's permission to search him ("Mind if I check you?"), and Drayton agreed. (2002:2113)

Yet as we have seen, deciding whether an utterance is a command or a request depends not just on the literal meaning of the words that were used, but is possible only by considering the pragmatic context. In fact, the language used to make requests and commands is very similar and in many cases may be identical.

One way to make a direct command is to use the verb "command", as in "I command you to sit down!" This is a relatively rare construction, however, that is mainly used for emphasis or when the hearer threatens to disobey. A more common way to issue a

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command or order is to use an imperative sentence, which in English normally involves a sentence that begins with an uninflected verb: "Sit down." Yet just because someone makes an utterance using an imperative does not mean that it is intended as a command. The grammar of English by Quirk et al. illustrates that imperative sentences can be used with a variety of meanings, including a *command* ("Ready, Aim, Fire!"), a *prohibition* ("Don't touch"), a *request* ("Shut the door, please"), a *plea* ("Help!"), *advice* ("Take an aspirin for your headache"), a *warning* ("Look out!"), a *suggestion* ("Ask me about it again next month"), an *invitation* ("Come in and sit down"), and *good wishes* ("Enjoy your meal"), among several others (1985:831–32). Clearly, the force of an imperative depends on the context in which it is used. "Sit down" can be a command in some situations, an invitation or request in others.

Complicating the picture is that, as we have seen, it is common to make commands and orders indirectly. In fact, we usually consider it bad form to issue a blunt order, even if we have the authority to do so. As linguist Robin Lakoff (1990:30) has pointed out, we tend to make requests and commands indirectly because a direct request or command could cause its recipient to lose face as someone who is subject to being ordered about. Consequently, a boss may ask his secretary, "Could you type this memo?" A father may ask his son, "Would you clean up your room?" or tell him, "I'd like you to clean up your room." None of these are literally commands, but they can all function as such.[7]

A polite command is usually made in such a way as to suggest that the hearer has a choice in the matter, even if she does not. It is true that police sometimes use direct imperative language, especially in tense confrontations ("Get out of the car!"). But normally they are inclined, especially during a routine traffic stop, to phrase commands politely: "Would you please get out of the car?" or, as officers said in an Ohio case, "[d]o you mind stepping out of your car?" (*McGann v. Northeast Illinois Regional Commuter Railroad Corp.* 1993:1177).

Note that the most common way to make a polite command is to phrase it as a request. This is a critical point, and it is one that the Supreme Court has consistently refused to recognize, even though each of the justices has probably made hundreds of such indirect

[7] Consider some other types of indirect commands (at least, in the right context). None of these are literally imperatives, although all could be phrased as such: "You are standing on my foot" ("Get off my foot!"); "I would like you to go now" ("Go now!"); "Officers will henceforth wear ties at dinner" ("Officers, wear ties at dinner!"); "Would you mind not making so much noise?" ("Be quiet!"); "How many times have I told you not to eat with your fingers?" ("Don't eat with your fingers!"). The examples are from Searle (1991:268–69).

commands during his or her lifetime ("Could you draft me a memo on . . .").

Consequently, commands and requests are often indistinguishable if we consider only the words used. They can only be differentiated using pragmatic information. The most important factor is the power relationship between the speaker and addressee. As the philosopher John Searle has pointed out, "If the general asks the private to clean up the room, that is in all likelihood a command or an order. If the private asks the general to clean up the room, that is likely to be a suggestion or proposal or request but not an order or command" (1976:5).

In deciding whether an utterance by a police officer during a traffic stop or bus sweep is a request or command, it is highly relevant that the "request" to search is usually made by a police officer who has already exercised his authority in stopping the automobile and perhaps also in ordering the occupants out of the car. Whether or not he has the legal power to search the car without permission, the officer certainly projects that power when he purports to "ask" the occupants to allow a search. Any ostensible request under these circumstances is likely to be interpreted as an indirect command.

Suppose that a police officer pulls over a car and asks the driver, "May I see your license?" Using "May I" is probably the most common way of making a request, which would allow the driver a choice in the matter. But in this situation it seems much more like an order. "No" is not an appropriate response. Moreover, flashing the license to give the officer a quick glimpse and then putting it back into one's wallet would literally comply with the officer's request to "see" the license, but most of us understand that we must hand it over for the officer to inspect more closely. We assume that the officer has the right to take and examine our license, that he can enforce this right, and that refusing to hand it over will only get us into trouble. The officer's polite request, asking whether he "may see" the license, is nothing short of a soft-spoken command: "Give me your license!" It is worth mentioning that the opinion of the Court of Appeals in *Bustamonte* revealed greater linguistic sophistication than the Supreme Court on this score. The Ninth Circuit noted that "under many circumstances a reasonable person might read an officer's 'May I' as the courteous expression of a demand backed by force of law" (*Bustamonte v. Schneckloth* 1971:701).

Thus, when someone in a position of power "asks" or "requests" us to do something, it will normally be interpreted as a command. Typically, such orders or commands are indirect, phrased in the language of requesting permission. By giving a superficial choice to the addressee, we allow her to save face. In

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reality, however, she has no choice. If Mommy "asks" Johnny whether he "would like" to wash the dishes, Johnny had better roll up his sleeves.

Power relationships are not the only relevant factor. If they were, a uniformed police officer would never be able to make a true request; every effort to do so would be interpreted as a command. An ostensible request is most likely to be interpreted as a command when the person in power appears to the subordinate to have the authority, in this specific situation, to order the subordinate to do the requested act. This will generally be the case when a police officer is acting in his official capacity. If an officer asks a driver whether he "may see" her license, his utterance will be interpreted as a command because he has not just the power to force compliance, but also appears to have the authority to request the driver's license in this situation. The same police officer who enters a restaurant just after midnight and asks if he "may have" a grilled cheese sandwich is making a request. The waiter should, without fear of legal difficulties, be able to tell the officer that the kitchen closed five minutes ago.

These cases illustrate that judgments about whether an utterance should be taken as a request or as a command are very context-sensitive. When one spouse says to the other, "Can you remember to pick up clothes from the dry cleaner," the question is probably not about cognitive capacity, despite what the words taken literally might suggest. But whether we call it a request, a command, some of each, or something else entirely depends on the details of the relationship. Our motivations are complicated, and our acts of speech are no less so, as critics of a simplistic approach to speech acts have pointed out (Lepore & Van Gulick 1991).[8] If asked whether the utterance is a request or command, it would not be surprising for the speaker to respond, "I don't know. It never gets to that. We just do these things for each other." The force of the speech act is ambiguous because the power relationship between the parties is relatively undefined. In contrast, the relationship between a police officer and the owner of a stopped vehicle is much more easily characterized as one of power, and linguistic theories relating to speech acts and pragmatics describe the situation well.

Let us now return to the plight of Mr. Bustamonte and his friends, whom we left standing outside the car. Most probably the occupants of the vehicle, driving a borrowed car with some nonfunctional lights at 2:40 in the morning, were not educated in the law. They would not have been aware of their constitutional

[8] For an expansive discussion of speech act analysis of legal events, including its limitations, see Yovel (2002).

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right to refuse to allow a search of their private possessions. In any event, with three armed police officers now on the scene, the lights on their squad cars flashing, Bustamonte and his friends might reasonably have concluded that the wisest course of action would be to cooperate. Like the speeder who says nothing, but simply hands the officer her driver's license when the officer asks if he "may see" it, Bustamonte and his friends opened the trunk when the officer "asked" to look inside.[9]

People who are stopped by the police alongside the road in the middle of the night would quite logically assume that the police have both the power and the right to force them to comply with any directives. Consider an actual case in which an officer was questioning people about the contents of their luggage, and then said to one of them, "Why don't you put your hands behind your back, all right?" Most of us would assume that this is not a question that can be answered by stating a reason ("Because I don't want to" or "It wouldn't be comfortable"), but an order to which the appropriate response is to put our hands behind our back.[10] Similarly, if the police ask to look into the trunk of someone's automobile, many people will assume the police can legitimately force them to comply. Only those who are aware that the police do not have the legal authority to make the search in this situation will construe the words as a request that they can refuse without adverse consequences. Yet the Supreme Court has held that people are not constitutionally entitled to be advised of their right to refuse (*Ohio v. Robinette* 1966).

Now consider the situation of Mr. Gomez, who had been stopped beside the highway and was asked, "May I search the vehicle? May I look?" (*United States v. Gomez* 1991). Or another case: "May I look into your car?" (*United States v. Chaidez* 1990:382). Or: "May I search your bag, your jacket, and your person?" (*United States v. Randolph* 1992:408). The natural assumption is that police officers would not ask this question unless they had the right to search your possessions, making this a polite command that it would be foolish to refuse. Thus, although under ordinary circumstances an utterance beginning with "May I" will be interpreted as a request, such an utterance is highly likely to be viewed as an order because of the inherently coercive nature of a traffic stop.

[9] Actually, the situation in *Bustamonte* is a bit more complicated, since the driver and owner of the car really had not committed any crime, and Bustamonte, who had committed a crime, was not the individual in control of the automobile. In the typical case, the person who can consent and the person who stands to lose are the same individual. Because of its prominence in legal history, we continue to illustrate our points about requests and commands with *Bustamonte*, asking the reader to put these nuances to one side.

[10] The example is from *United States v. Zapata* (1993:754, fn.1).

The situation is aggravated when the language used to make the request is itself somewhat coercive. Consider requests to search that begin with the phrase "Do you mind," the very language that the officers used in *Drayton*. Some other examples from the federal courts include:

> Would you mind if I took a look around there? (*United States v. $24,339.00 in United States Currency* 1995:2)
>
> . . . do you mind if we search your vehicle? (*United States v. Brugal* 2000:369)
>
> Well then do you mind if we search the truck? (*United States v. Johnson* 1999:1382)
>
> Do you mind if I take a look? (*United States v. Garcia* 1990:1416)
>
> Do you mind if I search? (*United States v. Valdiosera-Godinez* 1991:1095)
> Do you mind if I pat you down? (*United States v. Yusuff* 1996:984)

This formulation places the burden on the suspect to object to the search. Moreover, it suggests that the police officer intends to perform the search unless the suspect has a valid objection. Of course, a suspect who does not know his rights will be unable to articulate a valid objection. This is hardly a neutral way to request permission. Nonetheless, in all the above cases the subsequent consent was held voluntary.

The coerciveness of the question is even more apparent when it is phrased as a statement with question intonation ("you don't mind . . .") or if it includes what linguists call a *tag question* ("you don't mind . . ., do you?"). Some actual examples:

> You don't mind if I search the truck? (*United States v. Mondragon Farias* 1999:1279)
>
> You don't mind if I search your car? (*United States v. Baker* 2000)
>
> Well, then, you don't mind if I look around in the car then, do you, or would you? (*United States v. Erwin* 1998:821–22)

What is even more problematic about the "do you mind" or "you don't mind" phrasing is that people are sometimes uncertain about whether "yes" or "no" is the appropriate way to signal consent or lack of it:

> Officer: Okay. Do you have any guns or drugs in that car?
> Suspect: No (shaking his head).
> Officer: Do you mind if I take a look?
> Suspect: Sure (no head movement). (*United States v. Price* 1995:346–47)

Despite the suspect's refusal to later sign a consent form, the court held that he freely and voluntarily consented to a search.

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Equally confusing is the following exchange:

> Officer: Would you have any problems with me searching the van and the contents of the van?
> Suspect: (nods head).
> Officer: Would you mind if I search it?
> Suspect: Yes.
> Officer: It's o.k.?
> Suspect: It's o.k. Everything is o.k.
> Officer: You don't—do you mind if I search the van?
> Suspect: (no response).
> Officer: Is it all right for me to search the van?
> Suspect: Yes. (*United States v. Zapata* 1999:1240)

Again, this was held to be a valid consensual search, even though all the suspect did was to repeatedly say "yes" or signal the affirmative, whether or not it was contextually appropriate. It is only on the last turn that the officer finally seems to hit on the idea of phrasing the request in a way that would make "yes" the response that he was seeking.

A closer examination of cases in which the "do you mind" formulation is used reveals that this wording often directly follows another question asking whether the driver or bus passenger possesses or is carrying contraband. Consider the following interaction:

> Deputy: No firearms, no alcohol, no drugs, no large amounts of cash over $10,000?
> Johnson: None of that.
> Deputy: Well then do you mind if we search the truck?
> Johnson: Let me get the keys. (*United States v. Johnson* 1999:1382)

On appeal, the consent (which, incidentally, was very indirect) was held voluntary (*United States v. Johnson* 1999:1382). Likewise, in *United States v. Garcia*, an officer stopped a car for a traffic infraction, issued a warning ticket, and then asked if there were any "drugs or weapons in the vehicle." The driver responded "No," upon which the officer asked, "Do you mind if I take a look?" The driver consented, and the courts again held the consent voluntary (1990:1416).

Even though published appellate opinions often do not provide a good record of exactly what the police and suspects said, our review suggests that it is very common for law enforcement officers to preface a request to search with a question about whether the person is carrying drugs, weapons, or other contraband.[11] In another case, a police officer asked a driver what

[11] Some additional examples include *United States v. $24,339.00 in United States Currency* (1995); *United States v. Baker* (2000); *United States v. Colin-Velasquez* (1993:1382); *United States v. Erwin* (1998:821–22); *United States v. Price* (1995:346–47); *United States v. Rich* (1993:504); *United States v. Sharpe* (1994:792); and *United States v. Zapata* (1993).

was in a bag on the front seat. The driver responded, "[n]othing important." The officer then said, "Well, if there is nothing important, can I look in it?" The driver consented to the search, which was upheld as voluntary on appeal (*United States v. Aloi* 1993:440).

In fact, it appears to be a technique that is sometimes explicitly taught to officers. An Ohio drug interdiction officer described a traffic stop, in which he found drugs, as follows:

> I completed the traffic citation, gave the citation to her, driver's license and her vehicle registration back to her, and as part of my technique, I then continue on the conversation in a casual manner. Once she receives her paperwork back, and I'm concluding the conversation, I say you're now free to go, or you can go ahead and take off, and whatever the case may be. In this particular case, I remember telling her ". . . you have a nice day, you're free to go." At that point, as I was taught, Ms. Retherford would turn back to her vehicle. As soon as she turned and took one step, I said, "Excuse me, can I ask you one thing before you go," and at that point she said, "Sure." I said, "Are you carrying any large sums of money, drugs, or any weapons." She stated, "No, no, I'm not." I said, "Would you mind if I search your vehicle and contents to be sure there is no contraband in the vehicle," and she said . . . "Sure, go ahead." (*State v. Retherford* 1994:590–91)[12]

The deputy testified that in just one year, he had asked for consent to search a vehicle during routine traffic stops "approximately 786 times." (1994:591–92).

Thus, not only does the "do you mind" formulation suggest that the suspect needs to articulate a valid objection to prevent a search from happening, but the device of first asking about drugs or contraband, which most people will naturally deny, makes it extremely difficult to refuse. For one thing, having said "no" to the drugs question, they are now somewhat primed to say "no" ("I do not object") to the following question. Moreover, someone who is innocent will feel pressured to prove his veracity once it is questioned. As to those who are actually carrying drugs, they will likely assume that what they feared has happened—they have been caught—and that it is useless to resist. Refusing consent will only make them appear suspicious, so that if the officer did not have a legal reason to search them previously, he would certainly have one now. Add to this the inherent coerciveness of the situation, and it ceases to be surprising that such large numbers of people consent to searches during traffic stops.

[12] The court held the consent invalid because the officer had "seized" the driver when asking for her consent to search. For more on this case, see Lichtenberg (2001).

Even more egregious is the "rolling no's" technique. As one court described it, a police officer posed a series of questions to the suspect, each intended to elicit a negative response. The final question in the series was, "You don't mind if we search your car, do you?" The suspect, once again, responded with "no." He voluntarily consented to a search, the court concluded (*United States v. Badru* 1996:1475).

People would be more likely to interpret "requests" to search as actual requests that the hearer could refuse if police routinely used the sort of language that is normally used to make requests. Yet no matter how a request is phrased, it remains essential to take the pragmatic context into account in determining how the hearer is likely to interpret it. As we observed earlier, in the context of consent searches the pragmatic information needed to determine whether a question is a request or a command is the power relationship between the parties and whether the suspect believes that the police officer has the right to conduct the search. In *Bustamonte*, it was only if the occupants of the car were aware that the police had no authority to order them to open the trunk that the "request" to search the trunk could be interpreted as a true request with the option of refusal. If the car's occupants believed that they could be forced to submit to a search, they would naturally interpret the so-called request as actually being a command. That, of course, is exactly what seems to have happened. *Bustamonte* is hardly an isolated case. It seems highly likely that many people do not realize that they have a right to refuse in this situation. (See Nadler 2003 for a similar perspective.)

Courts thus seem to be rather inconsistent in their consideration of pragmatic information. Confronted with police utterances that are literally just questions inquiring about whether the trunk opens or whether the officer "can look" in someone's baggage, courts readily access the pragmatic context in deciding that these ostensible informational questions are really attempts to secure consent to search. The same is true when a suspect is held to have "consented" to a search by his or her actions. But in deciding whether those attempts to obtain consent are requests or commands—a critical distinction—courts suddenly shy away from considering the pragmatic context and tend to interpret the language in a more literal manner. The fact that these utterances are framed as questions and not imperatives seems to be all that matters.

It is hard to avoid the impression that courts are significantly more likely to take pragmatic information into account when it benefits the government, and less so when it helps the accused. Pragmatic information that suggests a defendant consented to a search is generally credited, while pragmatic information that

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suggests he believed he had no choice is less likely to be. We refer to this phenomenon as "selective literalism." We recognize that the notion of "literal" meaning is problematic for a host of reasons (Levinson 1983:263–76; Searle 1979). Nonetheless, we often tend to think of one sense of a word as the meaning we would assign if we had no other contextual information. *Can* in its sense of ability—as opposed to permission—is such an example (see Glucksberg & McGlone 2000). We use "selective literalism" as a convenient phrase to describe the way in which courts opportunistically cling to a word's default meaning even when pragmatic factors would dictate that another sense of the word was intended.

Most importantly, courts are reluctant to take seriously the notion that police-citizen encounters are almost always, to a greater or lesser degree, coercive. This inherent coerciveness invariably colors how people interpret what, to a dispassionate judge removed from the scene, is nothing more than a polite request by a police officer to a person who is technically free to leave at any time. The inherent coerciveness of the situation is the only explanation for why so many people, while knowing that they are carrying contraband, would allow law enforcement officials to rummage through their private belongings.

It is critical to understand that this is a linguistic matter. People are not forced to submit to consent searches because the police coerce them to do so physically. If this were the case, the searches would be blatantly illegal. Rather, they are forced to submit to such searches because of the interpretive practices of judges, and—more specifically—the Supreme Court in cases like *Bustamonte*. By ignoring pragmatics in this situation, the Court can construe the inherently coercive utterances of police officers as being nothing more than ordinary requests that the detained person will understand he can readily refuse. It is this interpretive legerdemain that allows the Court to preserve the fiction that consensual searches are almost invariably voluntary.

Invoking the Right to Counsel

Courts also tend to ignore the pragmatic context in construing a suspect's invocation of the right to counsel, guaranteed under the Fifth and Sixth Amendments. As is well known, when police wish to question a suspect, they must first administer the *Miranda* warning, which advises the suspect that she has the right to an attorney. If the suspect indicates that she wishes to consult with a lawyer, the police must stop the interrogation until the lawyer arrives. The original *Miranda* opinion was very explicit about this point: "If the individual states that he wants an attorney, the interrogation must

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cease until an attorney is present" (*Miranda v. Arizona* 1966:474). In a later opinion, *Edwards v. Arizona* (1981), the Supreme Court elaborated that once a suspect invokes the right to counsel, the police may not resume questioning until a lawyer has been provided or until the suspect voluntarily resumes the discussion.

There are doubtless a few people who, after hearing about their right to counsel, will expressly invoke it by saying something like, "I hereby exercise my right to counsel" or "I hereby request to have an attorney present before questioning continues." In written legal documents, using direct speech acts is the norm. Yet as we saw above, most people speak less directly in ordinary conversation, especially when they impose on someone else by making a request or command. Once again, a critical issue is the distinction between a *request* for a lawyer (which is typically viewed as an invocation of the right to counsel) and an *informational question* or other utterance (which normally does not count as an invocation). We therefore need to examine the speech act of requesting more closely.

Consider how we request or order something in a restaurant. We seldom say, "I request your salmon special." Instead, we might simply express a *desire*: "I'd like the salmon special" or "I feel like trying the salmon." Even though we have—strictly speaking—not directly requested anything, the waitress who has come to take our orders will almost certainly construe our utterance as a request for salmon. The pragmatic context, as always, is critical. Were we to say this to the friend who is dining with us before the waitress arrives, it would get its "literal" interpretation as a statement about our culinary desires, rather than being taken as a request for the friend to go to the kitchen and fetch us some fish.

Another way to request or order something is by expressing a *need*: "These potatoes need to be cooked a little longer." "I need some milk for my coffee." We might also speak the language of *obligation*: "I have to take the rest of this food home." Or we could make a statement about the *future*: "I'll have some coffee with my dessert." A request or command can also be made less imposing, and thus more polite, by phrasing it as a *question*: "Could you bring me a glass of water?" or "Why don't I have the Pad Thai?" A question ostensibly allows the addressee some choice in the matter and is therefore less overtly imposing on the addressee.

An analogous result can be obtained by *hedging*, which refers to methods that "soften" a claim or statement, or make it weaker. People tend to hedge when they are uncertain about something, but they also do it as a means of expressing politeness, often in combination with the other strategies listed above. One way to hedge is to add adverbs of uncertainty, such as "maybe" or "perhaps": "Maybe you could bring me the check" or "Could you

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perhaps get me a knife?" Another method of hedging is to use verbs that express the speaker's mental state ("I think" or "I believe") and make a weaker claim to the truth than an outright assertion: "I guess I'll have the vegetarian tacos" or "I think I'd like the Chardonnay" or "I believe you brought me the wrong dish."

Finally, we can make a request or command less imposing—and thus, more polite—by making it *conditional* on the good will or convenience of the addressee: "If you have a moment, could you bring me some salsa?" or "Charge it to my credit card, if you don't mind." Note that the condition is obviously one that the speaker presumes will be met, so that in this context these statements are actually unconditional requests, or perhaps even commands or orders.

Suppose now that instead of eating out, you have been picked up for questioning regarding the untimely death of your neighbor, with whom you had an ongoing feud. You are being interrogated by two detectives in a small, windowless room. You have been read your rights. After two hours of relentless questioning, you desperately need to visit the toilet. What do you say to the detectives? "Let me use the toilet" or "I request permission to use the restroom facilities" is possible, of course, but most of us would be inclined to speak more politely (i.e., less directly) under these circumstances. What most of us would say is something like:

Do you mind if I use the restroom?

I need to use the toilet.

I'd like to go to the bathroom, if that's all right.

Maybe I could use the toilet.

Where is the men's/ladies' room?

Is there a bathroom around here?

The detectives are obviously in control of this situation, so any request that we might make will naturally be phrased fairly indirectly and politely.

Requests for counsel are quite comparable. People in custody may feel uncomfortable making a direct request or a demand for a lawyer to someone in a position of power over them. Instead, they are naturally inclined by the situation to be polite or deferential, and therefore make any requests indirectly, perhaps by using expressions of need or desire, or by making the request in the form of a question, or by adding a condition.

Yet all too many judges read requests for counsel the same way they would read a deed or promissory note: they expect that suspects during interrogation will speak the way that lawyers write, leading them to interpret the statements in a very literal way. Consider the following interaction:

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> Officer: "[I]t's my understanding you don't want to sign the rights form now is that right?"
> Defendant: "Not 'til you know?"
> Officer: "O.K."
> Defendant: "When I talk to my lawyer I'll."
> Officer: "O.K. But you don't want a lawyer at this time, is that correct?"
> Defendant: "I will get a lawyer."
> Officer: "O.K. But you don't want one now is what I'm saying. O.K.?"
> Defendant: "I'd like to have one but you know I [sic] it would be hard to get hold of one right now."
> Officer: "Well what I am asking you Clayton is do you wish to give me a statement at this time without having a lawyer present?"
> Defendant: "Well I can I can [sic] tell you what I did."
> Officer: "O.K. that's what, that's what [sic] I'm asking." (*Bane v. State* 1992:103)

Despite the defendant's statement that he "would like to have a lawyer," the court held that he did not invoke his right to counsel (*Bane v. State* 1992:103). If what matters is the suspect's communicative intent, then the court was wrong. This is obviously a statement of desire that functioned as a request, no less than saying "I'd like a piece of apple pie" to a waitress will be understood as ordering apple pie. The dialogue is all the more troubling because it appears that the defendant really did try to invoke his constitutional rights but was ultimately too intimidated to force the issue when the officer did not abide by his wishes. Moreover, this case is not an isolated one. Another person being questioned by law enforcement officers commented that he "felt like he might want" to talk to a lawyer; he was likewise held not to have invoked his right to counsel (*Bunch v. Commonwealth* 1983:275).

Expressions of need may be equally ineffective. In *People v. Krueger*, police were questioning a suspect about a number of burglaries and then suddenly asked about a stabbing death. The suspect responded, "Wait a minute. Maybe I ought to have an attorney. You guys are trying to pin a murder rap on me, give me 20 to 40 years." Another policeman recalled that he said, "Maybe I need a lawyer." Either way, the Illinois Supreme Court held that he had not clearly enough invoked his right to counsel (1980:538–39). Likewise, a defendant who told police "I think I might need a lawyer" was held not to have effectively invoked the right to counsel (*People v. Kendricks* 1984:1139).

Both of the suspects' statements above were hedged ("maybe" and "I think"). Hedging seems to be common in this situation.[13]

[13] Other examples are *State v. Moore* (1988:480) and *People v. Bestelmeyer* (1985:607–09). In both cases, the hedged invocation was held ineffective and the police were allowed to continue the interrogation.

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Similar are conditional requests, as in the following example, which is combined with hedging: "[i]f I'm going to be charged with murder maybe I should talk to an attorney" (*State v. Campbell* 1985:456). The Minnesota Supreme Court held that the suspect did not request that a lawyer be present.

Not only do judges tend to take such hedged statements very literally, without considering the pragmatic context, but they often do the same with questions. According to the Virginia Supreme Court, for instance, a suspect's comment, "Didn't you say I have the right to an attorney?" was not a valid invocation of the right to counsel (*Poyner v. Commonwealth* 1985:823). In fact, this question was really a statement seeking confirmation that he did have this right, equivalent to "You said I had a right to an attorney, didn't you?" Like so many of these ineffective invocations, it is an indirect—and thus, more polite—way of asserting that the speaker has this right. Consider again the restaurant analogy. Suppose that a diner is told that she gets a free glass of wine with her meal, but sees that she was charged for the wine when the check arrives. A direct demand would seem out of place: "I assert my right to a free glass of wine and hereby demand that you adjust the check accordingly." Somewhat more polite, but still rather direct, is to assert: "The wine is supposed to be free." More polite is to phrase it as a confirmation-seeking question: "Didn't you say that the wine was included?" or as an observation, "I think you accidentally charged me for the wine." This shows deference to the server and allows the server to save face. These are the strategies that suspects employ during interrogation, much to their peril.[14]

Not all courts, though, have taken such a hyperliteral approach to interpreting the language of suspects.[15] According to Janet Ainsworth (1993), who has written a thoughtful analysis of the problem, courts have in the past taken three main approaches in these cases. One uses the *threshold of clarity* standard, which applies the very literal interpretations illustrated above. Unless the suspect clearly invokes his constitutional rights, questioning can continue. In contrast, the *per se* approach recognizes indirect requests as being valid invocations and requires that interrogation cease immediately. That is, a suspect's mention of legal counsel counts as a per se invocation of Fifth Amendment rights. The third line of cases employs a compromise that Ainsworth calls the *clarification standard*. These cases allow police to clarify a request for counsel that is considered ambiguous (1993:301–16).

[14] Note that the statement "I have a right to an attorney" is not a literal request for counsel, so that a hostile court might hold even this statement not to invoke the right.

[15] See, e.g., *Maglio v. Jago* (1978:205); *People v. Traubert* (1980:344); *Singleton v. State* (1977:912–13); *Sleek v. State* (1986:753–54); *United States v. Prestigiacomo* (1981:683).

While the clarification approach may initially seem the most reasonable, we must not forget that those seeking clarification have a strong interest in proceeding without a lawyer present. Most lawyers advise their clients to invoke their right to remain silent. Assuming that the police have indeed found someone involved in the crime, the presence of a lawyer may frustrate their ability to obtain evidence from one of the people who knows the most about it, perhaps the perpetrator himself. Under these circumstances, it would not be surprising if the questions purportedly seeking clarification doubled as indirect warnings advising the suspect that it might not be in his best interest to have a lawyer present.

Suppose once again that we are in a restaurant. The waitress asks what you would like to order, and you reply, "I believe I'll have the steak." The waitress attempts to clarify your ambiguous statement: "Are you saying that you are ordering the steak?" "Yes," you answer, but by now you are beginning to waver. "Well," replies the waitress, "I just wanted to be absolutely sure that you really wanted the steak. Some people order the steak but when it arrives they are sorry they did. So I just want to confirm that you really and truly want the steak, because once you order it, you're stuck with it." Many people, we imagine, would decide to order something else. The unstated message of the confirmatory questioning is that our decision was not a wise one.

This is exactly what some interrogators do to clarify what they regard as an ambiguous invocation of counsel. As Ainsworth points out, they suggest—directly or indirectly—that having an attorney present may not be in the suspect's best interest, or that finding a lawyer will be slow and cumbersome, or that the suspect does not yet need a lawyer (1993:312). Coming on the heels of an indirect invocation of the right to counsel, such "clarification" can only discourage suspects from persisting.

Aggravating the situation is that those who make indirect requests for counsel are likely to be less empowered members of society who are particularly susceptible to such pressure tactics. Research by linguists over the past two or three decades has shown that an indirect speech style and greater use of hedging tends to be associated with people of lower socioeconomic status. Robin Lakoff, who conducted pioneering studies on women's language, originally noticed that many women tend to speak in a less direct and more polite way than men. While men are more likely to make direct orders or requests, such as "Close the door" or "Please close the door," women tend to use what are considered more polite formulations: "Will you close the door?" or "Won't you close the door?" (1975:18). According to Lakoff, women also avoid stating strong opinions, preferring to use constructions that indicate some uncertainty or seek confirmation (1975:14–17). This is consistent

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with a higher use of hedged or conditional expressions, as well as employing questions to make requests, as in the examples above.

Subsequent research confirms what many readers are no doubt thinking: that this speech style may be characteristic of Aunt Mabel, but that it does not necessarily reflect how younger and more educated women talk. One study confirming this impression is an analysis of the language of witnesses conducted by a team of researchers headed by John Conley and William O'Barr. As reported in O'Barr (1982), some women did indeed use the female style described by Lakoff, but others did not. And although more women used this style than did men, a significant number of men used it as well. Examining the data more closely, they discovered that women who used a "women's" speech style tended to be housewives or have lower social status. In contrast, well-educated professional women did not use these features nearly as much. They noted the same distinction among men: those who spoke in the style that Lakoff described usually held lower-status jobs or were unemployed. The study concluded that what Lakoff described as women's speech was in fact better characterized as a "powerless" speech style that was typical of both men and women who were less well educated or of lower socioeconomic status (1982:64–71).[16]

It is evident that indirect invocations of counsel reflect this "powerless" style of speaking. In contrast, educated and more affluent people, who probably have a better understanding of their rights, will be inclined to assert them more directly. Their right to counsel will more likely be respected. Thus, a rule requiring detainees to invoke their right to counsel with clarity leads disproportionately to people with less education and socioeconomic clout having to navigate through police interrogations without a lawyer. Those who most need the assistance of a lawyer may be the least likely to get one.

In 1994, the year after Ainsworth's article was published in the *Yale Law Journal*, the Supreme Court addressed the issue of how directly suspects under interrogation must invoke their right to counsel. It held in *Davis v. United States* that a suspect's statement that "maybe I should talk to a lawyer" was not an invocation, adopting—as a matter of constitutional law—the literalistic threshold of clarity approach. The Court also held that officers were under no duty to ask clarifying questions, emphasizing that unless and until a suspect makes an *unambiguous* or *unequivocal* request for counsel, the police can continue questioning (1994:459). Strikingly, the government itself had agreed that clarification may be the best path to take when a suspect appears equivocal in his assertion of

[16] For an updated discussion, see Conley and O'Barr (1998:65–67).

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the right to counsel. Indeed, it is natural for people in ordinary conversation to ask for clarification if their interlocutor makes a vague or ambiguous utterance. And as we (and Ainsworth) have pointed out, the clarification standard is sometimes used by interrogators to subtly suggest to suspects that asking for a lawyer might not be in their best interest. Yet the Supreme Court rejected this relatively moderate approach, one that largely corresponds with ordinary interaction, in favor of requiring suspects to invoke their rights with unnatural directness and clarity.

It is enlightening to return to *Bustamonte* and to compare it with *Davis*. In *Bustamonte* the Court held that the police officer, by asking "Does the trunk open?" had requested consent to search the trunk. Literally, of course, the officer's utterance was nothing more than a question about the capabilities of the trunk. It was hardly an unambiguous or unequivocal request to search the trunk. Yet it apparently never occurred to the Court to consider that the officers did not literally request consent to search. The indirect or nonliteral meaning is so natural under these pragmatic circumstances that most people automatically interpret this utterance as a request to open the trunk, or—depending on who is asking—a demand to do so. Likewise, Alcala never unambiguously or unequivocally consented to the search. He simply confirmed that the trunk was capable of being opened and proceeded to do so. The Court, once again, interpreted his actions as constituting consent, even though any indications of consent were indirect. In contrast, when the defendant in the *Davis* case told police that "maybe I should talk to a lawyer," the Court suddenly took a very literal bent, insisting that requests for counsel be unequivocal and unambiguous. This is a clear illustration of selective literalism.

Indeed, the courts' reliance on a suspect's literal language is selective in another sense. While judges are reluctant to admit that people who come into contact with the police are likely to speak indirectly as a matter of politeness or deference to authority, they have far less trouble recognizing the use of vague and ambiguous language when it relates to crimes committed by means of language. For example, courts routinely recognize that people who are engaged in conspiracies or who are soliciting a crime or are threatening someone tend to speak indirectly to reduce the chance that they will be discovered, or to allow them later to deny that they were making a threat.

An illustration is a case from California that involved a litigant with little success in the courts. He wrote a letter to some of the judges asking, "Are all the windows insured?" (*People v. Oppenheimer* 1962:22). The court of appeal realized that this was literally just an informational question, but went on to hold that, in context, it could constitute a threat:

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> The concluding words of his letters to Judges Swain, Smith and Huls are not such as to be a simple inquiry into the status of the insurance on their respective windows. We think that the words (are all windows insured?) as used in context with the remaining parts of the letters and considering all of the other facts and circumstances could well be adapted to imply a threat to do damage to the respective judges or to their property. (*People v. Oppenheimer* 1962:24–25)

When it comes to threats, at least, courts for the most part find indirect or obscure expression to be quite natural. The same is true of extortion, which is often accomplished by threats to inflict bodily harm. The California Supreme Court wrote over a century ago that "[p]arties guilty of the offense here alleged seldom possess the hardihood to speak out boldly and plainly, but deal in mysterious and ambiguous phrases,—mysterious and ambiguous to the world at large, but read in the light of surrounding circumstances by the party for whom intended, they have no uncertain meaning" (*People v. Choynski* 1892:642). Moreover, indirect or ambiguous language might "serve to protect [the perpetrator] in the event of failure to accomplish his extortion" (*People v. Sanders* 1922:749). There is thus no doubt that judges are capable of incorporating pragmatic information into their linguistic judgments when it suits their purposes.

Thus, the problem is not merely that judges sometimes interpret the utterances of ordinary people in an overly literal way by failing to take pragmatic information into account. Rather, judges are selective in when they take pragmatic factors into consideration. Whether consciously or not, their interpretive practices tend either to ignore or to take into account pragmatic information when it benefits police and prosecutors. The utterances that police officers make in seeking consent to a search are almost invariably deemed to be requests, even if the officer poses what is literally an informational question or if the circumstances are such that the suspect is likely to interpret the utterance as an order that should not be refused. And in evaluating language crimes, judges readily view indirect threats as real threats. This makes it easier for police to obtain consent to a search and for prosecutors to obtain convictions. In contrast, people subject to interrogation are held to a higher linguistic standard than are the police: they must be quite literal in invoking their right to counsel. This practice, of course, leads to fewer suspects being represented by a lawyer during questioning.

If anything, it seems to us, the situation should be reversed. Police officers should be as direct as possible when they request consent to search, and they should clearly state that the suspect has the right to refuse. People suspected of crimes, who are typically

under great stress while being interrogated and who may not have received much education, should be allowed to invoke their rights by using the types of indirect requests that are so common in everyday speech.

Some Consequences of Selective Literalism

Distinguishing among requests, commands, and informational questions is sometimes a matter of subtle judgment, so it may not be surprising that police officers and judges can have trouble telling the difference. Encounters between the police and suspected offenders are always going to be somewhat tense. There will inevitably be an inequality in power and, as a consequence, anything the police do is likely to be perceived as coercive. Moreover, at least in the case of consent searches, the defendants must have been doing something illegal, or they would not be trying to suppress the fruits of the search. Similarly, because lawyers routinely advise clients not to talk to police, is it such a tragedy if a few suspects are not represented by counsel during interrogation? As long as the suspect tells the truth, justice will prevail.

Nonetheless, we believe that important issues are at stake. For one thing, the Constitution makes a statement about the kind of society in which we claim to live. The Supreme Court articulated the Fourth Amendment values in question some forty years ago in *Mapp v. Ohio*: "It is not the breaking of his doors and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property" (1961:647). More recently, in the context of the Fifth Amendment, the Court expressed similar concerns when it reaffirmed *Miranda* in *Dickerson v. United States*, "Because custodial police interrogation, by its very nature, isolates and pressures the individual, we stated that 'even without employing brutality, the "third degree" or [other] specific stratagems, custodial interrogation extracts a heavy toll on individual liberty and trades on the weakness of individuals.'" (2000:435, quoting *Miranda v. Arizona* 1966:455).[17] The courts, of course, will continue to pay homage to the Bill of Rights. Yet they can turn this adherence into a mere pretense by interpretive practices that fail to recognize the pragmatics of ordinary speech.

The interpretive practices of courts with respect to the nature of requesting and consenting can have serious practical implica-

[17] We recognize that there is a vast literature on both amendments and their relationship to each other, often taking opposing positions on even the most important issues. Compare Amar (1997) with Steiker (1999).

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tions. They effectively allow a large number of searches to take place under circumstances that would otherwise be illegal. Sometimes the police will find drugs or other evidence of wrongdoing. But mostly they will not. Because innocent people who are subjected to such searches will often feel that their dignity and privacy have been violated, the practice undermines confidence in the legitimacy of policing (Tyler 1990).

This is an even more serious problem when it becomes intermingled with race. A number of studies have shown that law enforcement officials tend to stop motorists belonging to certain minority groups significantly more than other drivers. They also are substantially more likely to search minority drivers (Harris 1997; Cole 1999; Gross & Barnes 2002). Understandably, the perception that they are being stopped and searched in disproportionate numbers has led to a great deal of resentment among members of these minority communities. While being stopped for a routine traffic violation is never pleasant, the added humiliation of being pressured into allowing a search, which is enabled by the interpretive practices of the courts, inflicts great damage on police-community relations (see generally Schauer 2003).

In this regard, it is noteworthy that in dealing with the problem of racial profiling, both law enforcement agencies and courts have attempted to cut the problem off at the source by making consent searches less available. In California, for instance, a recent lawsuit alleged that the California Highway Patrol (CHP) stops vehicles driven by black or Latino motorists significantly more often than those driven by whites, and that occupants are two to three times more likely to be searched by drug interdiction officers. Although the CHP denied that its officers are instructed to stop suspects based on racial criteria, it was concerned enough about the problem to impose a six-month moratorium on consensual searches (Moore 2001). In New Jersey, whose practice of racial profiling has led to a federal consent order, the state's highest court has interpreted its state constitution to require that police may conduct a consent search only if the officer has a "reasonable and articulable" suspicion that an offense has been committed (*State v. Carty* 2002:905).[18]

Of course, the selective literalism of the courts does not cause police officers to make racially based decisions in seeking consent for a search. But it does arguably contribute to the ease with which consent is obtained. If nothing else, judicial recognition of the

[18] In addition, as a result of a federal lawsuit against the New Jersey State Police for alleged racial profiling, the state police agreed to request detained motorists for consent to searches only when they have reasonable suspicion to believe that the search will reveal evidence of a crime. Suspects must be notified that they have the right to refuse (Oliver 2000:1477–78).

coercive circumstances in which "requests" are made would demonstrate a much-needed sensitivity to the consequences of a divisive police activity.

Selective literalism with respect to invocation of the right to counsel during police questioning also has its consequences. The Supreme Court applied the Sixth Amendment's right to counsel to the context of police interrogations in order to lessen the pressures inherent in the process by affording the assistance of a lawyer to those in custodial interrogation (*Escobedo v. Illinois* 1964). The mere possibility that the person under interrogation might request the presence of an attorney mitigates the coerciveness of the process. However, because the Supreme Court has held that interrogators are free to ignore what they regard as indirect or ambiguous requests for counsel, and do not even have to ask for clarification, many suspects whose statements are ignored will assume that their efforts to get a lawyer will not be effective and will simply drop the matter, rather than reformulating their request in a way that satisfies the Supreme Court's rigorous requirement. This literalism thus undermines an important protection against coercive interrogation practices.

Once a suspect agrees to speak with the police, interrogators are free to use a host of tactics. One result of these tactics is that many guilty people confess. Another result is that sometimes innocent people, often people of less than average intelligence and a weak will, confess as well (Leo 1996; Ofshe & Leo 1997; Leo & Ofshe 1998). We do not know how often a false confession has been extracted after an indirect request for a lawyer was rejected, but the possibility is more than theoretical.

Even when a suspect is guilty, the judicial practice of interpreting his requests for a lawyer as mere ruminations can have serious practical consequences. One of the reasons that attorneys advise their clients to remain silent during interrogation is to permit them to trade information later for agreements concerning charges and sentencing. Thus, even if the suspect's confession is true, the absence of a lawyer deprives him of one of the few tactical advantages he might otherwise have against the overwhelming power of the state.

The right to counsel—like the right against unreasonable searches and seizures—is not just constitutional window-dressing. If these rights are to have the effect that they were meant to have, they must not be denied by overly literalistic judges. Courts are clearly capable of considering pragmatic information when it benefits the government to do so, as when evaluating threats or deciding that "Does the trunk open?" constitutes a request to search. Yet too often they ignore such information when it would give substance to the rights of a criminal defendant. This selective

literalism not only has practical consequences, but it devalues the constitutional protections that all of us hold dear.

Conclusion

Language matters, and sometimes it matters a lot. Scholars of the legal system have extensively studied how judges interpret the written language of the profession, especially statutes and the Constitution. There has been intense debate in the last decade or two on how best to interpret such texts. In contrast, how judges interpret the spoken interactions of cops and alleged robbers has received remarkably little attention. It is time for this situation to change, both from the perspective of the criminal justice system and of the scholars who study it.

Of course, change will not come overnight. Convincing police officers to respect indirect requests for an attorney will not be easy when they hope to obtain information from someone about a serious crime. The Supreme Court's decision in *Davis* (1994) does not make it any easier, because the ruling precludes lower courts from imposing a stricter requirement on interrogators as a matter of federal constitutional law. But state courts may recognize indirect requests under their own constitutions, and law enforcement agencies may do so as a matter of adopting fair and professional police practices.

We believe that the legal system should recognize indirect requests for counsel, just as it recognizes indirect requests by the police to search a car, and just as it recognizes indirect acts of consent by suspects. At the very least, law enforcement officers should be required to explain, once a suspect raises the right to counsel, that his request will be respected and that if he wants to have a lawyer present, he only has to say so. We also vigorously recommend that encounters between suspects and the police be recorded, so that judges and juries have firsthand evidence of what happened during the interrogation.[19]

Another approach would be to have interrogators inform the suspect that specific "magic words" will stop an interrogation. For example, they might explain, "At any time, if you say the words, 'I want a lawyer,' we will stop questioning you and give you the chance to consult with an attorney."[20] While formalism is sometimes the enemy of successful communication, a clear procedure

[19] We discuss the problem of inaccuracy in testimony about prior speech more generally in Solan and Tiersma (forthcoming).

[20] This statement could either be incorporated into the Miranda warning or it might be given as a means of clarifying the request in those cases where a suspect has made an ambiguous or indirect invocation. The suggestion is from Princeton University undergraduate student Greg Webb.

that is easy to understand may be appropriate in this instance. Although we doubt that courts will insist on this procedure as a constitutional imperative, legislatures and law enforcement agencies might work together to produce a more professional approach to the problem.

With respect to searches, it is inevitable that interactions between police and citizens will be coercive to some degree. Yet this coerciveness can be mitigated in a number of ways. For example, if police officers want to make a noncoercive request instead of a command, they must make it evident that they are doing so. A general who tells a private that "you might want to clean your boots" will normally be interpreted as making an order. If it is actually no more than a suggestion or request, the general will have to add, "This isn't an order, private" or "That's just an informal suggestion."

The inherent coerciveness of the search situation mandates that if consent is to be freely and voluntarily given, the police must make it very clear that they are making a request rather than a command. In practice, this will require them to inform suspects that they have a right to refuse and that they are free to go if they do so. Here again, the Supreme Court has not been sympathetic to consideration of such pragmatic concerns: it explicitly rejected requiring such warnings in *Bustamonte*. The Court declined this solution because "it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning" (1973:231). The Court has since reaffirmed *Bustamonte*, holding that a lawfully detained person's consent to a search was voluntary under the circumstances even though he was not told that he was free to go (*Ohio v. Robinette* 1996; *United States v. Drayton* 2002).

Of course, simply saying "You have the right to say no and are free to leave at any time," which is probably all that police would have to do, is not particularly burdensome. In fact, some law enforcement officers already give such a warning: "Do you mind if I search—are you sure you don't mind that I search your person? You don't have to let me if you don't want to" (*United States v. Gray* 1989:321). Just adding a few words—"You can say no," or "You have the right to refuse"—would make the request less coercive and the ensuing consent more legitimate. A few jurisdictions now require under state constitutional law that people who are asked to undergo a consent search understand their right to refuse, or that they receive a warning to this effect (*State v. Johnson* 1975; *State v. Ferrier* 1998). The police officers in *Drayton* said that they often so inform people on buses before they begin to question them, although they did not do so in that instance (*United States v. Drayton* 2002:2109).

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It is possible, of course, that even after suspects are told that they have a right to refuse and are free to go, the inherent coerciveness of the situation will nonetheless induce them to consent. According to Lichtenberg (2001), a study in Ohio, which for a period of time required a warning of this sort, found that the consent rate did not change substantially. It may well be, therefore, that a warning might not be effective. A recent article by Janice Nadler (2003), drawing on social psychological research into how people respond to coercive situations, suggests that the circumstances themselves may overpower nuances in language, making it very difficult for people to realize and act on the fact that they have a right to say no to the police.

We encourage further research on this issue by social scientists who are interested in the criminal justice system.[21] If it turns out that most people do not realize that they can refuse to consent to a search, and that it is impossible to formulate a warning that effectively educates them, the only logical conclusion would be that the pragmatic context of a traffic stop is so coercive that a police officer simply cannot make a genuine request in this situation but will always be understood as issuing an order or command. Any subsequent consent under these conditions would therefore never be voluntary. The result would be that consent searches in the context of a traffic stop would be unconstitutional per se.

Of course, it is unlikely that the current Supreme Court would take the step of outlawing all consent searches, whatever the research shows. It would be too radical a departure from current legal doctrine, which helps explain why courts are so reluctant to consider the pragmatic context seriously. In this context, the real animus behind the *Bustamonte* decision becomes apparent in the Court's observation that "[c]onsent searches are part of the standard investigatory techniques of law enforcement agencies" (1973:231–32) and its insistence on the "legitimate need" for such searches (1973:227). The Court's concern seems to be that advising suspects of their constitutional rights will encourage them to exercise those rights, thus leading to less incriminating evidence being found and fewer criminals being apprehended and convicted.[22]

While punishing wrongdoers is an important social goal, one hopes that it can be attained without manipulating what it means to

[21] There is a growing body of research by linguists, and especially discourse analysts, on language issues that arise in the criminal justice system. Many of these issues are discussed in Solan and Tiersma (forthcoming). In addition, there is now a journal, the *International Journal of Speech, Language, and the Law*, devoted to the issue.

[22] Note, incidentally, that while liberal judges have often been accused of engaging in "result-oriented" jurisprudence, this analysis reveals that moderate and conservative judges are just as capable of doing so.

consent to a search or request a lawyer. Because more experienced criminals have probably learned that they usually have little to gain by cooperating with police, it is the inexperienced and less dangerous criminals who are most likely to be caught in this snare. Moreover, allowing police to subtly pressure suspects into consenting to searches or to forgoing their right to counsel undermines public confidence in the rule of law and the basic fairness of the criminal justice system.

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