Book reviews

Ten unanswered language questions about Miranda

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ABSTRACT The purpose of this paper is to suggest areas of needed forensic linguistic research into the use of the warnings that the police are required to give suspects about their rights as they are being arrested. In this case, the American Miranda warnings are used as an example. Familiar linguistic issues arise in such warnings, including discourse sequencing, coerciveness of questions, volition, comprehension, functional equivalence, the co-operative principle, agreement, topic recycling and intentionality.

KEYWORDS discourse, interrogation, coercion, volition, comprehension, intentionality

One of the clearest principles of the academic life is that the more we learn, the more we discover the things that we don't know. And once in a while it is healthy for us simply to list these unanswered questions, in the hope that someone will be energetic and brave enough to take them on and perhaps even to answer them. The following is such a list, gleaned from two decades of experience of dealing with various aspects of the Miranda warning. It is presented in the hope that forensic linguists will continue to find ways to assist the field of law in new and better ways.

BACKGROUND TO MIRANDA

The US Supreme Court's 1966 decision in Miranda v. Arizona departed from established law in the area of police interrogation. Before Miranda, confessions could be suppressed only if the courts determined that such confessions were a result of actual coercion such as threats or promises. Under Miranda, the statements of a suspect were considered involuntary if they were taken during a custodial interrogation when no waiver of rights had been elicited. The Miranda court reasoned that all custodial police interrogation is inherently coercive and that it could not result in a voluntary waiver of rights.

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might be considered coercive ways. The Miranda requirement was established to implement the self-incrimination provision of the Fifth Amendment rather than the Sixth Amendment's provision that the accused shall have the assistance of counsel for their defense. For this reason, therefore, it is logical, from a legal standpoint, to place first and prominently the warning, 'You have the right to remain silent' before the warning about the right to counsel. This logic would then argue that an attorney could be called to assist suspects to remain silent, if that is their choice, thereby not incriminating themselves.

The logic of law, however, does not necessarily equate to the logic of the average person. I have argued elsewhere (Shuy 1987, and [in press] 1998) that there is a strange everyday discourse illogicality in this sequence of warnings. What would happen, for example, if the first warning were the right to have an attorney present, followed by the right to remain silent? Would such a change more clearly alert the suspect to the immanent dangers in saying anything at all without legal support? How might suspects respond differently if the second warning, 'anything you say can and will be used against you in a court of law' were placed first?

One could visualize an experimental study in which the four Miranda statements are varied, reordering their prominence and, perhaps, importance to the everyday listener rather than to the logic of law, and then given to different groups of subjects for their interpretation and response. If the statement about the right to have a lawyer present were to precede the statement about remaining silent, would the suspect make a different decision? It would seem that linguists could contribute their knowledge about the importance of discourse sequence to such matters as the ordering of the Miranda warnings.

2. CAN INTERROGATION BE ANYTHING BUT COERCIVE?

It would appear that the Supreme Court was quite accurate when it noted that police interrogation is inherently coercive. Even if the words of the interrogation are thought to be neutral, the event itself is enough to make questions or non-question statements seem, and be, coercive.

Coercive questions

One might go so far as to say that *all* questions are, in some sense of the word, coercive. For one thing, questions compel an answer. Not to answer is considered inappropriate and rude, a violation of the co-operative principle.

Secondly, the interrogation is an elicitation interview, not an information interview. That is, the questioners elicit answers that they believe, know, or suspect to be true rather than seeking information about which they have no knowledge whatsoever. Such questions are similar to those asked by a teacher who is eliciting what the students know about a subject, not information that is new to the teacher. In fact, the interrogation is often more like a teacher's test question than, for example, a biographer's request for new and unknown information. There can be little doubt about the coercive nature of a teacher's test question. The students have no choice but to answer and to hope that the response matches the teacher's perception of correctness.

Coercion is sometimes thought to involve physical force or threats. The law specifically forbids this type of coercion. But the effects of physical force or threats are not significantly different from the effects of verbal dominance or control, especially when fear and anxiety are exploited, as they can easily be in a police interrogation. Intimidation can result both from physical force and from verbal force. If suspects are dominated by verbal force without regard for their individual desire or volition, the result is coercion as much as it would be from physical force.

Coercive statements and observations

Another potential linguistic issue concerns whether or not coercive language in an interrogation exists only in the form of questions. The case of Rhode Island v. Innis concerned the shotgun murder of a cab driver. After four days his body was discovered in a shallow grave. A suspect named Innis was arrested the next day. He was read his Miranda rights three times before finally invoking his right to remain silent. The arresting detective arranged to have Innis transported to the station, instructing the patrolman not to question him. On the way, Patrolman Gleckman started to talk about the missing weapon with his fellow officer, Patrolman McKenna. Gleckman's own words were:

> At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and that because a school for handicapped children is located nearby, there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves.

Almost immediately, Innis, who could easily hear the conversation between the two patrolmen, interrupted and asked that they turn the car around and return to the murder scene. He was once again read his rights and he acknowledged that he understood them. Then he led the officers to a nearby field where the shotgun had been hidden. Innis said that he wanted to get that shotgun away from where the children might find it.

Even though no questions were asked and even though the patrolmen did not even address Innis, it was debated whether or not an interrogation took place improperly after the suspect had invoked his rights. The trial judge did not think so, finding Innis' action a valid waiver of rights. Innis was subsequently convicted.

The Rhode Island Supreme Court overturned the conviction, stating that the conduct of the officers was 'subtle coercion' that was the functional equivalent of interrogation.

The government then took the case to the US Supreme Court and conceded that a direct question was not required, as follows: 'It is clear: that interrogation need not be in the form of a question; that interrogation may involve the use of psychological ploys as well as the more obvious direct question; and that the police must intend to produce incriminating responses.' The defense argued that any conduct likely to elicit a response is interrogation. Justice Stewart's opinion concluded that Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. Miranda refers not only to express questioning but also to any words or actions that the police should know are likely to elicit an incriminating response.

The Supreme Court therefore reinstated Innis' conviction, based on this new test: defendants need not be aware that the officer has the specific intent of eliciting an admission. That is, the suspect does not need to be aware that a deliberate ploy is being foisted upon him. Justice Stewart also noted that the entire conversation appears to have consisted of no more than a few offhand remarks and the officers need not have known that Innis would respond as he did.

Legal scholars have defended this decision, noting that the definition of 'interrogation' adopted in the case was broader than any previous general understanding of the term, and observing: 'The decision is most accurately seen as a case with language that expands the Miranda protections, while denying them in the particular facts of Mr. Innis' case.' Nissman *et al.* 1985: 121).

Volition

The concept of volition, the opposite of coercion, is also worthy of examination here. Like the requirement of voluntariness of confessions, voluntariness without coercion in responding to the Miranda warnings is necessary, as is implied in the Miranda follow-up question, 'Having these rights in mind, *do you wish* to talk to us now?'[italics mine]

The word 'voluntary' is commonly defined as 'proceeding from the will or from one's own choice or consent, unconstrained by interference, done by design or intention, and having the power of free choice'. Voluntariness of a confession is subverted by direct or indirect physical harm, such as unduly prolonged continuous questioning, or deprivation of food, water, or access to toilet facilities for an unreasonable length of time. Likewise certain types of promise are forbidden, such as the promise of freedom or a light sentence, while others are permitted, such as promising to recommend to the judge a light bail bond or to report that the suspect has co-operated in the investigation. The test of permissible promises is whether or not the promise presents a substantial risk of a false confession.

A curious example of the court's ruling about voluntariness is found in the case of Illinois v. Perkins (496 US 292 1990), where police informants posed as prisoners in an effort to get incriminating evidence from an inmate. The inmate fell for the ploy and incriminated himself in a murder. The Supreme Court overturned the lower court's suppression of the statement, ruling that when a suspect has no reason to believe that the listeners have official power over him, this statement was not obtained coercively. It further stated that non-coercive ploys that merely mislead or lull custodial suspects into a false sense of security do not violate Miranda or the self-incrimination clause. From this decision we can deduce that the courts believe that coercion depends on its agents, not on any external definition we might have. Apparently what is coercive language with one set of interactants is not necessarily coercive with another set.

Linguists might investigate the extent to which the meanings of 'coercion' and 'voluntary' extend to circumstances in which the persons to whom the information is addressed are not the ones the addresser thought they were. The larger linguistic issue here involves the context of the whole communicative event, including the sender, the receiver and the message itself. Are there differences in the degree of voluntariness or coerciveness that associate with differences in participants? If one were to pretend to be a physician, for example, could one legitimately obtain medical information that persons would not be likely to provide us with if it were known that we were not members of the medical profession? Would such imposture be considered coercive? Would these persons' privileged revelations then be considered voluntary?

Linguists need to examine more deeply the extent to which interrogation questions and statements are coercive, and how external contexts, such as those brought about by police custody or, in fact, simply being questioned by law enforcement authorites, can color the accuracy and truth of what is being said.

Of course, it would also be nice if linguists could suggest ways that the police could avoid coercive language and replace it with less coercive speech. Recent research on the asymmetries of participants in verbal interaction and the effect such asymmetries have on the effectiveness of the interview event might well be applied to the police interrogation and related to the Miranda issue (Shuy [in press]1998).

Another place to begin might be to review the recent research on interviews with children in child sex-abuse cases. The asymmetrical relationship of adult interviewer and small child interviewee mirrors in many ways the interrogation of a powerless suspect by a powerful detective.

3. WHAT DOES 'TO UNDERSTAND' MEAN?

After the Miranda warning has been read to suspects, they are asked whether or not they understand what was just read to them. Two meanings of 'understand' immediately suggest themselves here: 1) *recognizing* the words just read; and 2) *understanding* the meaning of the words just read. This difference between recognition and understanding has precedents in much of the linguistic literature on literacy and language learning. 'Word recognition' ability suggests that listeners hear a word and recognize it without necessarily being able to use or apply it themselves. They know that it is a word; they have heard it before. They may even think, correctly or not, that they know what it means. But they may not be able to use it in a sentence or define it out of context. Several words and phrases in the Miranda warning have the potential of being only recognized rather than understood by some suspects, including 'silent', 'used against you', 'lawyer', 'present with you', 'appointed to represent you before any questioning', 'rights', 'understand these rights' and 'wish to talk to us now'. In a matter as important as the Miranda rights, it is imperative that law enforcement be explicit in what is conveyed and that suspects clearly understand the meaning of their waiver.

There is at least some evidence, from cases I've worked on, that suspects say 'yes' to the follow-up question about understanding their rights when they may, in fact, understand little of what the Miranda warning means.

One example of an occasion on which the suspect was likely not to have understood his rights is the case of Texas v. Kevin Rogers in Houston in 1995 (Shuy 1998). Rogers was a fifteen year old who lived near an elderly lady who had been brutally murdered in her home. Although the Houston police made no tape recordings or notes of his arrest and interrogation, they did produce a typewritten confession, signed by Rogers. The first sentences of this confession read:

> I do not want to consult with a lawyer before I make this statement, and I do not want to remain silent, and I now freely and voluntarily waive my right to a lawyer and to remain silent and I knowingly make the following statement.

The police reported that several times during his seven-hour interrogation, Rogers was again asked if he understood his rights. On each occasion they reported that he said he did. Throughout the interrogation Rogers asked to see his mother. Finally, after he signed the confession, he was allowed to meet with her and later with his attorney. To both of them Rogers totally denied that he had committed the murder.

Several things cast some doubt on whether or not Rogers really understood his Miranda rights. For one thing, his school records and the testimony of his teachers showed that, even though he was in the eighth grade, his academic performance was at the second or third grade level, and his comprehension was even worse. Though intellectually slow (close to retarded), he had never given the school any problems and was considered by all to be a very nice, well-behaved child with a good attendance record and a neat appearance. The perplexing question, of course, is why would he have signed the confession if he hadn't commited the crime? One possible answer is that he didn't really understand his Miranda rights. This, coupled with his compliant nature and his persistent and naïve desire to get the interrogation over with so that he could be with his mother, could well have caused him to confess to something he did not do.

To test this theory, before trial I asked Rogers' attorney to tape record all future sessions with his client. These recordings served as a model for how Rogers habitually answers questions, how he thinks, what he understands and does not understand. From the tape recordings, it was clear that Rogers did not understand most of even the simplest questions he was asked, as the following sequence illustrates:

Q She [the magistrate] told you all that? [about your rights]
A Yeah.
Q Did you tell her you understood all of that?
A Yeah.
Q Did you really understand all that she was telling you?
A No.
Q Then why did you say you understood it?
A I don't know.
Q Have you ever been involved in anything where your rights were read to you before?
A Yes.
Q What situation was that?
A I don't know.
Q I mean, have you ever been involved in anything where somebody read you your rights, saying you have the right to remain silent before that time?
A No.
Q That was the first time anybody's read you any of these rights?
A Yeah.
Q Did you understand what they were saying?

A No, I was just listening to them. I know the right to remain silence [sic], and I ain't say nothing and I ain't understand the others. I ain't know what they was talking about then, I knew the right to remain silent.
Q How come you didn't request an attorney?
A I ain't know.

There were many complicating features to this case but this is not the forum to explain them. It is clear enough, from the tape recording, that Rogers was unclear about more than one of his Miranda rights. Both the interrogating officer and the magistrate before whom he subsequently appeared believed, or said they believed, that Rogers clearly understood all of his rights, although the basis for this belief rested solely on the fact that Rogers agreed that he understood them.

One of the odd myths of communication is that we are to believe the words that people utter without considering the contextual factors that may influence those words. In this case, a fifteen-year-old boy was tried, eventually, as an adult, convicted of murder and sentenced to life imprisonment on the sole evidence of a signed confession that was elicited under the condition that he *said* that he understood his Miranda rights. There was no other salient evidence in the case against him.

The field of literacy teaching has struggled with the question of comprehension for many years. There was a time when the only standardized measures of reading ability were focused on skills of decoding and not on comprehension at all. The reason for this is simple. It is much easier to measure and quantify such skills than to get at what is really understood by readers. Some progress has been made, however, in the past decades. What has come forth is that performance measures, not paper-pencil tests, are the best measures of comprehension.

The obvious analogy here is actually already present in some areas of law. In child sex-abuse cases, for example, young children are not asked yes/no questions about their ability to distinguish truth from falsehood. The judge commonly gives them real-life scenarios and then asks, 'Would this be true or not true?' Nor are most state departments of motorist licensing satisfied with only a question such as 'Can you drive?'. They are usually not even satisfied with a paper-pencil test of driving ability. They often include a performance test of driving and parking skills on real local streets.

The point here is that a self-reported measure of a person's ability to understand falls far short of adequacy in diagnosing that person's comprehension. As researchers are well aware, self-reported data are often unstable, if not downright inaccurate.

What does it mean to understand? Do some people equate understanding with hearing? Are people's statements that they really understand sufficient evidence that they actually do understand? Can't linguists

come up with better measures of understanding than the feeble, self-reported measure now being used in the Miranda warning?

4. WHAT DOES 'TO HAVE A LAWYER PRESENT' MEAN?

In police interrogations that I have analysed over the years I have seen suspects ponder this aspect of the warning and reply with such things as 'I'd rather talk to my parole officer first and then see what happens'; 'I wanna talk to my moma'; 'I want to talk to my supervisor'; and 'I'd like to see a priest'. Other than in the abovementioned case of the fifteen year old who asked for his moma five times during his interrogation, there is little evidence that the suspects actually thought that asking for their parole officer or their boss was the same thing as asking for an attorney. That is, they probably knew that there is such a thing as an 'attorney'.

In each case, however, the suspects actually seem to have been asking for an *authority figure* to help and advise them in their time of trouble. Although it is more common, in my experience, for the suspect to simply ignore the Miranda admonition and agree to talk to the police, there are enough examples of these pleas for help from authority figures to suggest that the suspects were simply not thinking of an attorney as their lone source of assistance. Their participant perspective was quite different.

Another interesting issue concerns a suspect's *schema* of what it means to request an attorney. Problems have arisen as to what constitutes a request for a lawyer, some suspects claiming that a functional equivalent, such as a relative, a parole officer, or an alleged accomplice, satisfies the requirement. In 1989, Detective R. A. Carey of the San Diego Police Department testified about his interview with Jesse Moffett concerning the murder of a young woman that had taken place some ten years earlier and had remained unsolved. Moffett had been in the area of the murder and had volunteered to talk with Carey a day after the body was found. The interview took place near the murder scene and Moffett was not in custody at that time although he had served time in prison and was then on parole. Detective Carey advised him of his rights. Carey's report of this incident states that Moffett responded that he wanted to talk to his parole agent, then asked, 'Am I going to be busted?'. Carey told him that he was not going to be arrested and his report then continues, 'He was asked if he had ever gone down to the wall that night', 'He was asked if he was north of this location at any time with the female', and 'He was asked who his parole agent was'. In addition, Carey's report states, 'He went on to relate that he did not see a radio or a bronze jacket the victim had left behind.' It is difficult to imagine why Moffett

would have 'gone on to relate' this information without being asked about it.

One issue became, then, whether or not Moffett's request to have his parole agent present constituted a refusal to talk further. Apparently Detective Carey did not consider it an invocation of Moffett's Miranda rights. Moffett, relatively unschooled, may well have believed that by asking for his parole agent he was saying that he wanted a functional equivalent, a legal authority figure, present at the interview. In a Miranda hearing, the Court ruled that Moffett had not invoked his Miranda rights by asking for his parole agent. Technically, this may have been the proper ruling, but one wonders about the extent to which such rulings overlook the internal semantic grids of the suspects. Both Kevin Rogers and Jesse Moffett may well have had a somewhat different belief or schema about what 'having an attorney present' actually means.

It would seem that linguistic research on discourse schemas and on the use of functional equivalence (commonly found in the area of translation) might well be called upon to shed some light on this issue. We have made considerable progress in relating these tools to literacy and translation, but have not, to my knowledge, applied them to the area of police interrogation regarding Miranda rights.

It would seem that the traumatic nature of a police interrogation might be cause enough for the Miranda statements to be clarified or expanded in such a way that it would become clear to such suspects that the only person who can help them at this time is an attorney, not a parole officer, a boss, a partner or a cleric. It might also be fair to explain *why* having an attorney present might be to their benefit. It might be equally helpful if the Miranda warning were to explain that any other authority figures, such as those noted above, simply don't count in this matter. The very fact that requests for authority figures other than attorneys are made at all suggests strongly that some suspects do not see the legal implications of their decisions. Perhaps it is the nature of bureaucratic language, such as law enforcement talk, to present information without offering causal explanations and without explaining alternatives. After all, such practice characterizes much of what physicians tell patients and what teachers tell students. Those in authority often seek compliance rather than understanding.

Even if the expression 'have an attorney' is understood, however, the suspect is still faced with the problem of knowing what is meant by 'present'. Does it mean right now? If so, how could that be, since it is only logical that this would take considerable time to arrange. Do they think that being 'present' means at arraignment? At trial? Or during this very interrogation that seems to have already begun and to which an attorney could only be, at best, a very late arrival, perhaps too late in fact? Or do suspects consider 'present' to refer to some future interrogation?

It would seem that linguists might be able to determine what suspects understand by this admonition and, more importantly, find ways to make the Miranda statements clearer.

5. WHAT DOES 'REMAIN SILENT' MEAN?

In his majority opinion in the Miranda case, Justice Warren used the words, 'The waiver must be specifically made'. This was to ensure express or explicit voluntariness. One test case for the meaning of the terms, 'specific', 'express', and 'explicit' is North Carolina v. Butler (441 US 369, 60 L Ed 2d 286, 99 S Ct 1755 1979), in which the suspect waived his right to silence by talking to the police officer but said nothing in response to the warning that he could have an attorney present. After conviction and appeal, the case went before the Supreme Court, where Justice Stewart concluded:

> Thus the Court held that an express statement can constitute a waiver, and that silence alone after such warnings cannot do so. But the Court did not hold that such an express statement is indispensable to a finding of waiver.
>
> An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the Miranda case.... The prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.
>
> (North Carolina v. Butler, supra at 373)

To a linguist, Justice Stewart's words have a ring of familiarity. Today we deal with topics such as explicitness, inference, and conveyed meaning much more comfortably than we did only a few decades ago. Likewise, current legal treatment of form versus function, so important in linguistics these days, has obvious salience. It is possible that linguistic analysis of silence can contribute further to issues involving the right to remain silent.

As noted earlier, Kevin Rogers claimed, accurately or not, that he actually knew what it meant to remain silent. Most people know what silence is. This is perhaps the clearest of the Miranda admonitions. On the other hand, even if suspects know what remaining silent means, it is quite another thing to be able to do it. Most human beings are uncomfortable with silence while in the presence of others because it violates the cooperative principle. But just how silent must one be to be considered

silent? Does 'silence' really mean that absolutely nothing will be said without forfeiture of the waiver? Does 'remaining silent' refer only to the substantive topics of the alleged crime? Can one engage in small talk for example, and still meet the requirement of 'remaining silent'? If so, what actually distinguishes small talk from the kind of talk that will give the police the right to start questioning again?

It has been my experience that many suspects who invoke their right to remain silent often continue to talk anyway. This is, of course, exactly what law enforcement wants them to do. It is as though suspects, having invoked this right, now consider anything else they might say as 'off the record'. One wonders, in addition, whether suspects who have invoked their right to remain silent believe that they have negated anything they might say after that, including the second Miranda warning, 'anything you say can and will be used against you in a court of law'.

In the Jesse Moffett case, noted earlier, Moffett was read his rights during his interview with the police. Moffett had telephoned the police because he had been at the scene of a murder the previous night and had actually spoken with the victim. The police then interviewed Moffett at the park where the murder took place. In that interview, Moffett said that since the victim was bleeding, he had stopped to offer her help. During his effort, he reported that he used his t-shirt to wipe blood from her face and, in the process, probably left his own fingerprints in the area. At this point, the detective reports that he read Moffett his rights. The report then says: 'He said he understood his rights and then he wanted to know if he was going to be arrested.' At this point Moffett invoked his Miranda rights (or at least he thought he did). After invoking his right to have an attorney, Detective Carey's report says:

> Prior to leaving, he asked me if we had any new evidence. He also asked me if we found any fingerprints between the walkway where he originally contacted the girl. I told him that we did have good prints off of the walls. He then advised the undersigned that the last he saw of her was right where we were standing. He said he left her here with his t-shirt and walked through the buildings pointing to where he first contacted her. He was asked if he had ever gone down the walk that night with her toward the handball courts. He said he never has been down there because he's only been in the park twice since he got out of Tracy [prison in California]. He also stated he did not see a radio or a bronze colored jacket. Prior to leaving the presence of the undersigned he said some of the guys in the area had told him that some lunatic that lives in the area did it. He said he knew his name.

The Supreme Court's mandate in Miranda indicates that police are not permitted to talk a suspect out of his initial refusal after he has requested or obtained a lawyer. It also indicates that any change in willingness to talk must be initiated by the suspect. In the Moffett case, as we see from the police report, Moffett initiated two questions after invoking his rights. He asked whether there was any new evidence and whether any fingerprints had been found. Do these apparent questions constitute opening the door for the detective to continue the interrogation? Has Moffett now revoked his right to remain silent? Apparently Detective Carey believed that Moffett had changed his mind, permitting the detective to interrogate, for the report continues, '*He was asked* if he had ever gone down the walk that night.' [italics mine] Another line in the report also gives evidence of the detective's continued questioning: 'He also stated he did not see a radio or a bronze colored jacket.' In that there was no previous mention of these items, one can easily surmise that Carey asked if he had seen these two items and that Moffett responded that he had not. It is possible that Moffett may have volunteered that some guys in the area told him that a lunatic had committed the murder, but the next line of the report, 'He said he knew his name', sounds very much like an answer to a question, 'What's his name?'

Just exactly what kind of talk is and is not permissible for suspects after they have invoked their rights? One would think that they could ask for a drink, request to go to the bathroom, or talk about their kids. How close to the subject of the suspect's involvement does any continuous talk have to be? And how could such be measured? Maybe asking for facts about the case, as Moffett is reported to have done here, comes close to revoking the waiver. But a much clearer revocation would be a performative-like statement such as, 'I've changed my mind. I really want to talk with you after all.' Somewhere in between the extremes of small talk and revoking their waiver performatively lies a language continuum that is suitable for considerable linguistic analysis.

And what kind of talk is and is not permissible for the police after suspects have invoked their rights? One would think that they could offer a drink, call a taxi, or discuss the weather. A well-known example of police comments that constitute Miranda-prohibited questions is found in the case of Brewer v. Williams (430 US 387, 1977), which contains the commonly known 'Christian burial speech'. This was a child abduction case in which the police were driving a suspect who had invoked his constitutional rights, and already had an attorney, to another location. Although technically the police did not ask the suspect any questions, they did observe to him that a snow storm was expected soon and they hoped they could find the child's body so that the family could have a proper Christian burial. The suspect promptly volunteered where the body was. The Supreme Court considered the case and ultimately ruled that the words of the police were the 'functional equivalent' of an interrogation.

Thus the words 'functional equivalent' once again become operative. Before, we noted that the courts ruled that suspects' perceptions of the

functional equivalents of 'attorney' were not valid. Here we see that the courts rule a police observation about their hope for a decent Christian burial is the functional equivalent of questioning. It is clear that the concept of functional equivalence is not uncommon in the interpretation of the law. But what are the functional equivalents of remaining silent? Linguists might be able to help shed light on this issue.

6. WHAT DOES 'DO YOU WISH TO TALK WITH US' MEAN?

Allied with the question of remaining silent is the type of conversation that the police can engage in with suspects after they have invoked their Miranda rights. For example, after John Hinkley was arrested for shooting President Reagan in 1981, the police wanted to question him as to whether or not other persons conspired in the crime which he had obviously committed. He was read his rights and he signed a form indicating that this had been done and that he understood them. But he was unwilling to answer questions saying, 'I'm not sure. I think I ought to talk to Joe Bates' (his father's lawyer in Dallas). While waiting for his lawyer, Hinkley agreed to answer various 'background' questions which carefully avoided anything related to his recent activities in Washington. The D.C. District Court later ruled that this 'background' information was the product of an interrogation after he had requested an attorney and that it could not be used as evidence against him.

In the context of everyday verbal exchange, it seems innately rude to be unwilling to talk. Such unwillingness commonly suggests that there is a reason for being unwilling to talk, such as anger, fear, or embarrassment. In the case of a police interrogation, of course, the ante is upped to fear of being caught. Innocent suspects being questioned are often quite aware of this and find it even more difficult to say that they are unwilling to talk for fear of appearing guilty if they refuse to co-operate.

In the case of the United States v. John DeLorean, I got a phone call from an FBI agent who asked me if he could come by and 'visit with me'. This was at the time before trial when the case was publicized widely. The week before this call came in, Larry Flint of *Hustler* magazine had announced that he had purchased copies of the tapes in the DeLorean case for a huge amount of money. In that this indicated a violation of chain of custody of the tapes, all those who had copies of the tape evidence were suspected of being the person who sold them to Flint. Naturally, I was a suspect too. I had nothing to hide in this matter and was at first inclined to tell the agent, 'Sure, come on over'. Fortunately, however, I have a somewhat suspicious mind. I had been working on this case for several months and was nearly ready for the trial which was

to begin shortly. I worried that the agent might try to get me to reveal my analysis and thereby tip off the prosecution about my findings.

I called Howard Weitzman, DeLorean's attorney, for advice. He agreed that the agent might try to discover my analysis and advised me to surreptitiously tape record our meeting. He pointed out that there are no witnesses at such meetings and that whatever the agent wrote up in his report, accurate or not, would be regarded as a court record. This scared me. If the agent were less than honest, he could write up a report that incriminated me even though I had no culpability in the matter. I told Weitzman that, despite this danger, I simply could not surreptitiously tape the meeting.

To protect myself, I hired an attorney to represent me in my meeting with the FBI. When, as feared, the agent attempted to invade the territory of my analysis, the attorney advised me not to answer. I followed his advice and the meeting was soon ended. The FBI later discovered the person who had sold the tapes to Flint, an assistant in a different law firm that had handled the case before Weitzman was hired. But the matter was not over for me. At trial, in an effort to impeach my testimony, the prosecutor brought out the FBI report showing that I had been uncooperative when I refused to answer some of the agent's questions.

This story illustrates several points. It showed me how difficult it is to tell the police, 'I am unwilling to talk to you.' I came within a hair's breadth of agreeing to the FBI interview when they first called me. Had I not been aware of what can happen when one is not represented by an attorney, I might well have agreed to be interviewed by the agent at that time. I have no particular reason to believe that the agent would have lied in his report and accused me of selling the tapes to Larry Flint, but I was certainly correct in my suspicion that the agent would try to find out as much as he could about my future testimony. If I had let him interview me, I'm not really sure how effective I might have been in refusing to give my analysis away. Being interviewed by law enforcement agents is a frightening experience, even for a person who is totally innocent. The only thing to do, guilty or innocent, is to get the representation of an attorney as quickly as possible. It is very difficult to tell someone that you don't wish to talk with them. I had the same difficulty that any suspect would have. Linguists need to carry out research that applies such linguistic tools as the co-operative principle to issues such as this.

7. WHAT DO SUSPECTS NEED TO SAY IN ORDER TO INVOKE THEIR RIGHTS?

Once again, the range of possibilities of language variation goes from the polarities of explicit performatives, such as 'I want a lawyer present', or 'I don't want to talk to you', or 'I'm willing to talk to you now

without a lawyer being present', to various less explicit or even ambiguous expressions. It is the ambiguous language, of course, that causes problems for law enforcement and the courts. It is also the language that is of great interest to linguists. At least some courts agree that ambiguous statements should be construed as invocations. The problem is how ambiguity is decided. The following are some candidates (Nissman *et al.* 1985: 183):

a) *Held as an invocation:*

'I don't know if I should have a lawyer or what.'

'I'm willing to co-operate, but I have to follow my lawyer's advice.'

'I won't tell you where the money is until I've talked to my lawyer.'

b) *Held not to be an invocation:*

'I can't afford an attorney.'

'Do I have to continue this interview?'

(after being asked if he wanted to waive his right to a lawyer):
'I guess.'

(after being asked if he would waive his rights):
'Uhm, well, to tell you the truth, I'd like to read. I have a book in my bag I'd like to read. I'd like to have my cigarettes.'

'I'd like someone in authority, like an attorney, to read my confession to me.'

'I'm not sure whether I want to tell you about it. I mean, I want to tell somebody, but if I tell you, you're going to use it against me. And if I tell my own lawyer, he'll use it for me. I'll be requesting an attorney eventually when I get back.'

'I will confess to my lawyer what is going down.'

(defendant remains silent for half an hour, ignoring the officer's repeated questions)

Obviously, no linguistic contribution to understanding the above responses can be made without more context than is given here. But even this minimal context raises questions about such things as the meaning conveyed by silence, what the speaker means by the word, 'confess', the meaning conveyed by uncertainty about what to do, and the significance of hedged denial or agreement. At present, the courts usually make determinations without benefit of input from linguistic knowledge or analysis. It would seem possible to collect such statements and develop an ambiguity continuum as a guide to the courts in judging such matters.

8. HOW FAR CAN THE POLICE VARY THE WORDS 'ANYTHING YOU SAY CAN AND WILL BE HELD AGAINST YOU'?

Not all Miranda warning language used by the police is exactly the same. For that matter, even different parts of the Miranda decision express warnings in different ways. On one page the decision says that any statement 'may' be used against the suspect and on another page it reads 'can and will'. Most courts have overlooked this ambiguity, concluding that it is quite enough to tell suspects that anything they say 'can', 'might', 'could', or 'may' be used against them. They conveniently overlook 'will', however, and at least one court has pointed out the logical and factual error in using this word, since there are obviously many things that suspects could tell a law officer that would never be used against them.

When police stretch the exact words of the warning, however, their case has been weakened. For example, in one case the police expanded the concept 'held against you' to 'for you or against you', as follows: 'Anything you say won't necessarily be held against you, it can be held to help you, depending on what happened.' The California court ruled that these words produced an invalid waiver (People v. Hinds, 154 Cal App 3d 222, 201 Cal Rptr 104, 1984, 5th Dist).

On the other hand, courts have ruled that it is perfectly permissible for police to say, 'You don't have to make a statement' and 'You don't have to answer questions' for 'You have the right to remain silent' (Nissman *et al.* 1985: 163).

Exactly what is the range of permissible variation of the Miranda warnings that exists and what are the linguistic principles upon which the court rulings seem to be grounded? One place to begin would be for linguists to tabulate all such variations and then find the principles that guide them or, alternatively, discover the extent to which the rulings distort any such principles.

9. HOW CAN AN INTERROGATION BE RECYCLED AFTER SUBJECTS HAVE FIRST INVOKED THEIR RIGHTS?

Once suspects have invoked their Miranda rights, the police must stop their questioning immediately. It is common for them to explain that they cannot question further because this right has been invoked. If, however, at some point after invoking their rights, suspects initiate conversation indicating that they are willing to talk, the questioning may

continue as though their rights had been waived. This has a parallel in topic recycling studied by discourse analysts. An important condition, however, is that the police are not permitted to talk suspects out of their initial refusal after they have requested counsel.

The courts are in general agreement about the definition of 'initiation'. It occurs when the suspect's question evinces a willingness and desire for a generalized discussion of the subject matter of the criminal investigation (Oregon v. Bradshaw 642 US 1039, 77 L Ed 2d 405, 103 S Ct 2830, 1983, on remand 66 Or App 585, 674 P2d 1190, review den 296 Or 712, 678 P2d 740).

But what are the linguistic characteristics of the suspect's initiations of willingness to talk? What measures of willingness and desire for a recycled discussion of the subject matter of the criminal investigation can be linguistically described? Jesse Moffett, as noted earlier, after invoking his rights, asked two broad questions about the police investigation, after which Detective Carey, by admission of his own report, asked Moffett several further questions about his actions and whereabouts in relationship to the murder of the preceding night. How specific to the crime event must the suspect's topic recycling be before the police can assume that they have reconsidered and are now willing to talk after all? To what extent and under what conditions can the police justifiably infer that the words of invoked suspects indicate a change of heart about their rights?

10. HOW CAN INTENTIONALITY BE DETERMINED?

A number of court decisions have supported the prosecution even though in one sense or another, apparent Miranda violations have occurred (Michigan v. Tucker, Oregon v. Elsted, Harris v. New York, Oregon v. Haas). In most cases, these violations were judged to be accidental or unintentional. Crawford (1997) notes that such limitations on the effects of Miranda 'have encouraged some law enforcement officers to conclude that they have "little to lose and perhaps something to gain" by disregarding the Miranda rule' (28). When officers see that the interrogation has only the slimmest chance of obtaining incriminating facts, they may ignore the suspect's invocation and continue their questioning. This practice is actually encouraged by the courts' lack of compelling legal reasons to avoid such a strategy along with the fact that there has been precedent for those whose rights have been violated holding officers liable for civil actions.

Crawford notes, however, that in one decision, Cooper v. Dupnick, it was held that *intentional* violations of Miranda may result in law enforcement officers being held personally liable for depriving individuals of either their Fifth Amendment protection against compelled self-incrimination or the constitutional guarantee of due process (1997: 29).

The appellate court ruled that the blatant refusal to honor Cooper's invocation generated a feeling of helplessness. Hours of harsh and unrelenting questioning was also cited as a reason for the ruling. The court found that such questioning compelled Cooper to make statements that were not factual and that Cooper was, indeed, coerced. Benign, accidental, or unintentional Miranda violations were not the subject of this ruling. The focus was on *intentional* violations by law enforcement officers.

The issue of intentionality is obviously one in which linguists have had some recent experience. It is clear that no linguist, psychologist, or anyone else can reach into the minds of speakers and determine exactly what their intentions were. But tape recorded interrogations make it possible to discover conversational strategies that can offer strong clues to such intentions. These clues are found in the topics people introduce, the responses they give, their techniques of acceptance, avoidance, or rejection, and other language practice.

It would appear that linguistic analysis has a strong potential for helping law enforcement, the courts, the prosecution, and the defense in finding clues to the intentions of both the police and the suspect in cases where Miranda warnings have been violated.

A multitude of cases and case transcripts are available for linguistic analysis in such matters, providing a wealth of data for defense in finding clues to the intentions of both the police and the suspects in cases where Miranda warnings have been violated. There is a wealth of data for linguists concerned about presupposition, inferencing, indirect speech acts and syntax. Optimally, such research will prove helpful to the courts in their efforts to understand and carry out effective and fair Miranda warnings. Linguists have barely scratched the surface of the useful work that is available to us. It is hoped that these ten questions will stimulate the field to extend its growing importance and service to the law.

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