

Deconstructing *Davis v. United States*: Intention and Meaning in Ambiguous Requests for Counsel

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Introduction: The Legacy of Deconstruction for Constitutional Interpretation

Jacques Derrida, the French intellectual known as the father of “deconstruction” theory, died on October 8, 2004, at age 74, in Paris. His passing has been the occasion for a reconsideration of the influence of deconstruction across a wide range of disciplines, including the law. In the legal world, some have seen the death of Derrida as an excuse to close the door on any deconstructionist analysis of the law.¹ However, many insights on language and meaning that are associated with deconstruction theory remain crucial to legal analysis. For interpretation, as with all other things, ignorance of the past dooms one to relive its errors. A case in point is the United States Supreme Court’s holding in *Davis v. United States*.² As we shall demonstrate, the holding in *Davis* — that courts must

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1. See, e.g., Justin Scheck, *Deconstruction Bar Finds Meaning in Derrida’s Death*, SAN FRANCISCO RECORDER, October 18, 2004, at p. 4.

2. 512 U.S. 452 (1994).

determine whether a suspect has “articulate[d] his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney”³ — depends on conceptions of language and meaning that deconstruction theory has discredited.

Section 1: Derrida’s Deconstruction of Literal Meaning

One problem with describing the influence of deconstruction theory in the United States is that the term deconstruction has meant many, and sometimes contradictory, things to different people. Certainly, deconstruction is associated with the work of Jacques Derrida.⁴ The full legacy of deconstruction resides, however, not only in the works of Derrida but also in the large body of ideas and writings created in response to those works. Derrida and deconstruction became a sounding board against which scholars across a wide range of academic disciplines engaged in important theoretical debates on the nature of philosophy, society, and language. One particular subsection of these debates has centered on the relationship between language and meaning. Controversy on this topic arose, initially, within the greater academic world of literary theory, but ultimately spread to several other disciplines, including the law, where it became part of a larger debate — sometimes referred to as the “culture wars” — in which some commentators complained that certain theoretical movements, including and especially deconstruction, were undermining traditional Western values.⁵

Derrida’s influence on literary theory began with his participation in the Structuralist Conference at Johns Hopkins University in 1966. Structuralism was a movement associated with the French anthropologist Claude Lévi-Strauss. Lévi-Strauss and his movement had attempted to describe cultural constructions, such as

3. *Id.* at 459.

4. See JACQUES DERRIDA, *Structure, Sign, and Play in the Discourse of the Human Sciences*, in *THE STRUCTURALIST CONTROVERSY* (Richard Macksey & Eugenio Donato eds., Johns Hopkins Univ. Press 1976).

5. See, e.g., ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS FAILED DEMOCRACY AND IMPOVERISHED THE SOULS OF TODAY’S STUDENTS* 379 (Simon & Schuster, 1987); (“[Deconstructionism] is the last, predictable, stage in the suppression of reason and the denial of the possibility of truth in the name of philosophy. The interpreter’s creative activity is more important than the text; there is no text, only interpretation.”); see also DAVID LEHMAN, *SIGNS OF THE TIMES: DECONSTRUCTION AND THE FALL OF PAUL DE MAN* (Poisedon Press 1991).

the myths of aboriginal peoples, as systems of terms within a structure.⁶ Lévi-Strauss, in turn, had been influenced by the work of certain linguists, in particular Ferdinand Saussure, who had described language as a formal structure of elements (i.e., words and grammatical rules) existing apart from the particular spoken utterances of individual speakers.⁷ Structuralism's emphasis on the formal structures of language can be seen as an attempt to obtain scientific rigor through an objective method for the interpretation of language.⁸ As will be discussed below, the *Davis* Court, in propounding its standard for interpreting a suspect's invocation of the right to counsel, expressed a similar sort of desire to reach an "objective" method of interpretation.

Derrida criticized structuralism for failing to appreciate how the very nature of language defeats any attempt to define linguistic utterances as formal structures. In particular, Derrida pointed to one essential quality of language being its "iterability" — i.e., the availability of its components for repetition — which, he argued, confounded structuralism's and other theoretical attempts to define a closed system of language. In this vein, Derrida stated:

The iterability of the mark does not leave any of the philosophical oppositions which govern the idealizing abstraction intact (for instance, serious/non-serious, literal/metaphorical or sarcastic, ordinary/parasitical, strict/non-strict, etc.). Iterability blurs a priori the dividing-line that passes between these opposed terms, "corrupting" it if you like, contaminating it parasitically, qua limit.⁹

By "iterability," Derrida meant that the essence of any word is that it will be repeated, that is, used to produce meaning time and time again in different situations. This was not a new idea. In fact, the concept of the "iterability" of language lay at the basis of structuralism, in its principle that languages are closed systems because there exists at any given moment only a finite set of words within a given language. Consequently, any given word must be capable of being used over and over again — repeated, iterated — in

6. See CLAUDE LÉVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* (Claire Jacobson & Brooke Schoepf trans., Basic Books 1963).

7. This is the basis for Saussure's famous distinction between *langue* and *parole*. See FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* (Wade Baskin trans., McGraw-Hill 1966).

8. See ROBERT CON DAVIS & RONALD SCHLEIFER, *CONTEMPORARY LITERARY CRITICISM: LITERARY & CULTURAL STUDIES* 233-41 (Longman 3d ed. 1994).

9. JACQUES DERRIDA, *LIMITED INC.* 123 (Northwestern Univ. Press 1988).

an unforeseen (and unforeseeable) number of possible situations. Derrida pointed out that the quality of inherent iterability suggests that no word or phrase can be assumed to retain a constant meaning across all instances of its use. Rather, when a word or phrase is spoken or written in different contexts, it will necessarily assume different meanings.

One of the most familiar instances of words' variable meaning lies in the common distinction between the "literal" use of a word or phrase, and a "figurative" use of the same word or phrase — for example, as sarcasm. Thus the single phrase, "That's just great," can have very different meanings depending on the context surrounding its utterance and the intention of the speaker. If a law student utters this phrase immediately after she has learned she has passed the bar examination, a hearer would intelligently assume she intends it to have its "literal" meaning. However, if she utters the identical phrase immediately after observing that a parking ticket has been placed on the windshield of her car, a hearer would properly interpret her meaning as sarcasm. The latter hearer would, in fact, most reasonably conclude that the law student actually meant (sarcastically) to convey a meaning that is the reverse of the phrase's literal meaning.

Using even such a simple example as this, one can generate an almost limitless number of contextual variations that might throw into question a hearer's ability to judge accurately whether a phrase is being used literally or sarcastically. For example, suppose that prior to learning that she had passed the bar examination, our hypothetical law student had been expressing her ambivalence about the legal profession generally — stating that she actually hoped she would fail the examination so she would not have to undertake the labor of building a new lawyer's career. In such a context, we might also interpret her statement, "That's just great," even when uttered upon her learning she had passed the bar examination, as being uttered sarcastically and, hence, having a non-literal meaning.

Partly by using such examples, Derrida focused on the uncertainty of any text's meaning in order to demonstrate that one may not take for granted, as many theorists had, traditional categories of meaning such as "literal" versus "figurative." Derrida persistently sought to "deconstruct" such oppositions through rigorous reading of philosophic and literary texts. Because of his emphasis on deconstructing these traditional oppositions, many understood Derrida to be arguing that traditional categories of interpretation (for example, the category of literal versus figurative) do not exist in

reality and, consequently, that language is without meaning. Certainly this was the way Derrida was understood by many of his critics.¹⁰

A somewhat more temperate, and sympathetic, interpretation of Derrida's work is available, however. Some have taken as deconstruction's central insight, not that traditional oppositions in the understanding of language are meaningless but, rather, that such traditional oppositions exist in a fluid relationship to each other — and that a useful understanding of the subtle and changeable nature of words' meaning is obscured, rather than assisted, by unexamined reliance on rigid interpretive dichotomies.¹¹ From this perspective, awareness of the iterability of language allows an interpreter to understand any phrase (no matter how literally one context might demand that it be taken) as having various meanings, other than its literal one, in various contexts. Structuralist theorists avoided acknowledging the potential for various meanings inherent in any phrase because acknowledging this would complicate, if not completely frustrate, the structuralist project of articulating a completely specified, predictive theory of language. Thus, to the extent that structuralists acknowledged ambiguity as a phenomenon in language, it was considered a type of flaw or defect, or its use was limited to non-standard "literary" uses of language. But Derrida's insight was that, far from being a flaw or a specialized use of language, the potential for a word to carry various meanings was fundamental to all language:

Once it is iterable, to be sure, a mark marked with a supposedly "positive" value ("serious," "literal," etc.) can be mimed, cited, transformed into an "exercise" or into "literature," even into a "lie" — that is, it can be made to carry its other, its "negative" double. But iterability is also, by the same token, the condition of the values said to be "positive." The simple fact is that this condition of possibility is structurally divided or "differing-deferring" [*differante*].¹²

Derrida also coined the French word "differante" — a pun on the similar sounds of the French words for "differing" and "deferring."¹³ Through the use of this neologism Derrida sought to

10. See, e.g., John R. Searle, *Literary History and its Discontents*, 25 NEW LITERARY HIST. 637 (1994).

11. See JONATHAN CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* (Cornell Univ. Press 1982).

12. DERRIDA, *supra* note 9, at 123.

13. See JACQUES DERRIDA, *Differance*, in *SPEECH AND PHENOMENA, AND OTHER*

indicate that the opposing meanings of a word not only “differ” from each other, but also that they operate so that, in any given particular utterance, some possible meanings of a word “defer” to other possible meanings. But Derrida also argued that the opposing (or otherwise differing) meanings of a word are never entirely absent, but merely defer to the dominant meaning for the moment, or in that context. Thus, Derrida, in often whimsical style, with an emphasis on puns, expressed the serious insight that it is not always easy to determine where the line between literal and figurative meaning lies.

Section 2: Intent versus Meaning: the Debate in Modern Literary Theory

Derrida’s work came to prominence in Europe as part of the ongoing theoretical debates over “structuralism” which, as noted above, were largely focused on the relationship of philosophical concepts to linguistics and anthropology. In British and American universities, however, Derrida’s work was taken up primarily in literature departments. There are a number of possible reasons for this, but perhaps the most important was that the interpretive issues Derrida dealt with, like the dichotomy between literal and figurative language, had long been centrally important to Anglo-American literary criticism. In particular, a broad literary critical movement identified as “the New Criticism” had emphasized close textual “readings” of literary texts to uncover the nuanced meanings and ambiguities of literary texts.¹⁴ Although the tradition of New Criticism provided a basic framework by which Derrida’s ideas could be assimilated into the work of literature scholars, many proponents of deconstruction in literature departments presented themselves as breaking with traditional New Criticism.¹⁵ Some such critics argued that proponents of traditional New Criticism correctly identified hidden ambiguities in subject texts, but then inaccurately attempted to “resolve” them into a single “coherent” reading.¹⁶ Deconstructionist critics from this perspective emphasized the presence of irresolvable ambiguities as reflecting the indeterminate

ESSAYS ON HUSSERL’S THEORY OF SIGNS (David B. Allison trans., Northwestern Univ. Press 1973).

14. See FRANK LENTRICCHIA, *AFTER THE NEW CRITICISM* (Univ. of Chi. Press 1980).

15. *Id.*

16. *Id.*

nature of language itself.¹⁷

In reaction to deconstructionist criticism's emphasis on the radical indeterminacy of meaning, certain literary critics sought to develop criteria for what was variously called "correct" or "valid" or "objective" interpretation. Of course, the question of how to determine a "correct" interpretation has been a perennial issue not only in literature and philosophy, but in the law as well. One recurring approach to defining a method of correct interpretation in all of these fields has been to focus on the "literal" meaning of words. As already discussed, Derrida relentlessly pointed to the problem of determining, in any specific case, what the literal meaning of a word or phrase may be.

Additionally, literary studies and the law differ in their perspectives on linguistic ambiguity. Ambiguity has generally been regarded in the law — as reflected most strongly in the areas of contractual and statutory law — largely as a technical problem to be solved by careful drafting. But in literary studies, because of the pervasive influence of New Criticism, by the 1960's, even conservative literary critics acknowledged, and even celebrated, the use of figurative and ambiguous language. Thus, for a literary critic who wanted to present an acceptable method for determining a "correct" or "valid" interpretation, it simply was not fruitful to renounce linguistic ambiguity in favor of literal meaning. Literary scholars and critics were driven, instead, to elaborate methods of interpretation that took ambiguity into account, yet offered criteria for arguing the validity of particular interpretations against competing ones. The issue of valid interpretation took on increased importance in the aftermath of deconstructionist theory, partly because some deconstructionist critics appeared to take the position that *all* language, literary and non-literary alike, was, in the end, hopelessly indeterminate.

If one accepts that a particular phrase can have several possible meanings, then one solution to the problem of determining which meaning is the "correct" one is to identify the speaker's or writer's apparent intention. This was the approach of the literary theorist E.D. Hirsch in his aptly titled book, *Validity in Interpretation*.¹⁸ Hirsch argued that the meaning of a text "is, and can be, nothing

17. *Id.* Polemics aside, arguably some "traditional" New Critics, like William Empson in *The Seven Types of Ambiguity*, offered readings of literary works that were just as "radical" in their exploration of indeterminate meaning.

18. E. D. HIRSCH, JR., *VALIDITY IN INTERPRETATION* (1967).

other than the author's meaning," and "is determined once and for all by the character of the speaker's intention."¹⁹ Hirsch also argued that valid literary interpretation "must stress a reconstruction of the author's aims and attitudes in order to evolve guides and norms for construing the meaning of his text."²⁰ In particular, Hirsch contended, literary critics should use historical and bibliographical information in order to understand an author's meaning, and not limit themselves just to generating possible understandings from the various possible meanings of a text's words themselves.²¹ Possible meanings of words are defined, in such an approach, by "public norms" — that is, words have agreed-upon meanings as indicated by, among other things, definitions appearing in dictionaries that are generally considered authoritative.²²

As Hirsch elaborated, "no mere sequence of words can represent an actual verbal meaning with reference to public norms alone. Referred to those alone, the text's meaning remains indeterminate."²³ As an example, Hirsch gives the sentence: "My car ran out of gas." While this sentence is instantly recognizable to us in its usual, "literal," meaning, Hirsch argued that, considered as a string of words, the sentence is susceptible to a number of possible interpretations. The usual meaning is, of course, *my automobile ran out of fuel*. But consider that the same phrase can have the possible meaning: *my Pullman railroad car dashed out from a cloud of Argon gas*. Given the availability of more than one possible meaning, we might ask, what inclines us, ordinarily, to understand the phrase as having its usual, "literal," meaning? According to Hirsch, our tendency to assign a given text its usual or literal meaning arises from our understanding of the intentions of the speaker who uttered it. The public norms governing the words alone, that is, do not determine what we take as the "correct" interpretation. Each of the

19. *Id.* at 216, 219.

20. *Id.* at 219.

21. *Id.* at 224.

22. But it is essential to remember that dictionaries do not even purport to be independent determiners of meaning in particular contexts. Dictionaries contain after-the-fact descriptions of existing meanings of words and can at most present sets of possible meanings; they cannot conclusively determine *the* meaning conveyed by a word's use in a particular context. Dictionaries also are, necessarily, incomplete; new meanings of existing words are constantly developing, which is why dictionaries are regularly revised. Such fundamental points often seem lost on courts that turn to dictionaries for the "objective" meaning of words.

23. HIRSCH, *supra* note 18, at 225.

words composing our sample text stating that a car ran out of gas, for example, has at least two alternative public (i.e., dictionary) meanings. If you look up the word “car” in a complete dictionary, you will find as possible meanings, both automobile and railroad car. If you look up the words “ran out of” you will find both “became empty of” and “dashed from within.” If you look up the word “gas,” you find both “gasoline” and “elemental gases like Argon.” Hirsch argued that what allows us to have confidence that the first interpretation of the sentence is the correct one is our understanding of the speaker’s intention in uttering the sentence. Our understanding of that intention, Hirsch argued, will determine our understanding of the context in which the sentence is spoken. Hirsch sums up: “The array of possibilities only begins to become a more selective system of *probabilities* when, instead of confronting a mere word sequence, we also posit a speaker who very likely means something.”²⁴

Hirsch’s exhortations that literary critics examine authors’ intentions in settling upon valid interpretations actually were made prior to deconstruction, and at the time were directed against what Hirsch complained were the unhistorical readings of certain New Critics who examined only possible meanings of texts themselves, and refused to consider historical and bibliographical information in arriving at their interpretations.²⁵ Hirsch’s intentionalist arguments, however, were brought back into prominence in the era of deconstructionist criticism by Steven Knapp and Walter Benn Michaels, two literary theorists who argued that Hirsch had not gone far enough in insisting on the inseparability of a text’s meaning and the speaker’s intention.

Knapp and Michaels argued that, for an interpreter, the very act of finding any meaning in a sentence presupposes hypothesizing that sentence as the intention of some speaker or writer: “For a sentence like ‘My car ran out of gas’ even to be recognizable as a sentence, we must already have posited a speaker and hence an intention.”²⁶ Expanding on the question of the choice between two possible meanings of Hirsch’s hypothetical sentence, Knapp and Michaels posit:

24. *Id.*

25. See E.D. Hirsch, *Against Theory?* in W.J.T. MITCHELL, *AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM* (Univ. of Chi. Press 1985), pp. 48-52, at p. 51.

26. See Steven Knapp & Walter Benn Michaels, *Against Theory?* in W.J.T. MITCHELL, *AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM* (Univ. of Chi. Press 1985), pp. 11-30, at p. 14.

Pinning down an interpretation of the sentence will not involve adding a speaker but deciding among a range of possible speakers. Knowing that the speaker inhabits a planet with an atmosphere of inert gases and on which the primary means of transportation is by railroad will give one interpretation; knowing that the speaker is an earthling who owns a Ford will give another. But even if we have none of this information, as soon as we attempt to interpret at all we are already committed to a characterization of the speaker as a speaker of language. We know, in other words, that the speaker intends to speak; otherwise we wouldn't be interpreting.²⁷

Thus, Knapp and Michaels insisted that what is commonly thought of as the "literal" interpretation of a sentence comes, not just from the words on the page, but, rather, always involves an implicit hypothesis on the part of the interpreter about the speaker's circumstances and intention. That we do this as interpreters is easy to see in the case of unusual applications of commonplace phrases, like Hirsch's example of "My car ran out of gas." In order to see how the phrase, "My car ran out of gas," could possibly mean "my Pullman car dashed out of the Argon," for example, an interpreter has to supply a highly unusual background situation in which the hypothetical speaker lives and then understand the speaker's intention to communicate something in relation to that background situation. But Knapp and Michael's point is that, as interpreters, we *always* engage in this basic process of constructing implied context and speaker intention when we grasp the meaning of a sentence, even when we think we are merely grasping the "literal" meaning of a sentence. Thus, even when we understand, "My car ran out of gas," in its "literal" sense, we have no less implicitly placed the statement within a context and posited the speaker's intention (in this case, our usual world of the internal combustion engine and the intention to describe something happening in that world).²⁸

Now suppose that we find ourselves transported to the Argon world and that we have figured out how that world works so that we can understand what an inhabitant of that world means when he or she says, "My car ran out of gas." But suppose we nonetheless assert that the phrase, "My car ran out of gas," has to mean what it usually means in our usual world — that is, what earthlings would identify as

27. *Id.*

28. The speech act philosopher of language, John R. Searle, has written extensively about how context (what he calls "the background") is essential to meaning. See JOHN R. SEARLE, *INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND* (1983).

its “literal” meaning. We would then be insisting on understanding the sentence in its “literal” sense rather than in the sense we actually understand the speaker to be intending. As an approach to interpretation, taking such a position would entail both understanding the apparent intention of the speaker *and* rejecting that intention in favor of another, possible, meaning (based ultimately on how we reasonably would understand the words if they were uttered in another context). But as Knapp and Michaels explained, such a position is an interpretive absurdity: “We have tried hard to find, or when we couldn’t find it, to *invent*, a reason why someone might insist that a text be read as meaning what it means in the language in which its author wrote it, even while at the same time insisting that it doesn’t matter what the author intended.”²⁹ According to this analysis, it would be a fundamental interpretive blunder to purport to understand the meaning of a speaker’s utterance while simultaneously ignoring the speaker’s intent.

As detailed below, the United States Supreme Court in *Davis v. United States* committed precisely the interpretive blunder Knapp and Michaels warned against. *Davis* suggests that the only way for a court to engage in an “objective inquiry” into the meaning of a suspect’s utterance is to ignore the “subjective” intent of the suspect. *Davis* held, specifically, that in evaluating a putative invocation of the right to counsel courts should employ an “objective” standard of meaning — namely, the court must determine that the suspect “articulate[d] his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.”³⁰ “If the statement fails to meet the requisite level of clarity,” the officer can treat it as ambiguous and can continue questioning.³¹ The Court acknowledges that this standard allows suspects’ statements to be disregarded as an invocation of the right to counsel in cases where suspects do “not clearly articulate their right to counsel although *they actually want to have a lawyer present*.”³²

As will be discussed below, the interpretive standard mandated by *Davis* contains several fundamental theoretical flaws of the sort previously identified by deconstruction theory in the literary context.

29. See Steven Knapp & Walter Benn Michaels, *Reply to John Searle*, 25 NEW LITERARY HIST. 669, 671 (1994).

30. *Davis v. United States*, 512 U.S. 452, 459.

31. *Id.*

32. *Id.* (emphasis added).

Most fundamentally, *Davis* creates a standard of meaning that allows the actual intentions of the actual speaker to be ignored, in favor of what those words *could* be construed to mean by some other speaker, in some other context. As discussed above, when it comes to determining the meaning of a speaker's statement, the intent of the speaker is anything but irrelevant. Consideration of the intent of the speaker is inseparable from the determination of the meaning of an utterance. The determination of a speaker's meaning always involves a consideration of the speaker's intention, because a hearer always places an utterance in context when determining an utterance's meaning, and the concepts of context and speaker intention are analytically inseparable. As will be discussed in detail below, by propounding a standard of "clear articulation" that allows actual intent of the speaker to be ignored, the *Davis* court has created a standard of interpretation that actually undermines "objective" interpretation. *Davis* creates, in fact, a standard that allows a court to engage in arbitrary interpretation.

Section 3: The Evolution of Miranda Doctrine on Invocation of the Right to Counsel

The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law"³³ In 1966, the United States Supreme Court, in one of Chief Justice Earl Warren's most famous and controversial opinions, held that statements obtained from criminal defendants during incommunicado interrogation in a police-dominated atmosphere, without full advisement of relevant constitutional rights, are inadmissible as evidence, as having been obtained in violation of the Fifth Amendment's privilege against self-incrimination.³⁴ Among the procedural safeguards *Miranda* accorded a person in custody is "the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned."³⁵ Indeed, if a person in custody "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that

33. U.S. CONST. amend. V

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

35. *Id.* at 445.

he does not wish to be interrogated, the police may not question him.”³⁶

Miranda itself did not address the level of clarity required of a person in custody when expressing a desire to consult counsel. The question may arise whenever the communication is ambiguous, that is, when the suspect makes a reference to an attorney, but it is unclear whether the reference expresses the desire to consult an attorney prior to further questioning. In *Miranda*'s own terms, does such a communication “indicate[] in any manner” that the person in custody wishes to remain silent absent counsel, such that “the police may not question him”? Or does ambiguity in the communication render it an insufficient indication of the person's wishes to trigger constitutional protection?

The high court addressed aspects of the problem in several cases preceding *Davis*, showing an increasing willingness to treat textual ambiguity as grounds for flexibility in *Miranda*'s application. In 1975, Justice Stewart wrote for the court in *Michigan v. Mosely*, 423 U.S. 96 (1975), that admissibility under *Miranda* of statements obtained after a person in custody has invoked his right to silence depends, *not* on whether counsel was actually present for any subsequent questioning but, rather, on whether his right to cut off questioning was “scrupulously honored.” Purporting to preserve an arrestee's right to “control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation,” the high court nevertheless admitted a murder confession obtained in response to police questioning in the absence of counsel two hours *after* the defendant — who had been arrested and questioned on an unrelated robbery charge — invoked his right to silence following *Miranda* warnings.³⁷ A review of the circumstances leading to the defendant's confession, the court reasoned, revealed that “his ‘right to cut off questioning’ was fully respected in this case.”³⁸

36. *Id.* at 444-45.

37. *Michigan v. Mosley*, 423 U.S. 96, 103-104 (1975).

38. *Id.* at 104-05. “Before his initial interrogation, Mosley was carefully advised that he was under no obligation to answer any questions and could remain silent if he wished. He orally acknowledged that he understood the *Miranda* warnings and then signed a printed notification-of-rights form. When Mosley stated that he did not want to discuss the robberies, Detective Cowie immediately ceased the interrogation and did not try either to resume the questioning or in any way to persuade Mosley to reconsider his position. After an interval of more than two hours, Mosley was questioned by another police officer at another location about an unrelated holdup murder. He was given full and complete *Miranda* warnings at the outset of the second interrogation. He was thus reminded again that he could remain silent and could consult with a lawyer, and was carefully given a full

In *North Carolina v. Butler*, 441 U.S. 369 (1979), the high court held that an explicit waiver is not necessary to support a finding that a defendant has waived his *Miranda* rights. “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.”³⁹ Confusingly intoning that “mere silence is not enough,”⁴⁰ the court simultaneously held that in “at least some cases waiver can be clearly inferred from the actions and words of the person interrogated”⁴¹ — implying that verbal silence respecting waiver of counsel is no *bar*, at any rate, to its being inferred.⁴²

Two years later, in *Edwards v. Arizona*, 451 U.S. 477 (1981) — the case most commonly treated by commentators as setting the analytical stage for *Davis* — the high court seemed decisively to limit the inferential opportunities afforded police interrogators based on a suspect’s ambiguous statement.⁴³ In *Edwards*, the high court held that, where a defendant has invoked his right to have counsel present during custodial interrogation, subsequent waiver of the right is *not* established solely by his thereafter responding to police-initiated interrogation (even if he is again advised of his *Miranda* rights). “We further hold that an accused, . . . having expressed his desire to deal

and fair opportunity to exercise these options.” *Ibid.*

39. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

40. *Id.* (italics added). The court also had “said that the right to counsel does not depend upon a request by the defendant.” *Brewer v. Williams*, 430 U.S. 387, 404 (1977). Thus, in *Brewer*, the court found *Miranda* violated when police transporting a defendant against whom judicial proceedings had begun agreed with his attorney not to interrogate him but then made statements during the trip designed to elicit information. *Id.*

41. *Butler*, 441 U.S. at 373.

42. At trial, one of the questioning agents testified that the defendant “said nothing when advised of his right to the assistance of a lawyer.” *Id.* at 377. But the high court nevertheless allowed the waiver inference based on the defendant’s other “words and actions.” Specifically, the court noted: “the agents then took the respondent to the FBI office in nearby New Rochelle, N. Y. There, after the agents determined that the respondent had an 11th grade education and was literate, he was given the Bureau’s ‘Advice of Rights’ form which he read. When asked if he understood his rights, he replied that he did. The respondent refused to sign the waiver at the bottom of the form. He was told that he need neither speak nor sign the form, but that the agents would like him to talk to them. The respondent replied: ‘I will talk to you but I am not signing any form.’ He then made inculpatory statements.” *Id.* at 370-71.

43. *See also*, *Michigan v. Jackson*, 475 U.S. 625, 633 (1986); (“Doubts must be resolved in favor of protecting the constitutional claim” so “we presume that the defendant requests the lawyer’s services at every critical stage of the prosecution.”). *Id.*

with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.”⁴⁴

Subsequent pronouncements, however, made clear that *Edwards*' protective treatment of custodial reticence would not necessarily inhibit police interrogators from creatively interpreting suspects' statements as communicative openings to further questioning.⁴⁵ When the high court held only three years after *Edwards*, in *Smith v. Illinois*, that all questioning must cease “[w]here nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous,”⁴⁶ its holding opened up the possibility of a significant contrary proposition, namely that an ambiguous request would not require the cessation of questioning. But while the court acknowledged the issue, noting that “[o]n occasion, an accused's asserted request for counsel may be ambiguous or equivocal,”⁴⁷ it expressly declined to choose among the “conflicting standards for determining the consequences of such ambiguities” that it saw developing in the lower courts.⁴⁸

Three years later, in *Connecticut v. Barrett*, the court held that there was no *Miranda* violation when oral statements are used against a suspect who refused to make *written* statements without the presence of his attorney.⁴⁹ The defendant in *Barrett*, after refusing to make written statements, then went on to make *oral* statements to the police without his attorney being present.⁵⁰ On appeal, the defendant argued that the *Miranda* issue should be decided in light of the court's previous pronouncements that a defendant's request for counsel must be interpreted broadly.⁵¹ The high court was of the view that interpretive problems were not presented, however, stating, “*Barrett*

44. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

45. *See, e.g., Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983) (plurality opinion), wherein the court held that, in asking, “Well, what is going to happen to me now?” the accused had initiated further conversation for purpose of the *Edwards* rule.

46. *Smith v. Illinois*, 469 U.S. 91, 98 (1984).

47. *Id.* at 95.

48. *Id.*

49. *Connecticut v. Barrett*, 479 U.S. 523, 530, n.3 (1987).

50. *Id.* at 529. Upon arrival at the police station, an officer advised the defendant of his rights and he signed a *Miranda* acknowledgment. Thereafter, “he would not give the police any written statements but he had no problem in talking about the incident.” *Id.* at 525.

51. *Id.* at 529.

made clear his intentions, and they were honored by the police.”⁵² Interpretation, the court said, “is only required where the defendant’s words, understood as ordinary people would understand them, are ambiguous.”⁵³

It was not until it decided *Davis*, seven years later, that the court directly considered the legal effect of a suspect’s ambiguous utterance. And the standard of meaning the court articulated in *Davis* changed from that it previously had articulated — from “words, understood as ordinary people would understand them”⁵⁴ to words that were required to meet a “requisite level of clarity.”⁵⁵ This change creates significant consequences for the constitutional standard of meaning that courts must apply today.

Section 4: The Holding of *Davis v. United States*

As shown in the previous section, although *Miranda* states that the right to counsel is triggered whenever a person in custody “indicates in any manner . . . that he wishes to consult with an attorney,” the high court in subsequent cases has oscillated in how liberally it construes detainees’ utterances. As discussed above, *Smith v. Illinois* and *Connecticut v. Barrett* implied that only an *unambiguous* statement would count as a valid invocation of the counsel right. Having thus painted itself into a corner (by making the issue of ambiguity central) the court in *Davis* attempted to formulate a bright line solution to the resulting problem. Regrettably, the court pronounced a standard of meaning that is theoretically contradictory and so, ironically, encourages courts to engage in arbitrary acts of interpretation.

The underlying facts of *Davis* can be briefly summarized. Robert L. Davis, a Navy seaman, spent the evening of October 2, 1988, shooting pool at a club on his base. Another sailor, Keith Shackleton, lost a game (and a \$30 wager) to Davis, but refused to pay the gambling debt. After the club closed, Shackleton was beaten to death with a pool cue on a loading dock behind the commissary; the body was found the next morning. The Naval Investigative Service (NIS) gradually focused its investigation on Davis. On November 4, 1998, Davis was interviewed at the NIS office. As required by military law,

52. *Id.*

53. *Id.*

54. *Id.*

55. *Davis v. United States*, 512 U.S. 452, 459 (1994).

the agents advised Davis that he was not required to make a statement, that any statement could be used against him at a trial by court-martial, and that he was entitled to speak with an attorney and have an attorney present during questioning. Davis waived his rights to remain silent and to counsel, both orally and in writing. Approximately an hour and a half into the interview, Davis said, "Maybe I should talk to a lawyer." The interviewing agents indicated they would not continue questioning Davis unless he clarified whether he was asking for a lawyer or was just making a comment. Davis said, "No, I'm not asking for a lawyer," and then added, "No, I don't want a lawyer." After a short break, the agents reminded Davis of his rights to remain silent and to counsel. The interview then continued for another hour, until Davis said, "I think I want a lawyer before I say anything else." At that point, questioning ceased.⁵⁶

At his general court-martial, Davis moved to suppress statements made during the interview of November 4. The Military Judge denied Davis' motion, holding that "the mention of a lawyer by [Davis] during the course of the interrogation [was] not in the form of a request for council and . . . the agents properly determined that [he] was not indicating a desire for or invoking his right to counsel." Davis was convicted on one specification of unpremeditated murder, in violation of Article 118 of the United States Code of Military Justice. The United States Court of Military Appeals granted discretionary review and affirmed. The United States Supreme Court granted certiorari to address questions about the varying approaches being approved in the lower courts with respect to ambiguous or equivocal references to counsel during custodial interrogation.⁵⁷

As discussed, lower federal courts had prior to *Davis* adopted varying approaches, in the context of ambiguous or equivocal references, to *Edwards'* requirement that questioning must cease upon a suspect's invocation of the right to counsel. The primary approaches being taken were: (1) all questioning should stop and not resume until a lawyer is present (that is, treating an ambiguous or equivocal request identically to a non-ambiguous or non-equivocal request); (2) all questioning except that necessary to clarify a suspect's intention should cease until it is clarified that the suspect does *not* intend to invoke his counsel right; and (3) general questioning may continue, on the ground that officers had no duty to clarify a suspect's intended meaning. When Davis was interrogated,

56. *Id.* at 454-55.

57. *Id.* at 455-56.

the NIS officers involved had followed procedure (2) — thus, after Davis made an ambiguous reference to counsel, the officers questioned him as to his intent until he clarified that he was not, in fact, asking for a lawyer. The court ultimately found no constitutional error had been committed in the course of Davis' interrogation, thus impliedly validating approach (2) as constitutional. But the high court in its opinion went further, taking the occasion to state that approach (3) *also* is constitutional — with the consequence that, not only may police questioning continue after a suspect ambiguously references his counsel rights, but questioning officers have no constitutional obligation under such circumstances to clarify the suspect's intention:

Thus, *Davis* held: “[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. . . . Rather, the suspect must unambiguously request counsel.”⁵⁸ This holding in turn rests on the high court's selection of an interpretive standard of meaning by which interrogating officers (and reviewing courts) are to distinguish ambiguous from unambiguous requests. The court states this standard to be: “Although a suspect need not ‘speak with the discrimination of an Oxford don’ . . . he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.”⁵⁹

Justice Souter along with three other concurring justices wrote separately to urge that due process, contrary to the majority's implication, requires officers to clarify a suspect's intention when the suspect refers ambiguously or equivocally to his counsel rights during custodial interrogation. Justice Souter emphasized general principles that had guided *Miranda* jurisprudence for the preceding thirty years, including, most importantly, consideration of the realities of the interrogation process. As Justice Souter noted, “awareness of just these realities has, in the past, dissuaded the court from placing any burden of clarity upon individuals in custody, but has led it instead to require that requests for counsel be “given a broad, rather than a narrow, interpretation.”⁶⁰ Numerous commentators have followed

58. *Id.* at 459.

59. *Id.*

60. *Id.* at 470 (Souter, J., concurring).

Justice Souter's lead in criticizing the *Davis* majority's approach.⁶¹ What has not been closely scrutinized, however, is the way in which the key formulations of the *Davis* majority's posited standard of meaning are revealed, upon close analysis, to be contradictory. Certain insights available from the debates in literary criticism previously described readily illuminate these problems.

Section 5: Contradiction in the *Davis* Standard of Meaning

Proceeding similarly to those literary critics who sought to provide a theoretical method for the "correct" interpretation of a literary text, the *Davis* majority sought to mandate an "objective inquiry" into whether a suspect's reference to an attorney should be interpreted as an invocation of the right to counsel under the *Miranda* doctrine.⁶² *Davis* held that "[i]f the statement fails to meet the requisite level of clarity," the officer can treat it as ambiguous and can continue questioning.⁶³ The court acknowledged that this standard allows suspects' statements to be disregarded as an invocation of the right to counsel in cases where suspects do "not clearly articulate

61. See, e.g., Wayne Holly, *Ambiguous Invocations of the Right To Remain Silent: A Post-Davis Analysis and Proposal*, 29 SETON HALL L. REV. 558, 591 (1998) (noting social science "has confirmed the debilitating effect that the interrogation atmosphere can have on many suspects' ability to assert themselves linguistically"); Anthony McDermott and H. Caldwell, *Did He or Didn't He? The Effect of Dickerson on the Post-Waiver Invocation Equation*, 69 U. CIN. L. REV. 863, 927 (2001) (arguing "*Miranda's* premise is a recognition of the compulsion inherent in custodial interrogation in the state's attempt to subjugate the individual to its will, and thus any efforts, even equivocal ones, to invoke the very protections designed to assist the individual in such circumstances should be recognized"); Samira Sadeghi, *Hung Up on Semantics: A Critique of Davis v. United States*, 23 HASTINGS CONST. L. Q. 313, 343-346 (1995) (arguing that to burden individuals in custody with a clarity obligation invites police manipulation in evasion of *Edwards*); Harvey Gee, *Essay: When Do You Have To Be Clear?: Reconsidering Davis v. United States*, 30 SW. U. L. REV. 381, 382 (2001) (arguing *Davis* "marks a departure from the Fifth Amendment's requirement that the government bear the entire burden of protecting an individual's privilege against self-incrimination"); Peter Tiersma and Lawrence Solan, *Cops and Robbers: Selective Literalism in American Criminal Law*, 38 LAW & SOC'Y REV. 229, 250 (2004) ("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"). But see Timothy Yuncker, *Davis v. United States: The Unambiguous Decline of Ambiguous Requests for Counsel During Custodial Interrogation*, 4 WIDENER J. PUB. L. 711, 742 (1995) (arguing police officers "should not be responsible for delving into the subjective intent of a suspect who haphazardly mentions counsel during custodial interrogation").

62. *Davis*, 512 U.S. at 459.

63. *Id.*

their right to counsel although *they actually want to have a lawyer present.*"⁶⁴ Thus the *Davis* court asserts that an "objective inquiry" into the meaning of a suspect's utterance allows a court to disregard the subjective intent of the suspect, and instead requires that the suspect "articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."⁶⁵ But, as has been shown through the linguistic analyses of Hirsch,⁶⁶ and Knapp and Michaels,⁶⁷ it is a theoretical contradiction to ignore the intent of a speaker in favor of some purportedly "objective" standard of meaning. To find any sort of meaning whatsoever in an utterance, every interpreter implicitly provides a context and a hypothetical speaker's intent. As discussed above, the interpretive choice is not between subjective intent and objective meaning but, rather, is always between different hypothetical intents.

As Justice Souter emphasized in his concurrence, *Davis* places a "burden of clarity upon individuals in custody."⁶⁸ Subsequent legal commentators have pointed out *Davis*' basic unfairness in demanding that all individuals in custody meet the same standard of linguistic clarity, noting that some individuals are, by virtue of their education or socio-economic background, incapable of meeting such a standard.⁶⁹ The related point, which also has been raised by several

64. *Id.* at 460 (emphasis added).

65. *Id.* at 459.

66. *Supra* note 18.

67. *Supra* note 26.

68. *Id.* at 470 (Souter, J., concurring).

69. "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." (Peter Tiersma and Lawrence Solan, *Cops and Robbers: Selective Literalism in American Criminal Law*, 38 LAW & SOC'Y REV. 229, 253 (2004).) "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." *Id.* at 254. In particular commentators have correctly noted that the actual linguistic practices of many women and minorities preclude them from meeting the standard of clarity demanded by *Davis*. See, e.g., Alexa Young, *When Is A Request A Request?: Inadequate Constitutional Protection for Women In Police Interrogations*, 51 FLA. L. REV. 143, 145 (1999) (analyzing *Davis*' threshold of clarity standard "through feminist legal methods to reveal the gender bias in a seemingly gender-neutral legal doctrine"); Samira Sadeghi, *Hung Up on Semantics: A Critique of Davis v. United States*, 23 HASTINGS CONST. L. Q. 317, 330-35 (1995) (arguing *Davis* ignores cultural and sociological differences, with the consequence that "certain groups, including women and ethnic minorities, will feel the brunt of the decision to adopt the threshold-of-clarity approach"); Tom Chen, *Davis v. United States: "Maybe I Should Talk to a Lawyer" Means Maybe Miranda is Unraveling*, 23 PEPPERDINE L. REV. 607, 643

commentators, is how will a standard of clarity for custodial suspects be defined?⁷⁰ The *Davis* majority somewhat sarcastically quotes

(1996) (arguing *Davis* “would mainly affect the rights of two main groups of individuals: those that do not have the communication skills to adequately make an unambiguous request for counsel and those who are so intimidated by the police that they do not or cannot make an unambiguous request”). Even *Davis*’ defenders acknowledge the point. See, Timothy Yuncker, *Davis v. United States: The Unambiguous Decline of Ambiguous Requests for Counsel During Custodial Interrogation*, 4 WIDENER J. PUB. L. 711, 745 & n.184 (1995) (expressly not attempting “to counter the empirical data that established that some females and minorities speak in a less assertive manner than do most white males”); Adam Finger, *How Do You Get A Lawyer Around Here? The Ambiguous Invocation of a Defendant’s Right to Counsel Under Miranda v. Arizona*, 79 MARQ. L. REV. 1041, 1063 (1996) (arguing “the clarification standard is the only process that adequately recognizes the cultural diversity of American society while allowing effective law enforcement”). Other areas of the law present analogous issues surrounding the setting of objective standards for an individual’s conduct, for example, the objective “reasonable person” standard prescribed by tort law. Just as the law of negligence judges tortious acts by an objective standard of care, and states in effect: We do not care what you meant to do, we will still hold you liable for the consequences of your acts according to an objective standard of care; *Davis* says, in effect: We do not care what you meant to say; we will interpret the meaning of your words by an objective standard of clarity. Notwithstanding the fact that individuals vary widely in their intelligence and other qualities bearing on the ability to act prudently, all are held legally liable for meeting the same standard of care. See Restatement (Second) of Torts, § 283 (“Conduct Of A Reasonable Man: The Standard”) (“Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances Negligence is a departure from a standard of conduct demanded by the community for the protection of others against unreasonable risk. The standard which the community demands must be an objective and external one, rather than that of the individual judgment, good or bad, of the particular individual.”).

70. See, e.g., Eugenia Guiffreda, *Davis v. United States: Speak Clearly or Lose Your Right To Counsel*, 6 MD. J. CONTEMP. LEGAL ISSUES 405, 418 (arguing “the [*Davis*] court’s failure to set forth objective criteria allows lower courts to develop different thresholds of clarity” and that, as a result, “similarly situated defendants will be treated differently depending upon what jurisdiction they are in”); Harvey Gee, *Essay: When Do You Have To Be Clear?: Reconsidering Davis v. United States*, 30 SW. U. L. REV. 381, 386-389 (2001) (arguing post-*Miranda* decisions “have impaired *Miranda*’s original clarity, making it difficult for the police and lower courts to determine the circumstances under which confessions may be obtained” and that the result “is not merely confusion, but a tacit encouragement of police overreaching and judicial circumvention”); Alexa Young, *When Is A Request A Request?: Inadequate Constitutional Protection for Women In Police Interrogations*, 51 FLA. L. REV. 143, 159 (1999) (“The threshold of clarity standard allows officers to guess whether the suspect wants an attorney and if she has articulated clearly enough to require one, which results in ‘difficult judgment calls’”); Jane Faulkner, *So You Kinda, Sorta, Think You Might Need A Lawyer? Ambiguous Requests For Counsel After Davis v. United States*, 49 ARK. L. REV. 275, 302 (warning that “courts may engage in a comparison of *Davis*’s statement with the statements made in subsequent cases, paying particular attention to the use of hedge words”); William Worobec, *Designing A “System For Idiots”: An Analysis of the Impracticality of Davis v. United States on Ambiguous Waivers of the Right to the Presence of Counsel*, 16 N. ILL. U. L. REV. 239, 281 (surveying courts’ application of *Davis* and concluding that “the *Davis* decision has done little if not nothing to solve the question of equivocal waivers of the right to counsel” partly because

Justice Souter's "Oxford don" phrase to define its standard in terms of what will *not* be required — namely, that "a suspect need not 'speak with the discrimination of an Oxford don.'"⁷¹ But even if one sets aside this mythical exemplar of linguistic clarity, there remains considerable uncertainty as to what the actual standard amounts to.

As the linguistic analysis of Tiersma and Solan has shown, the issue as presented in police interrogation cases is usually not clarity of expression but, rather, *bluntness*.⁷² In treating verbal equivocation as ambiguity, the *Davis* majority suggests a suspect has not invoked his right to counsel unless he has intoned it verbatim — "I hereby demand my right to speak to a lawyer forthwith." But this is the sort of formulistic statement no actual person other than a lawyer would ever utter. In ordinary life, of course, statements of desire are considered perfectly clear even when they are much less blunt. What the *Davis* majority takes as equivocation in a phrase like, "Maybe I should talk to a lawyer," viewed in terms of actual linguistic practice, may in reality simply reflect the way ordinary people are inclined to express requests, particularly requests directed to persons in authority.⁷³

Critics of the *Davis* majority from Justice Souter onwards have pointed out the unfairness of the amorphous less-than-an-Oxford-don burden of clarity now demanded of suspects. We want to take the critique a step further and consider a theoretical contradiction inherent in the *Davis* interpretive standard not directly addressed by the previous commentary. It is a contradiction for a listener to say to a speaker: "I understand, from what you have just said, that you actually want to have a lawyer present; however, what you have said does not count as request for counsel, because you have not clearly articulated the request." As the above analysis has shown, if the listener understands the speaker's intent to communicate a meaning, then that *is* the meaning of the utterance. It is irrelevant that the same request could be made in another way, which might, by some standard, be considered more "clearly" articulated. But *Davis* makes it possible for a court to rule a suspect's request "ambiguous" (and thus disqualify it as an invocation of the right to counsel) on precisely this contradictory basis.

The *Davis* court acknowledges it is allowing a distinction

questions "still exist such as what exactly an equivocal statement is").

71. *Davis*, 512 U.S. at 459.

72. See, Tiersma & Solan, *Cops and Robbers: Selective Literalism in American Criminal Law*, 38 LAW & SOC'Y REV. 229, 239-241.

73. *Id.*

between a custodial suspect's intention and his or her words when it states "that requiring a clear assertion of the right to counsel might disadvantage some suspects who — because of fear, intimidation, lack of linguistic skills, or a variety of other reasons — will not clearly articulate their right to counsel although they actually want to have a lawyer present."⁷⁴ Proceeding under the intentionalist analysis articulated by Hirsch,⁷⁵ and by Knapp and Michaels,⁷⁶ however, when an interrogator perceives the speaker's intent is in fact to communicate a desire to have a lawyer present, then *that* is the meaning the interrogator should assign to the speaker's utterance. And that, we would argue, is also the meaning that a reviewing court should charge the interrogator with having understood.

It is true that certain forms of expressing a desire to have a lawyer present like, "Maybe I should have a lawyer," might properly in certain contexts be interpreted as not actually being requests — as, for example, where someone not in a custodial interrogation makes the comment while talking to a friend about the issue of estate planning. But the point is, the meaning of the utterance must be defined by *the context of the actual utterance*. *Davis* states that the suspect must "articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."⁷⁷ But, as discussed above, a listener's consideration of the "circumstances" of a speaker's utterance *necessarily entails consideration of the speaker's intention*. And *Davis* allows the speaker's intention to be ignored as one of the circumstances a court may consider.

A defender of *Davis* might argue that *Davis* is only seeking to preclude consideration of the unspoken, and thus unknown, intentions of a speaker in determining whether or not a suspect has invoked his right to counsel. Neither a police officer, nor a reviewing court, after all, can be expected to take on the role of psychoanalyst and search for a suspect's secret, innermost wishes and desires for counsel, if the suspect fails to express those desires. This is a perfectly valid point, but neither we nor any other critic of *Davis* has ever suggested that a completely private and unexpressed subjective intention of a suspect can be the basis for the invocation of the right to counsel. The purported intention of a suspect only becomes a legal

74. *Davis*, 512 U.S. at 460.

75. *Supra* note 18.

76. *Supra* note 26.

77. *Id.* at 459.

issue when the suspect manifests that intention in some public way. Plainly, the only means by which a criminal suspect's subjective intention becomes known (whether to police, in the course of interrogation, or to a reviewing court, examining the record on appeal) is through objective signs: through actions and circumstances that are held to the usual legal standards of evidentiary verification, and through written, recorded, or described words.⁷⁸

The problem is that the *Davis* standard goes much further than allowing reviewing courts to excuse police for ignoring a suspect's *unexpressed* intention. As discussed above, by putting a burden of "clarity" of expression on the speaker, *Davis* allows interrogators to ignore *expressed* intention as well. Of course it is possible to argue in defense of *Davis* that an unclearly expressed request for counsel should be treated the same as an unexpressed one: that police cannot reasonably be expected to determine a suspect's intention when it is not expressed clearly. After all, why should a special burden be placed on the police officers to puzzle out the speaker's intention in order to understand what a suspect means by his or her words?

As the theorists reviewed above have demonstrated, the answer to this objection is that it is *not* a special burden on a hearer to consider the intent of the speaker when determining the meaning of his or her words; rather, it is normal interpretive practice. As discussed above, the only interpretive alternative to considering a speaker's intention is to proceed as if the spoken words have meaning independent of that intention. The *Davis* court implicitly adopts this position in mandating a purely "objective inquiry" into the meaning of suspect's utterances concerning counsel. Indeed, the *Davis* court asserts that "an objective inquiry" "avoids difficulties of proof" and "provide[s] guidance to officers conducting investigations."⁷⁹

As authority for its emphasis on objectivity, the high court in *Davis* cited *Connecticut v. Barrett*.⁸⁰ But *Barrett* nowhere uses the term "objective inquiry." At the citation given in the *Davis* opinion, *Barrett* states only that: "Interpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous."⁸¹ Indeed, we would agree that a search for

78. "Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.'" *Id.*, citing *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991).

79. *Davis*, 512 U.S. at 459.

80. *Barrett*, 479 U.S. at 529.

81. *Id.*

“objectivity” when inquiring into a suspect’s purported invocation of the right to counsel is perfectly compatible with normal interpretive practice — in the words of *Barrett* itself, with the way “ordinary people” would “understand” words. But as discussed above, the way that “ordinary people” understand words is by considering the circumstances in which they are spoken, which necessarily includes a consideration of the speaker’s intention.

By stating that a speaker’s intention is necessarily always part of a listener’s consideration of the circumstances of the utterance, we are not claiming that the listener’s hypothesis of the speaker’s intention will always correspond to what that speaker may later claim was his or her actual intention in speaking. There will always be situations in which the listener reasonably misunderstands what the speaker is trying to say. Sometimes there will be no useful evidence concerning the circumstances of the utterance that can cast additional light on the speaker’s intention. In such instances, interrogating police and reviewing courts presumably are justified in applying a “literal” interpretation of the suspect’s statement (which should still be understood, as discussed, as a hypothesis about intention — but one that has been applied to such words so often that it has become, in effect, the “default” hypothesis about the intention such words convey). Consonant with the intentionalist position discussed above, of course, a court really *is* applying such a default hypothesis about intention when it purports to consider a suspect’s statement “on its face.”⁸²

Often, however, there will exist useful evidence indicating that, in the particular circumstances, a defendant’s words should have been understood in a “non-literal” way — that is, evidence indicating the speaker’s intention was to communicate a request for counsel in a “non-literal” manner. There appears no reason why courts should not be free to consider such evidence, or even required to consider it. Indeed, part of the *Davis* holding appears to direct courts to consider evidence of this nature, in that *Davis* states its interpretive standard in terms of what “a reasonable police officer *in the circumstances*” would understand. Presumably, relevant circumstantial evidence will include any special evidence that bears on the speaker’s intention.⁸³

82. See *People v. Gonzalez*, 104 P.3d 98, 106 (2005). *Gonzalez*, a recent California Supreme Court decision based on *Davis*, will be discussed in detail in the next section.

83. An instructive but unlikely example would be if a suspect were to say at the beginning of his custodial interrogation, “If I say “knock knock, buzz, buzz” during the course of this interrogation that means that I am hereby invoking my right to counsel

But *Davis* tends, both theoretically and practically, to nullify the “under the circumstances” part of its holding in simultaneously requiring that the custodial suspect “articulate his desire to have counsel present” according to an unspecified level of “requisite clarity.” As has been explained, one unfortunate consequence of the “requisite clarity” locution is that reviewing courts may regard themselves as free (or even required) to examine a defendant’s statement “on its face,” and to make a determination of the suspect’s meaning based solely on “literal” meaning, even when there exists relevant evidence indicating a custodial suspect’s words should have been understood by interrogating police in a non-literal way.

Thus, in terms of the intentionalist position earlier discussed, the “requisite clarity” part of *Davis*’ holding makes it possible for police, and courts reviewing their conduct under *Miranda*, to ignore relevant evidence respecting a custodial suspect’s intention when he or she makes an ambiguous reference to the presence of counsel.⁸⁴ As Hirsch in particular pointed out, when words are considered merely as strings of possible meanings, interpretation takes place more or less at the whim of the interpreter — who is free to pick and choose between possible meanings. In the context of legal interpretation, such freedom may encourage courts in particular cases to select meanings with a view to generating (more or less consciously) desired outcomes.⁸⁵ As will be discussed next, one legacy of *Davis* has been to provide an interpretive standard that allows reviewing courts broad, if not unlimited, latitude to find a suspect’s utterance

under *Miranda*. Later during the interrogation, the suspect does say “knock knock, buzz, buzz.” Would it not then be reasonable for the officer under the circumstances to treat the phrase, “knock knock, buzz, buzz,” as being a request for counsel? Whereas, without this extremely unlikely background circumstance, it would be manifestly unreasonable to treat the phrase “knock knock, buzz, buzz,” as a request for counsel.

84. It is important to note that the *Davis* majority never even went through the motions of actually applying the new standard of meaning announced in that case. The majority never explained, that is, why *Davis*’ statement did not convey his desire to have counsel present sufficiently clearly that a reasonable officer in the circumstances would have understood him. Rather, when the high court turned to consider *Davis*’ statement, it simply deferred to the interpretations of the courts below: “The courts below found that petitioner’s remarks to the NIS agents — ‘Maybe I should talk to a lawyer’ — was not a request for counsel, and we see no reason to disturb that conclusion.” *Davis*, 512 U.S. at 462.

85. As Tiersma and Solan point out, this appears to be the actual practice of many courts, which routinely ignore common linguistic practice in order to adopt hyper-literal interpretations of criminal defendants’ requests, when it suits the result a court wants. See Tiersma & Solan, *supra* note 72, at p. 247 (“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.”).

ambiguous, and thus to find that the utterance is not an invocation of the right to counsel.

Section 6: The Continuing Legacy of *Davis*

The *Davis* decision continues to dictate that courts apply an artificial approach when interpreting a criminal defendant's alleged invocation of the right to counsel. This can be seen in a recent decision, *People v. Gonzalez*, in which the Supreme Court of California reviewed the first degree murder conviction of a Los Angeles gang member for shooting a police officer.⁸⁶ The defendant in *Gonzalez* was being interviewed by a police officer after having waived his right to remain silent. Asked whether he would be willing to take a lie detector test, the defendant agreed. Specifically, the interviewing detective asked, "You're willing to do it?" and the defendant replied, "That um, one thing I want to ask you to that, if for anything you guys are going to charge me I want to talk to a public defender too, for any little thing." Defendant eventually went on to confess shooting a police officer.⁸⁷

At trial, the defendant moved to exclude his confession on the ground (among others) that the police had not adequately honored his invocation of the right to counsel. The trial court denied the motion, but the Court of Appeal reversed the murder conviction on this ground.⁸⁸ The Supreme Court, in turn, reversed the Court of Appeal, holding that, under the *Davis* standard, "defendant's statement was ambiguous and equivocal" and therefore did not constitute a valid invocation of the Fifth Amendment right to counsel.⁸⁹

Under *Davis*, the question for the state high court in *Gonzalez* was, of course, whether, in light of the circumstances, a reasonable police officer would have understood the defendant's reference to an attorney ("I want to talk to a public defender") to be an unequivocal and unambiguous request for counsel.⁹⁰ As defendant's reference was by its terms conditional ("if for any thing you guys are going to charge me . . ."), answering that question required the court to decide what the police officers interrogating the defendant could reasonably have

86. *Gonzalez*, 104 P.3d 98.

87. *Id.* at 102.

88. *People v. Gonzalez*, No. B154557; 2003 WL 22977531 (Cal. Ct. App.) (rev. granted Mar. 24, 2004).

89. *Gonzalez*, 104 P.3d at 100.

90. *Davis*, 512 U.S. at 460-62.

understood him to mean by the word, “charge.” The lower appellate court, in reversing defendant’s conviction, had concluded that his custodial references to a public defender constituted “a sufficiently clear articulation of a desire to speak to counsel” even prior to formal charging because this court saw no basis for concluding defendant meant to draw a “distinction between booking and charging.”⁹¹ Defendant, in his briefing to the state high court, had argued that “charged” includes “booked” and that the detectives interviewing him should reasonably have understood that.⁹²

Under *Davis*, if a reasonable police officer in the circumstances would have understood the defendant to have meant “charged” to include being booked, and the police were indeed planning to book him, his invocation of counsel arguably was one the police were required immediately to acknowledge and act upon.⁹³ At trial, however, the interviewing detectives had testified they understood the defendant to mean he wanted to have the services of a public defender only if he was charged with a crime.⁹⁴ Since the literal denotation of “charge” is the formal filing of charges by the District Attorney, the defendant’s reference to counsel arguably was a conditional request for counsel in the event of a possible future occurrence over which the police had no control (since prosecutors, not police, are responsible for charging decisions). Pursuant to this analysis, the police reasonably understood defendant to be saying that, if and when the District Attorney charged him with a crime, he wanted to consult an attorney.

The Supreme Court of California accepted this analysis. The court held: “On its face, defendant’s statement was conditional; he wanted a lawyer if he was going to be charged. The conditional nature of the statement rendered it, at best, ambiguous and equivocal because a reasonable police officer in these circumstances would not necessarily have known whether the condition would be fulfilled since, as these officers explained, the decision to charge is not made by police. Confronted with this statement, a reasonable officer would have understood only that ‘the suspect might be invoking his right to counsel,’ which is insufficient under *Davis* to require cessation of questioning.”⁹⁵

91. *Gonzalez*, 104 P.3d at 106.

92. *Id.* at 107, n. 3.

93. *Davis*, 512 U.S. at 459.

94. *Gonzalez*, 104 P.3d at 103.

95. *Id.* at 106.

The *Gonzalez* court's reasoning is both faithful to the *Davis* framework and highlights the problems with that framework. The court states that its task under *Davis* is to determine what a reasonable police officer in the circumstances would have understood the defendant's actual statement to mean, "without regard to the defendant's subjective ability or capacity to articulate his or her desire for counsel, and with no further requirement imposed upon the officers to ask clarifying questions of the defendant."⁹⁶ But, as we have explained, to enquire into what these officers reasonably could have understood the defendant to mean by the word "charged" necessarily is to ask what the defendant intended to communicate by his question. This is so because, as discussed above, what the officers understood the defendant to mean was by definition the hypothesis they formed, in the circumstances, about his intention when uttering the statement. Any such hypothesis necessarily is determined by the whole context of the utterance at issue, and is never determined by the "literal" definitions of its component words or phrases considered in isolation. In other words, one can only decide what a reasonable officer in these particular circumstances would have understood the defendant to have meant by the word "charged" through analyzing what these officers reasonably could have understood the defendant to have intended.⁹⁷

While the state high court in *Gonzalez* correctly followed the *Davis* approach, one can observe in the court's discussion a desire to proceed analytically beyond *Davis*. This desire reflects the court's natural impulse to follow normal interpretive practice. As mentioned above, the state high court criticizes the lower appellate court for examining the defendant's personal background with respect to whether he was sophisticated enough to understand the distinction between "charging" and "booking." The court characterizes this as focusing on the defendant's "ability to clearly articulate his desire for counsel," a consideration which, as the court correctly notes, *Davis* rejects: "[T]he detectives were not required, under *Davis*, to ascertain whether, when he used the word 'charged,' the defendant actually meant 'arrested' or 'booked,' though, in effect, they gave him the opportunity to clarify the point when they explained to him the

96. *Id.*

97. The factual context in *Gonzalez* was sufficiently unusual that it is difficult to imagine what implicit "default" context would determine the interpretation of a reasonable interrogating officer.

difference between those terms.”⁹⁸

The *Gonzalez* court itself, however, plainly addresses an aspect of the defendant’s intention in the circumstances when it focuses on the fact that the interviewing officers brought the distinction between charging and booking to the defendant’s attention.⁹⁹ Strictly according to *Davis*, the question of whether defendant understood such distinctions is supposed to be irrelevant. But in actual interpretive practice the issue is inescapable, because it goes to the issue of what the defendant *intended* to say. Here, if it could be shown that the defendant speaker understood the formal distinction between “charging” and “booking,” then any hypothesis about the meaning of his statement based on this distinction becomes much more plausible. The *Gonzalez* court seems implicitly aware of this, and thus is drawn to address the issue, even though it is, strictly speaking, irrelevant to the interpretive standard prescribed by *Davis*.

Conclusion

Although Derrida is dead, the interpretive debate his work has provoked should live on. His work prompted crucial insights that serious scholars of interpretation now take for granted, and that legal interpretation cannot ignore. Among these is the simple yet crucial insight that a given set of words may mean different things when spoken by different speakers in different contexts. Derrida’s critics complained that his focus on the ambiguity of language would undermine all standards for objective interpretation and thus open the door to arbitrary interpretation. As it turns out, ignorance of the complexities of how language determines meaning does not insure objective interpretation. Rather, as analysis of *Davis v. United States* and its legacy reveals, such ignorance perpetuates the reverse. Ironically, while the high court in *Davis* sought to introduce an “objective” standard of interpretation for custodial suspects’ alleged invocations of the right to counsel, the high court’s failure to heed some of deconstruction’s fundamental teachings has engendered interpretive confusion.

Several critics of *Davis* have argued that the best solution to the problem of ambiguous invocations of the right to counsel would be to impose a duty upon interrogating police officers to clarify a suspect’s

98. *Gonzalez*, 104 P.3d at 107.

99. *See id.* at 106 (noting “the detectives responded to defendant’s statement by explaining to him the difference between being arrested and booked and being charged, thus providing him with an opportunity to clarify his meaning . . .”).

intention before continuing questioning, when a suspect makes an ambiguous reference to counsel.¹⁰⁰ We agree, but even failing a reversal of *Davis* on this point, we would argue that courts can and should apply normal interpretive methods when determining the meaning of a criminal suspect's purportedly "ambiguous" invocation of the right to counsel, which necessarily includes a consideration of the speaker's intention. The *Davis* standard, at best, offers no practical guidance in this area. At worst, by setting forth a standard of interpretation that allows meaning to be separated from the speaker's intention, *Davis* distances interpretation from this essential determiner of meaning, encouraging both police and courts to engage in arbitrary acts of interpretation.

100. See, e.g., McDermott & Caldwell, *supra* note 61, at 927; Holly, *supra* note 61, at 581; Finger, *supra* note 69, at 1063; Chen, *supra* note 69, at 650.