MIRANDA INVOCATIONS: AN INTENTIONALIST APPROACH

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I. INTRODUCTION

In *Miranda v. Arizona*, the Court set out to neutralize the coercive nature of custodial interrogations by requiring police officers to inform suspects of their Fifth Amendment rights.[1] A patent deficiency in *Miranda* jurisprudence, however, is that for all the procedural emphasis on informing people of their rights, rare is the individual who actually knows how to assert them. As to recourse, the law offers little. And where it does, it tends to contravene the basic linguistic notion that people routinely convey their intentions by implication, especially when navigating power dynamics.[2] For instance, under *Miranda*'s progeny, if someone in custody implies the desire to have an attorney present, it nonetheless registers as a failed attempt because the utterance only *might* be construed as an invocation.[3] This failure often spurs the inverse conclusion that rights have been waived,[4] which opens the door for interrogation.

In *State v. Demesne*, a recent case involving *Miranda* rights, the Supreme Court of Louisiana issued a routine writ denial,[5] and the accompanying two-paragraph concurrence made headlines.[6] At issue was whether the defendant successfully invoked his Fifth Amendment protections when he stated: "if y'all, this is how I feel, if y'all think I did it, I know that I didn't do it so why

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[1] *See* Miranda v. Arizona, 384 U.S. 436 (1966).

[2] Janet Ainsworth, *'You Have the Right to Remain Silent . . .' But Only If You Ask for It Just So: The Role of Linguistic Ideology in American Police Interrogation Law*, 15 INT'L J. SPEECH, LANGUAGE & L. 1, 6–7 (2008).

[3] *See* Davis v. United States, 512 U.S. 452, 459 (1994) (providing the standard for asserting the right to counsel); Berghuis v. Thompkins, 560 U.S. 370 (2010) (adopting the *Davis* standard for asserting the right to remain silent).

[4] Aaron Tang, *Reverse Political Process Theory*, 70 VAND. L. REV. 1427, 1460 (2017).

[5] State v. Demesne, 228 So. 3d 1206 (La. 2017).

[6] *See Demesne*, 228 So. 3d at 1206–07 (Crichton, J., concurring); Tom Jackman, *The Suspect Told Police 'Give Me a Lawyer Dog.' The Court Says He Wasn't Asking for a Lawyer*, WASH. POST (Nov. 2, 2017), https://www.washingtonpost.com/news/true-crime/wp/2017/11/02/the-suspect-told-police-give-me-a-lawyer-dog-the-court-says-he-wasnt-asking-for-a-lawyer; Lydia Wheeler, *Court Rules Request for "Lawyer Dog" Too 'Ambiguous,'* HILL (Oct. 30, 2017), http://thehill.com/regulation/court-battles/357817-court-rules-request-for-lawyer-dog-too-ambiguous.

don't you just give me a lawyer dog cause this is not what's up."[7] The concurring justice viewed the "lawyer dog" reference as ambiguous and equivocal.[8] Regardless of whether the defendant was requesting a legally trained canine or had simply fallen prey to a transcriptionist's wayward comma, the defendant failed to invoke counsel.[9]

The real issue in *Demesne* is not the "lawyer dog" reference—remove the word "dog" and the result is the same. Instead, the issue is that "if" and "why don't you" frame the statement as indirect, making it impossible to succeed as an invocation under Supreme Court precedent.[10] This reality has been attributed to the rhetoric that flows from textualism, a school of construction that prizes the objective reading of language.[11] For the textualist, "the most objective criterion available" for reading a text is "the accepted contextual meaning that the words had when the law was enacted."[12] Limiting one's analysis in this way is well-suited to resolving ambiguity in statutes or contracts because these texts are typically created by multiple people, such as the members of a legislative body or the various parties to a contract (legal counsel included). Textualism helps uncover the objective reading of such a text as it appears on paper, independent of whether the writing is a product of careful deliberation or "the random typing of a thousand monkeys."[13]

However, in the context of custodial interrogations, textualist principles fall short for at least two reasons. First, the textualist separation of language from the author has the needless and harmful effect of dismissing authorial intent, as authorial intent is the hinge on which *Miranda* cases turn. Indeed, the perennial issue is whether the individual intended to waive or invoke his or her rights. Second, because textualism advises against looking beyond the text[14] (or, here, an oral invocation), it hinders the process of discerning intent because intent is seldom expressed with such precision that context is rendered useless. Separating language from the author and confining the analysis to the text forms a hyper-literal approach, one which leaves individuals none-the-wiser for having been informed of their rights. Mr. Demesne, for instance, was advised of his rights[15] but had no way of knowing

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[7] *Demesne*, 228 So. 3d at 1206 (Crichton, J., concurring).

[8] *Id.* at 1207.

[9] *Id.* (citing *Davis v. United States*, 512 U.S. 452, 462 (1994)).

[10] *See Davis*, 512 U.S. at 459.

[11] *See* Charlie D. Stewart, *The Rhetorical Canons of Construction: New Textualism's Rhetoric Problem*, 116 MICH. L. REV. 1485, 1490–91 (2018).

[12] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (1st ed. 2012).

[13] *Id.* at 25.

[14] *See id.*

[15] State v. Demesne, 228 So. 3d 1206 (La. 2017) (Crichton, J., concurring).

how to assert them. His attempt failed because the judge zeroed in on the "lawyer dog" reference and detached Demesne from his words.

This Note asserts that an approach more akin to intentionalism is better equipped for analyzing *Miranda* rights invocations (or attempts thereof). Intentionalism is a method of statutory construction that strives to discern what, specifically, a reasonable lawmaker would intend a given law to achieve.[16] For example, in *Digital Realty Trust, Inc. v. Somers*, the Court interpreted certain provisions of the Dodd-Frank Act.[17] Though the bulk of opinion rested on the plain language of the Act, the majority supported its decision by citing a Senate Report that detailed the statute's intended purpose.[18] The intentionalist approach, viewed by some as a subset of the purposivist school,[19] often relies on Senate reports and other forms of legislative history to "illuminate ambiguous text."[20] Because there is no such record to consult in custodial interrogations, this Note substitutes linguistic theory as a legislative history analog to reach similar ends, that is, to derive not just meaning but intent from seemingly unclear language. Linguistic theory helps clarify statements like Demesne's by elevating substance over form, giving predictable, legal effect to the actual, if non-express, intent of an individual in custody.

Part I introduced the central argument of this Note. Part II proceeds in three sections by (1) tracing the evolution of the Supreme Court's *Miranda* jurisprudence from *Miranda* to *Salinas v. Texas*,[21] (2) briefly detailing the intentionalist school, its merits, demerits, and applicability in the *Miranda* context, and (3) giving an overview of linguistic theory, specifically pragmatic theory, to provide a sense of how its ideologies support the proposed framework. Part III analyzes the influence of *Miranda*'s progeny on appellate and state courts and illustrates how non-defendant-friendly *Miranda* jurisprudence has become. Finally, Part IV applies a new intentionalism-based framework as a means for returning to the defendant-friendly *Miranda* standards.

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[16] *See* Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation - and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 686 n.3 (2014).

[17] Dig. Realty Trust, Inc. v. Somers, 138 S. Ct. 767 (2018).

[18] *Id.* at 777.

[19] *See* Fallon, *supra* note 16.

[20] Milner v. Dep't of the Navy, 562 U.S. 562, 572 (2011) (noting the utility of legislative history).

[21] Salinas v. Texas, 570 U.S. 178 (2013).

II. HISTORY

A. The Miranda Rights

The *Miranda* requirement to inform, or to warn, serves as a procedural safeguard against coerced confessions.[22] In theory, receiving the warnings positions the individual to make an educated decision on whether to answer police questions.[23] Because the suspect can freely choose, "the compulsion inherent in custodial surroundings" is ostensibly dispelled.[24]

To meet the *Miranda* requirement, officers must recite (1) the suspect's right to remain silent, as well as "the consequences of forgoing it,"[25] and (2) the suspect's right to an attorney, with the specification that one can be appointed if the accused is indigent—otherwise, the warnings would be hollow.[26]

Once these warnings are given, an individual is "adequately and effectively apprised of his rights."[27] The suspect may then waive or invoke one or more of those rights. Waivers, the Court held, must be "made voluntarily, knowingly and intelligently."[28] To invoke a right, one must simply indicate "in any manner" the desire to remain silent or to have counsel present.[29] Upon invocation of either the right to counsel or the right to remain silent, the interrogation must cease.[30] Statements taken after an individual invokes his or her rights can only be "the product of compulsion, subtle or otherwise."[31]

The *Miranda* Court put these "concrete constitutional guidelines"[32] in place so "rights declared in words might [not] be lost in reality."[33] Yet in many instances, they are. Subsequent decisions, "row[ing] against the tide,"[34]

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[22] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[23] *See id.* at 473.

[24] *Id.* at 458.

[25] *Id.* at 469 (noting the consequence of speaking is that anything said by the suspect can and will be used against the suspect in court).

[26] *Id.* at 473.

[27] *Id.* at 467.

[28] *Id.* at 444.

[29] *Id.* at 444–45.

[30] *Id.* at 474–75.

[31] *Id.* at 474. *But see* Edwards v. Arizona, 451 U.S. 477, 484–85 (1981) (holding that statements made after invocation may still be admissible if the accused initiates communication with the police); Michigan v. Mosley, 423 U.S. 96, 102–03 (1975) (holding that invoking the right to remain silent does not indefinitely proscribe further interrogation); Maryland v. Shatzer, 559 U.S. 98, 110 (2010) (holding that a successful invocation of the *Miranda* rights expires after fourteen days).

[32] Miranda v. Arizona, 384 U.S. 436, 441–42 (1966).

[33] *Id.* at 443 (citing Weems v. United States, 217 U.S. 349, 373 (1910)).

[34] *See* United States v. Bloom, 149 F.3d 649, 653 (7th Cir. 1998).

have effectively reversed the *Miranda* requirements for waiver and invocation, making it easier to find a waiver than a successful invocation.[35]

B. Miranda*'s Progeny*

The requirement that officers inform individuals of their rights prior to custodial interrogation still stands,[36] but the courts have gradually whittled away the associated *Miranda* guidelines.[37] While suspects could once successfully invoke their rights "in any manner,"[38] they are now tasked with hurdling an arbitrary threshold of clarity.[39] That threshold emerged in *Davis v. United States*, where the Court held that an invocation must be unambiguous and unequivocal.[40] To meet this standard, a statement cannot merely suggest the suspect *might* be invoking their right to counsel.[41] The disputed language in *Davis*, "Maybe I should talk to a lawyer," for instance, is inadequate.[42] A reasonable officer must be able to determine that the individual has actually asserted the privilege,[43] and the Court held that "Maybe I should talk to a lawyer" does not allow for such a determination.[44]

In *Berghuis v. Thompkins*, the Court held the same criterion of clarity guards the right to remain silent.[45] Both the right to remain silent and the right to counsel "protect the privilege against compulsory self-incrimination by

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[35] *See, e.g.*, North Carolina v. Butler, 441 U.S. 369 (1979); Davis v. United States, 512 U.S. 452 (1994); Berghuis v. Thompkins, 560 U.S. 370 (2010); Salinas v. Texas, 570 U.S. 178 (2013).

[36] Congress attempted to supersede *Miranda* by statute. The legislation, 18 U.S.C. § 3501, established a voluntariness test for confessions, which said nothing of warning individuals of their rights, much less requiring it. But the Court held that "Congress may not supersede [its] decisions interpreting and applying the Constitution." Dickerson v. United States, 530 U.S. 428, 437 (2000).

[37] *Id.* at 443–44.

[38] Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

[39] Davis v. United States, 512 U.S. 452, 459 (1994).

[40] *Id.*

[41] *Id.* (emphasis in original).

[42] *Id.* at 455.

[43] *Id.* at 458–59.

[44] *Id.* at 454–55.

[45] *See* Berghuis v. Thompkins, 560 U.S. 370 (2010). By contrast, if an individual chooses to waive his rights, he need not take "heightened linguistic care." Davis v. United States, 512 U.S. 452, 469 (1994) (Souter, J., concurring). In fact, one may waive his rights without an express statement. North Carolina v. Butler, 441 U.S. 369, 373 (1979). The Court will uphold an implicit waiver insofar as a suspect has received and understood the *Miranda* warnings. *Berghuis*, 560 U.S. at 384. Thus, a defendant may simply continue making statements without formally stating, "I hereby waive my rights," and nevertheless do so. *See* North Carolina v. Butler, 441 U.S. 369 (1979); *Berghuis*, 560 U.S. 370. Even total silence, combined with a "course of conduct" indicative of waiver, can constitute a waiver. *Butler*, 441 U.S. at 373. The net result is that, absent evidence of coercion, *Berghuis*, 560 U.S. at 384, an individual can waive his rights in essentially 'any manner' and meet the voluntarily-knowingly-intelligently requirement. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

requiring an interrogation to cease when either right is invoked."[46] Thus, the Court found "no principled reason to adopt different standards."[47] The standard for successful invocation—that it be unambiguous and unequivocal—will therefore be referred to in this Note as the *Davis-Berghuis* standard; the proposed solution will also apply to both rights.

In *Davis*, the Court recognized that people often fail to "clearly articulate their right to counsel although they actually want to have a lawyer present."[48] The Court assured, however, that suspects need not speak "with the discrimination of an Oxford don" to invoke counsel.[49] More recently, in *Salinas*, the Court added, "no ritualistic formula is necessary" to invoke the right to counsel.[50] Despite these assurances, the priority for courts remains that the *warnings* are issued, not that the *rights* described in the warnings are actually secured.

C. Intentionalism

Judges begin statutory construction from the same point of departure: the language of the statute.[51] Unambiguous language does not require further inquiry,[52] but language that is unclear, or that suggests an absurd result, prompts members of the judiciary to look beyond the text.[53] The chosen method of interpretation informs how a judge will proceed. Prominent methods include textualism, originalism, purposivism, and intentionalism, each differing from the next in important ways.[54] Indeed, the method

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[46] *Berghuis*, 560 U.S. at 371.

[47] *Id.* at 381. The same standard also applies when a suspect is not in custody and has not been informed of his rights. Salinas v. Texas, 570 U.S. 178, 186 (2013) (holding that silence may be used as inculpatory evidence if the defendant has not expressly invoked the right to remain silent).

[48] *Davis*, 512 U.S. at 460.

[49] *Id.* at 459 (quoting Justice Souter's concurring opinion at 476.) Justice Souter's "Oxford don" reference expresses the idea that invoking the right to counsel does not require someone to be an articulate scholar with a distinct command of language. In other words, anyone can do it.

[50] Salinas v. Texas, 570 U.S. 178, 181 (2013) (citing Quinn v. United States, 349 US. 155, 164 (1955)).

[51] *See* Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1976 (2016); Marx v. Gen. Revenue Corp., 568 U.S. 371, 388 (2013) (Sotomayor, J., dissenting); McNeill v. United States, 563 U.S. 816, 819 (2011).

[52] ROBERT A. KATZMANN, JUDGING STATUTES 29 (2014).

[53] *Id.*

[54] *See* BRIAN G. SLOCUM, ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION (2015). Textualism is "the doctrine that the words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means." *Textualism*, BLACK'S LAW DICTIONARY (10th ed. 2014). Originalism is "the doctrine that words . . . are to be given the meaning they had when they were adopted." *Originalism* (1), BLACK'S LAW DICTIONARY (10th ed. 2014). Purposivism is "the doctrine that texts are to be interpreted to achieve the broad purposes that their drafters had in mind." *Purposivism*, BLACK'S LAW DICTIONARY (10th ed. 2014).

influences the outcome.[55] For example, the principles of textualism, as applied in the space of *Miranda* jurisprudence, produce holdings like the one in *Demesne*.[56] But applying intentionalist principles to the same facts yields a more defendant-friendly result, one more compatible with *Miranda*. This is because intentionalism focuses on substance, allowing one to find that Demesne had asserted, "in any manner," his right to counsel.[57] To that end, this subsection introduces the intentionalist framework and primes it for application in Part IV.

Intentionalism is a method of disambiguating statutory language by discerning the intent of the legislative body that drafted the provision in question[58] (the approach is sometimes called legislative intentionalism[59] as a result). The underlying theory is straightforward: the meaning of the language and the author's intended meaning are identical.[60] Equating authorial intent with linguistic meaning—the former being the touchstone for the latter[61]—leads proponents of intentionalism to view other methods as less intuitive.[62] Ascertaining legislative intent and, in the process, avoiding judicial decision-by-proxy often involves, if not requires, a consultation of legislative history to illuminate the text.[63] In *Digital Realty Trust, Inc. v. Somers*, for instance, the Court referred to a Senate Report to construe the intended purpose of whistleblower provisions found in the Dodd-Frank Act.[64]

"Legislative history is not the law,"[65] to be sure, but one might think of it as the unabridged or unpolished version[66] that comprises the hearings, committee reports, floor debates, and other proceedings that guide a statute to its enactment.[67] Legislative history can clarify ambiguous language or even "confirm the court's sense of the text"[68] by lending insight to how drafters

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Intentionalism is "the doctrine that a legal instrument should be interpreted to effectuate the intent of those who prepared it or made it legally binding." *Originalism* (2), BLACK'S LAW DICTIONARY (10th ed. 2014).

[55] KATZMANN, *supra* note 52, at 5.

[56] *See supra* Part I.

[57] Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

[58] *See* Fallon, *supra* note 16.

[59] Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1237 (2015).

[60] SLOCUM, *supra* note 55, at 37.

[61] Fallon, *supra* note 60, at 1249.

[62] *See* SLOCUM, *supra* note 54, at 37.

[63] *See* Milner v. Dep't of the Navy, 562 U.S. 562, 572 (2011) (noting the utility of legislative history).

[64] Dig. Realty Trust, Inc. v. Somers, 138 S. Ct. 767, 777 (2018).

[65] KATZMANN, *supra* note 52, at 38.

[66] *See* JUSTIN B. PETERSEN, SYNTACTIC CARTOGRAPHY AS A FORENSIC LINGUISTICS TOOL 19 (May 2017) (unpublished M.A. thesis, Arizona State University) (on file with author).

[67] *Legislative History*, BLACK'S LAW DICTIONARY (10th ed. 2014). Legislative history may also include post-enactment events. *Id.*

[68] KATZMANN, *supra* note 52, at 35.

wanted the law to work, what issues they hoped to address, the results they wished to achieve, and how they endeavored to meet those ends.[69] Unsurprisingly, many view legislative history as "essential reading,"[70] especially if judges are to appreciate "how Congress signals its meaning."[71] But not all share this commitment to discovering legislative intent.

Critics of intentionalism view legislative intent as "a fiction, something judges invoke to elide the fact that they are constructing rather than identifying a legislative decision."[72] Justice Scalia stated, "We are governed by laws, not by the intentions of legislators."[73] For textualists, even using the word *intent* in place of *meaning* is considered a "slippery" move.[74] The reasonable fear is that judges, by advancing their take on the legislature's intent, will assert their own will.[75]

Yet even strident critiques of intent-based construction fail to overcome the frequency with which judges "discuss the legislature's state of mind."[76] Between 1997 and 2008, in more than 60,000 federal and state court opinions, some variation of the word *intent* appeared within six words of *Congress* or *legislature*.[77] Variants of *meant* and *believe*, each word indicative of intent, appeared frequently as well,[78] and the numbers continue to add up.[79] Between 2008 and 2018, more than 134,000 federal and state court opinions featured a variation of *intent* within six words of *Congress* or *legislature*.[80] The same period yielded more than 5,000 and 1,000 variants of *meant* and *believe* with *Congress*, respectively.[81]

While some may hesitate to acknowledge intent-based approaches, others have argued construing language without reference to authorial intent

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[69] *Id.*

[70] *Id.* at 28.

[71] *Id.* at 8.

[72] John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2400 (2017).

[73] Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). Oliver Wendell Holmes similarly remarked, "We do not inquire what the legislature meant; we ask only what the statute means." LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION 82 (2010) (citing Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899)).

[74] SCALIA & GARNER, *supra* note 12, at 198.

[75] *See* Bylsma v. Willey, 416 P.3d 595, 626 n.164 (Utah 2017) (Lee, J., concurring).

[76] SOLAN, *supra* note 73, at 101.

[77] *Id.*

[78] *Id.*

[79] Applying the same LexisNexis search terms—Search 1: ((Congress or legislature) w/6 inten!); Search 2: (Congress mean! or legislature mean!); Search 3: (Congress believe! or legislature believe!) SOLAN, *supra* note 73, Table 4.1 (2010)—shows the trend continuing since 2008.

[80] This figure was derived by applying the same LexisNexis search terms used by Solan: Search 1: ((Congress or legislature) w/6 inten!). *See Id.*

[81] These figures were derived by applying the same LexisNexis search terms used by Solan: Search 2: (Congress mean! or legislature mean!); Search 3: (Congress believe! or legislature believe!). *See Id.*

is not even possible.[82] Likewise, whether commentators or judges acknowledge it, intent is present, indeed, prominent, in Fifth Amendment invocations.[83] Yet the same tools for discovering intent are conspicuously unavailable: hearings, reports, or other proceedings that might lend insight into the intentions of an individual in custody simply do not exist. However, a viable analog for legislative history does exist, one that can make operable the principles of intentionalism in the space of *Miranda* jurisprudence. The analog is linguistic theory, which is a capable source for fueling the eclectic,[84] all-embracing interpretive approach that suspects deserve from judges.

D. Linguistics

Linguistic theory is inextricably intertwined with intentionalism. In fact, the intentionalist school "is based on a Gricean conception of communication where the communicative content of an utterance is the content that the speaker intends the hearer to understand by recognizing that very intention."[85] H.P. Grice, a prominent British philosopher of language, contributed widely to the understanding of pragmatics, a subfield in linguistics concerned with the ideas of "deixis[,] implicature, presupposition, speech acts, and aspects of discourse structure."[86] From this list of ideas, speech act and implicature theory are particularly relevant to the present analysis of *Miranda* rights invocations.

1. Speech Acts

A speech act, as the name suggests, is one in which "a speaker *does*

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[82] *See* Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004); SLOCUM, *supra* note 55, at 58.

[83] This is the case in many other areas of the law as well. For instance, the analysis in of each of the following areas features intent as a key component: evidence admissibility, FED. R. EVID. Rule 801(a) (providing that a statement is only considered to be an assertion if it is *intended* to be one); criminal guilt, Elonis v. United States, 135 S. Ct. 2001, 2009 (2015) (observing the *mens rea* requirement, which provides that a defendant must be "blameworthy in mind," that is, that he or she had the intent to act as charged); contract formation, *see* Lucy v. Zehmer, 84 S.E.2d 516 (Va. 1954) (intent, albeit objective, is needed to establish mutual assent); patent claims, Phillips v. AWH Corp., 415 F.3d 1303, 1316 (Fed. Cir. 2005); and taxable income, Comm'r v. Duberstein, 363 U.S. 278, 285 (1960).

[84] In a survey of federal judges, one asked, "When the text [or, for present purposes, transcript of the invocation] doesn't really give you the answer why wouldn't you want to be eclectic?" Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1343 (2018).

[85] SLOCUM, *supra* note 54, at 36.

[86] Izabela Skoczeń, *Minimal Semantics and Legal Interpretation*, 29 INT'L J. SEMIOTICS L. 615, 617 (2016) (citing STEPHEN C. LEVINSON, PRAGMATICS (1983)).

something in saying something."[87] It is an action taken through speech. Speech acts are classified as constative or performative.[88] Constative speech acts are statements or observations, things that can be verified or falsified.[89] Performative speech acts include promises, offers, requests, invocations, and the like.[90] The latter form of speech acts, of particular interest here, further subdivide into two categories: direct and indirect. A direct performative (e.g., "I hereby invoke my *Miranda* rights") provides little trouble to the individual tasked with interpreting the statement.[91] The *Davis-Berghuis* standard calls for this kind of speech act.

By contrast, indirect performatives (e.g., "why don't you just give me a lawyer dog cause this is not what's up"[92]) leave, for some judges, more room for misinterpretation.[93] And they make up the lion's share of everyday discourse[94]: "people frequently use indirect and modified forms of imperatives that are nevertheless intended to be interpreted as unequivocal demands."[95] English speakers opt for indirect performatives, at least in part, out of a general aversion to direct, imperative speech, especially when it comes to making requests.[96] Put that individual in custody, add the power dynamics unmistakably present in police interrogations, and the reliance on hedging and other linguistic mitigating strategies quickly multiplies.[97] This inherent asymmetry decreases the likelihood that the suspect, the powerless speaker relative to an interrogating officer, will "make direct and unhedged demands upon the more powerful party."[98]

As the basic tenets of speech-act theory expose, the *Davis-Berghuis* standard fails "to recognize the ways in which we ordinarily use nonliteral language to communicate."[99] Relying solely on legal precedent is therefore

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[87] SANFORD SCHANE, LANGUAGE AND THE LAW 109 (2006) (emphasis in original). Examples of doing by saying are the various forms of unlawful speech sometimes referred to as "language crimes": perjury, threats, extortion, defamation, offering bribes, solicitation to murder. Other speech acts of legal consequence include solemnizing a marriage, announcing a jury verdict, and invoking Fifth Amendment protections. *Id.* at 8–9.

[88] Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L. J. 259, 265 (1993).

[89] *Id.*

[90] *See* Marianne Mason, *Can I Get a Lawyer? A Suspect's Use of Indirect Requests in a Custodial Setting*, 20 INT'L J. SPEECH, LANGUAGE & L. 203, 213 (2013).

[91] *See* Ainsworth, *supra* note 88, at 266.

[92] State v. Demesne, 228 So. 3d 1206 (La. 2017) (Crichton, J., concurring).

[93] Ainsworth, *supra* note 88, at 267.

[94] *Id.* at 268.

[95] Ainsworth, *supra* note 2, at 11.

[96] Mason, *supra* note 90, at 214.

[97] *See* Ainsworth, *supra* note 2, at 6–7.

[98] *Id.* at 7.

[99] Ainsworth, *supra* note 88, at 264.

insufficient in this area of the law.[100] Enter the Gricean theory of conversational implicatures, supported by the cooperative principle and its associated maxims.

2. Implicature

The Gricean theory of conversational implicature is central to speech-act theory.[101] It follows what Grice termed the Cooperative Principle (CP): "Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged."[102] Guiding the CP are the maxims of quantity, quality, relation, and manner.[103] Quantity refers to how informative an utterance is; quality to its truth; relation to its relevance; and manner to its clarity.[104] Importantly, Grice's CP and its associated maxims are not intended to operate as a normative standard[105]—speakers rarely observe each of the maxims as they engage in discourse, and it is not expected that they do.[106]

Grice's theory focuses on the relationship between what is said and what is meant by the speaker.[107] The maxims provide a structure for calculating implicit meaning.[108] When a speaker fails to observe a maxim, "the non-observance [is] recognizable"[109] and it generates an implicature.[110] Rather than perceiving the utterance as nonsense, the listener "assume[s] that an appropriate meaning is to be inferred."[111] The listener then "search[es] for an implied or indirect meaning"[112] by interpreting the language "as though it were in accordance" with the maxims.[113]

Implicatures, like most linguistic phenomena, are so intuitive that individuals seldom notice them in real time, even as they deploy and decipher

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[100] *See* Mason, *supra* note 90, at 207.

[101] *Id.* at 214.

[102] Francesca Poggi, *Law and Conversational Implicatures*, 24 INT'L J. SEMIOTICS L. 21, 24 (2011) (citing H.P. GRICE, LOGIC AND CONVERSATION (1975)).

[103] *Id.* at 24–25.

[104] The assumption is that, for the most part, speakers are economic with their words, that they do not seek to deceive each other, they stay on topic, and they avoid ambiguity and vagueness. Poggi, *supra* note 102, at 24–25.

[105] *See* Bethan L. Davies, *Grice's Cooperative Principle: Meaning and Rationality*, 39 J. PRAGMATICS 2308 (2007).

[106] *See* JONATHAN CULPEPER & MICHAEL HAUGH, PRAGMATICS AND THE ENGLISH LANGUAGE 99 (2014); Davies, *supra* note 105, at 2308.

[107] *See* CULPEPER & HAUGH, *supra* note 107, at 99.

[108] *See* Davies, *supra* note 105, at 2310.

[109] CULPEPER & HAUGH, *supra* note 106, at 96.

[110] Davies, *supra* note 105, at 2309.

[111] *Id.*

[112] Mason, *supra* note 90, at 214.

[113] Poggi, *supra* note 102, at 24.

them with great agility.[114] One need only consider the alternative practice of explaining every possible layer of nuance in a conversation to appreciate the value and utility of implicatures.[115]

That value and utility cannot be understated in the *Miranda* context. Currently, however, it is only employed in cases of waiver, where judges "appear quite capable of implicating non-literal meaning."[116] An utterance like "I hereby waive my rights," for instance, is not required to execute a successful waiver, for a waiver will be recognized whether express or implied.[117] The same standard should govern invocations of the right to counsel or the right to remain silent, but it does not.

The *Miranda* warnings themselves are an implicature, as they implicate to the recipient "that the police *intend* to respect constitutional guarantees."[118] Otherwise the police should simply not give the warnings. But as the following section illustrates, the reading of the *Miranda* rights is, more often than not, a hollow formality.

III. ANALYSIS

It has been said that everything that rises must converge,[119] but with *Miranda* the opposite governs. Three elements must converge before giving rise to *Miranda*'s procedural protections: custody, police (as a specific state actor), and interrogation.[120] As a result, one cannot anticipatorily invoke the *Miranda* rights,[121] though it is not always clear what defines custody,[122] police,[123] and interrogation.[124] Other layers of "judicially crafted

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[114] *See* Ainsworth, *supra* note 88, at 268.

[115] *Id.*

[116] Ainsworth, *supra* note 2, at 14.

[117] *See* Berghuis v. Thompkins, 560 U.S. 370 (2010).

[118] Ainsworth, *supra* note 88, at 297 (emphasis added).

[119] FLANNERY O'CONNOR, EVERYTHING THAT RISES MUST CONVERGE (1965).

[120] DAVID M. NISSMAN & ED HAGEN, LAW OF CONFESSIONS 21 (2d ed. 2018). *But see* Salinas v. Texas, 570 U.S. 178, 181 (2013) (holding that a defendant who is not in custody and has not received the *Miranda* warnings must nonetheless affirmatively and expressly invoke the right to remain silent, as mere silence without more has no legal effect).

[121] *See, e.g.*, McNeil v. Wisconsin, 501 U.S. 171, 182 n.3 (1991) ("We have in fact never held that a person can invoke his *Miranda* rights . . . prior to arrest, or indeed even prior to identification as a suspect."). *But see* Salinas v. Texas, 570 U.S. 178, 191 (2013) (holding that a person must expressly invoke the *Miranda* rights prior to custody and prior to the *Miranda* warnings, otherwise mere silence may be used as inculpatory evidence).

[122] Establishing custody "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." Stansbury v. California, 511 U.S. 318, 323 (1994).

[123] For example, the *Miranda* doctrine does not apply to undercover officers because their police authority is not apparent. *See* Illinois v. Perkins, 496 U.S. 292, 297 (1990).

[124] Interrogation has been broadly defined as "express questioning or its functional equivalent," such

qualifications"[125] further complicate the *Miranda* warnings,[126] but for purposes of this Note, it is presumed that *Miranda*'s procedural protections are in play, that the rights have been read, and that an individual has attempted to invoke those rights. The focus, then, is on how courts have interpreted such attempts and, more crucially, where they have missed the mark.

A. Miranda Holdings 1966–1994

In 1966, the *Miranda* Court introduced the procedural safeguards of informing individuals of their rights and providing the opportunity to invoke them.[127] Nearly thirty years later, the *Davis* Court refined the standard for successfully invoking one's right to counsel.[128] But between 1966 and 1994, the *Miranda* jurisprudence split in three directions:[129] (1) a per se standard,[130] a sort of 'everything goes' benchmark, giving effect to ambiguous words and those creating a reasonable inference of invocation,[131] (2) a clarification standard, instructing officers to ask individuals to clarify their statements,[132] and (3) a threshold-of-clarity standard, "seizing upon any hedges" to disqualify invocation attempts.[133]

The per se standard most closely reflects the *Miranda* requirement that suspects may claim their constitutional protections "in any manner."[134] Louisiana was one of at least eight states where judges took this approach,[135] but the concurrence in *Demesne*[136] reflects a shift to the threshold-of-clarity standard. The threshold-of-clarity standard likely informed the Court's holding in *Davis*.[137] Judges in about a dozen states upheld a threshold-of-

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as "words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innes, 446 U.S. 291, 300–01 (1980).

[125] ALFREDO GARCIA, THE FIFTH AMENDMENT: A COMPREHENSIVE APPROACH 86 (2002).

[126] For example, a successful invocation of the *Miranda* rights expires after fourteen days. Maryland v. Shatzer, 559 U.S. 98, 110 (2010). Likewise, a suspect who is not in custody and who has not received the *Miranda* warnings must nevertheless affirmatively claim the right to remain silent, or else the silence may be used to incriminate the individual. Salinas v. Texas 570 U.S. 178, 181 (2013).

[127] Miranda v. Arizona, 384 U.S. 436 (1966).

[128] Davis v. United States, 512 U.S. 452 (1994). *See also* Berghuis v. Thompkins, 560 U.S. 370 (2010) (adopting the standard set out in *Davis* for invoking the right to remain silent).

[129] *See* Ainsworth, *supra* note 88, at 260.

[130] *Id.* at 306.

[131] *Id.* at 307.

[132] *Id.* at 308.

[133] *Id.* at 302.

[134] Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

[135] Ainsworth, *supra* note 88, at 306 n.245; *see also* State v. Abadie, 612 So. 2d 1, 12 (La. 1993).

[136] *See supra* Part I.

[137] In calling for clarity, the Court held ambiguous, equivocal, and even potential invocations to be insufficient. Davis v. United States, 512 U.S. 452, 459 (1994).

clarity standard prior to *Davis*.[138]

The clarification standard, a middle-of-the-road concept between *Miranda* and *Davis*, was applied in more than twenty states.[139] Although *Davis* acknowledged clarification as a "good police practice,"[140] it effectively ruled out this approach by refusing to impose a requirement that officers ask clarifying questions.[141] *Davis* brought the same fate to the per se standard, as the in-any-manner standard invariably falls short of meeting the clarity threshold. Thus, the courts are left with the threshold-of-clarity standard, which *Davis* (and later *Berghuis*) put in synonymous terms: invocations must be unambiguous and unequivocal.[142]

The *Davis-Berghuis* standard might be more reasonable were it not for its ex post facto flavor. Police dutifully inform individuals of their rights, but suspects learn about the clarity threshold only *after* it is too late to act. For example, Demesne arguably would have benefited from knowing while he was in custody that "lawyer dog" references are not effective.[143] Either the *Miranda* warnings and the caveat of clarity should be given together, or the Court needs to rethink its invocation jurisprudence. The intentionalist approach presented in Part IV supports the latter option.

B. The Current Landscape: Demesne et al.

The "lawyer dog" example in *Demesne*[144] shows how courts have leveraged the *Davis-Berghuis* standard to reach counterintuitive conclusions. A host of other decisions exhibit the decline of *Miranda* and its protections for defendants. In each, Charles Dickens would describe the courts as "mistily engaged in . . . tripping one another up on slippery precedents, groping knee-deep in technicalities . . . and making a pretense of equity with

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[138] Ainsworth, *supra* note 88, at 302 n.217.

[139] *Id.* at 308 n.254.

[140] Davis v. United States, 512 U.S. 452, 461 (1994).

[141] NISSMAN & HAGEN, *supra* note 120, at 340.

[142] *Davis*, 512 U.S. at 459; Berghuis v. Thompkins, 560 U.S. 370, 381 (2010). Ambiguity results when linguistic knowledge "fails to limit to one the possible interpretations of a sentence." LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 64 (1993). Not dissimilar, equivocal language is that which appears to contemplate more than one meaning. *See* NISSMAN & HAGEN, *supra* note 120, at 339. In *Miranda* jurisprudence, the question is whether an individual has cancelled out every possible interpretation except the desire to invoke or whether the offered statement contemplates other meanings. Put simply, an individual has either invoked her rights or she has not. But because language rarely, if ever, limits to one the possible range of interpretations, meaningful distinctions are frequently blurred, such as when "the defendant couches the invocation in conditional language." *Id.* at 356.

[143] *See supra* notes 5–9 and accompanying text.

[144] *See supra* notes 5–9 and accompanying text.

serious faces."[145] The following sections demonstrate this practice.

1. One Hedge, Two Hedge, Three Hedge More

In *State v. Hernandez*, the Supreme Court of Nebraska held that the defendant did not invoke his right to remain silent when he said, "I think I'll probably stop talking now."[146] To "think" about "probably" being silent, the court determined, is ambiguous and equivocal.[147] The same is true for using words like "maybe" or "believe," which cause the utterance they preface to be unclear.[148] In the court's eyes, Hernandez was "merely musing" about exercising his rights at this point in the interrogation.[149]

Yet later in the interrogation when Hernandez stated, "Boss, I think we should end this interview right now," the court took no issue with the prefatory "think."[150] Excusing this use and not the first contradicts the court's own reasoning, which lists *think* (as well as *maybe* and *believe*) as an equivocal word, one generally incapable of constituting "a clear, unambiguous, and unequivocal invocation."[151] This description notwithstanding, the court viewed the second use of *think* as being in "stark contrast" to the first.[152] The only appreciable difference between Hernandez's two statements is that, in the latter, he omitted the word *probably*—though the court did not identify this as the deciding factor.[153] The court simply concluded that Hernandez indicated his desire to end the interview, and that he was "very capable" of doing so.[154]

Left unanswered is whether *think* is generally equivocal by itself or only when paired with another word like 'probably.' But the majority seems to develop a one-hedge rule: begin an attempt with "I think" and stay in the invocation game, but interrupt the effort with "maybe" or "probably"—a

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[145] CHARLES DICKENS, BLEAK HOUSE 14 (Nicola Bradbury ed., Penguin Classics 2003) (1853).

[146] State v. Hernandez, 911 N.W.2d 524, 544 (Neb. 2018).

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] Compare *Hernandez* with *State v. Bartelt*, 906 N.W.2d 684, 703 (Wis. 2018) (Bradley, J., dissenting). There, the defendant asked, "[s]hould I or can I speak to a lawyer or anything?" The detective responded, "Sure, yes. That is your option." Defendant then told him, "I think I'd prefer that." The dissent in *Bartelt* argued that the word "think" was a "colloquial filler, not an indication of ambiguity." *Id.* at 704. But had Bartelt coupled the word "maybe" with "think" (i.e., "I think I'd maybe prefer that"), the attempt to invoke the right to counsel would have been ambiguous. *Id.* The same reasoning is implicit in the *Hernandez* decision above. Combining 'think' with 'probably' fails to constitute an invocation, but using the word "think" alone does not.

[154] *Hernandez*, 911 N.W.2d at 544.

second, third, or fourth hedge—and the officer has no reason to stop the interrogation.[155] Until the official calculus is given by the court, this faulty holding precludes defendants and their attorneys from knowing what combination of words will successfully end a police interrogation.

The Supreme Court of Arizona also found the word "probably" ambiguous. In *State v. Rushing*, the defendant responded at various points of the officer's questioning with, "I'm not sure I should say anything" and "I probably should not talk about [what happened]."[156] When asked whether there was anything he could tell the officer, Rushing shook his head and said, "I don't know. Not really."[157] After viewing video evidence, and having factored in Rushing's words and body language, the court held that instead of invoking the right to remain silent, the defendant only communicated his doubts about disclosing information to the police.[158] Allowing statements of doubt to end an interrogation would make the *Miranda* procedures a matter of guesswork, the court argued.[159] And the risk of guessing wrong is the risk of having a voluntary confession suppressed, which places a "significant burden on society's interest in prosecuting criminal activity."[160]

The *Rushing* court's concerns are unfounded. In fact, the greater risk of suppression comes from the officer pressing Rushing to keep talking, as he did.[161] The officer "guessed" that "I'm not sure I should say anything"[162] meant Rushing did not want to invoke his right to remain silent. Had the court ruled differently, everything Rushing said in response to the officer, including his eventual confession to the crime, would have been suppressed. But suppose the officer "guessed" the opposite, taking Rushing at his word that there was "not really"[163] anything he could talk about, and concluded Rushing wanted to remain silent. If so, and assuming Rushing did not initiate any more dialogue, nothing after that point could have been suppressed—a non-existent confession cannot be suppressed.

Prosecuting criminal activity, as *Rushing* stresses, is an important societal interest.[164] Indeed, in amending the Constitution, "the Founding Fathers were largely focused on the investigation, prosecution, and punishment of criminals."[165] Yet "it is easy to forget how much of the Bill of

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[155] *See, e.g.*, *supra* note 153.
[156] State v. Rushing, 404 P.3d 240, 253 (Ariz. 2017).
[157] *Id.*
[158] *Id.* at 254.
[159] *Id.* (citing Berghuis v. Thompkins, 560 U.S. 370, 382 (2010)).
[160] *Id.*
[161] *Id.* at 253–54.
[162] *Id.* at 253.
[163] *Id.*
[164] *Id.* at 254 (citing *Berghuis*, 560 U.S. at 382).
[165] ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL

Rights was designed to protect criminals and people suspected of crime."[166] The *Miranda* rights are an extension of that design, with the same purpose of protecting the accused. However, requiring a defendant to invoke *Miranda* with unimpeachable clarity, while allowing an interrogation to proceed on less, protects the government, not the accused.

While *Hernandez* allows for a single hedge, the *Rushing* court does not allow for any, at least if the chosen word is "probably." How the *Rushing* court might have dealt instead with "I think" would be a matter of speculation, but these cases have a combined effect: under the *Davis-Berghuis* standard, courts resolve doubtful cases *contra proferentem*, that is, against the drafter.[167] Indeed, to lighten the "burden [of] prosecuting criminal activity,"[168] the courts tend to rule in favor of the government, and in conflict with *Miranda*.[169]

2. *Miranda* in Jeopardy: No Answers in the Form of a Question

Elevating form over substance, courts have generally interpreted the *Davis-Berghuis* standard of clarity as requiring invocations to be made in the imperative, rather than in the form of a question. In *State v. Jett*, for instance, the South Carolina Court of Appeals held that "Where my lawyer at?" was ambiguous because the defendant did not expound upon the meaning of his question.[170] Because Jett had waxed too philosophical with his custodial wonderings, the question was equivocal enough that a reasonable officer could have ruled out Jett's intention to invoke counsel.[171] As a result, the court found no error in admitting Jett's statements.[172]

The *Jett* court erred in its application of *Davis*. "[A]t a minimum," invocation requires "some statement that can reasonably be construed to be an expression of a desire for" counsel.[173] Either a statement is an invocation or it is not.[174] Given the custodial context and the fact that Jett had been

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RIGHTS 164 (2018).

[166] *Id.*

[167] *See* NISSMAN & HAGEN, *supra* note 120, at 339.

[168] State v. Rushing, 404 P.3d 240, 254 (Ariz. 2017) (citing *Berghuis*, 560 U.S. at 382).

[169] *See* NISSMAN & HAGEN, *supra* note 120, at 339.

[170] State v. Jett, 814 S.E.2d 635, 637 (S.C. Ct. App. 2018).

[171] *Id.*

[172] *Id.* The dissenting judge in *Jett* also saw ambiguity in the defendant's question but not the kind that would support admission of the evidence. True, the judge reasoned, more than one interpretation can be drawn from a question like "Where my lawyer at?" Either Jett has a lawyer and wants her there or he is asking for the lawyer mentioned in his *Miranda* rights. *Id.* at 638 (Konduros, J., dissenting). What is clear is that the defendant was not simply pondering aloud the necessity of having counsel present. *Id.*

[173] *Id.* at 637 (citing Davis v. United States, 512 U.S. 452, 459 (1994)).

[174] *Id.*

informed of his right to an attorney, an inquiry into the location of one's lawyer can reasonably be construed as an invocation. Assigning a different meaning to the statement would be unreasonable. The court never explains how "Where my lawyer at?" could mean anything else; it simply faulted Jett for failing to "expound upon the statement."[175]

Expounding upon an allegedly ambiguous statement does not necessarily revive an invocation attempt, either. In *State v. Mattox*, the defendant asked, "You all care if a get a lawyer in here?"[176] The Supreme Court of Kansas explored the possible constructions of this utterance. Perhaps Mattox intended, "I want an attorney right now. I'm not going to talk to anybody until I get it."[177] Or possibly he meant, "I'm thinking about it. Would you care if I brought one in?"[178] The court concluded that because Mattox's utterance fell short of "I want an attorney," it did not satisfy the clear and unequivocal standard imposed by *Davis*.[179] When the officer asked Mattox to clarify his question, he repeated, "a lawyer present."[180] But the court declined to view this response as anything more than a response; the clarification itself carried no weight because it was not a clear request or demand for counsel.[181] Faulting Mattox because he repeated rather than clarified what he presumably believed was a straightforward request is one thing. Faulting him because he responded to the question he was asked rather than offering a separate request or demand for counsel is quite another.

The *Mattox* court opined that questions beginning with "Do you care?" are the hallmark of equivocation.[182] One need only consider a few variations of this theme to expose the court's error. For instance, suppose the phone rings during a meeting and you ask, "Do you care if I take this?" A guest in your home asks, "Do you care if I use your restroom?" A coworker brings donuts to the office and you ask, "Do you care if I have the last one?" And so on. In each of these scenarios, the "Do you care" preamble is not understood to indicate that the individual is simply pondering aloud. Hedging in this manner is a hallmark, not of equivocation, but of deference and politeness. The answer to such requests will invariably be in the affirmative "no."[183] Yet the same logic and linguistic understanding somehow escapes

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[175] *Id.*

[176] State v. Mattox, 390 P.3d 514, 531 (Kan. 2017).

[177] *Id.* at 532.

[178] *Id.*

[179] *Id.*

[180] *Id.* at 533.

[181] *Id.*

[182] *Id.*

[183] Even if one's interlocutor did object, that is, they did care and preferred that the call be ignored, their rejection of the request is, at once, a recognition of what has been requested. In other words, if someone asks, "Do you care if I take this phone call?" it would be absurd to ask if they want to take the

judges in the foregoing *Miranda* contexts. The repercussion, though, is inescapable: not letting someone ask for their rights is the functional equivalent of denying their rights.

In *Gupta v. State*, the defendant, in attempting to ask for his rights, was not even allowed to finish the question. Mr. Gupta started to ask, "When do I get to talk . . . ," before being promptly cut off by the police.[184] The Supreme Court of Maryland judged that even had the defendant asked, "When do I get to talk to my lawyer?" the expression would not have satisfied the unambiguous standard set out in *Davis*.[185] Yet in practically the same breath, the court held that nothing prevented Mr. Gupta from requesting counsel at any other point of the interrogation.[186] "If he wanted assistance of counsel," the court reasoned, "he had many opportunities to say so."[187] In other words, nothing prevented Mr. Gupta from requesting counsel aside from the fact that he could not, in fact, *request* counsel. He needed to *say* so.

The *Gupta* decision forecloses the ability of a defendant to ask for legal representation. Just as the *Miranda* warnings say nothing of the unambiguous-and-unequivocal standard, they omit the vital proviso that invocations be unpunctuated by question marks. Thus, in Maryland, unless the *Miranda* warnings provide, "you have the right to an attorney insofar as you affirmatively demand one," scarce will be the individual who secures the assistance of counsel.

The courts in *Gupta*, *Jett*, and *Mattox* underline the significant disconnect between *Miranda* and the *Davis-Berghuis* standard: the enterprise of informing people of their rights will be a boondoggle as long as suspects have no way of using that information. The *Miranda* warnings do not feature an ascertainable standard for invocation (or waiver), which leaves the accused unsure about what speech will have legal effect and what speech will not. And they are often ultimately penalized[188] for not knowing how to "navigat[e] the linguistic minefields of invocation law."[189]

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call or if they are merely considering doing so—because there is nothing equivocal about asking "Do you care?"

[184] Gupta v. State, 156 A.3d 785, 804 (Md. 2017).

[185] *Id. See also* Davis v. United States, 512 U.S. 452 (1994).

[186] *Gupta*, 156 A.3d at 804.

[187] *Id.* at 804–05.

[188] This can be in the form of continued interrogation or, later in court, a denied motion to suppress evidence.

[189] Ainsworth, *supra* note 2, at 14.

3. Knee-Deep in Technicalities

In *Smith v. Commonwealth*, the Supreme Court of Kentucky engaged in a more thorough, albeit prosecution-friendly, linguistic analysis.[190] The defendant was interrogated on two separate occasions, once in March and again in April. That Smith successfully invoked his rights in March was not disputed. In April, the officer read Smith his *Miranda* rights and told him he needed to sign a waiver form for the questioning to continue.[191] Smith inquired about the purpose of the form, prompting the following exchange:

> Officer: It's pertaining to you. And it's pertaining to a report.
> Smith: I don't know man.
> Officer: But here's the thing. There's nothing incriminating on it, okay? If you don't want to sign that, that's fine with me, okay?
> Smith: Yeah, I'd just rather have my lawyer present.
> Officer: You don't want to sign that?
> Smith: No.
> Officer: Okay. So the question, then, is: do you want to talk to me?
> Smith: I'll answer as many questions as I can.
> Officer: Okay, so you will talk to me?
> Smith: Yeah.
> Officer: Right now?
> Smith: Yeah.
> Officer: Without your lawyer here? Without having a courtroom or anything like that?
> Smith: Yeah.[192]

Smith argued that the officer ignored his request for counsel, but the court believed this argument "wane[d] under scrutiny."[193] Instead of asserting his desire for the presence of counsel during the interrogation, Smith "was apparently just leery of signing something without his lawyer."[194] The court's characterization of Smith's response is reductive, for the *something* he was leery to sign was not trivial—it was a form that, if signed, would waive his constitutional rights. Nonetheless, the court recognized the response as an invocation to the extent it applied to the act of signing the waiver.[195] In other words, the court believed Smith wanted counsel to be present as he signed the form to waive his right to counsel—an absurd construction of his words.

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[190] Smith v. Commonwealth, 520 S.W.3d 340 (Ky. 2017).
[191] *Id.* at 349.
[192] *Id.*
[193] *Id.* at 350.
[194] *Id.*
[195] *Id.*

Rather than limiting the invocation to the act of signing the form, the court should have held that Smith's statement was an invocation of counsel, full stop. The interrogation should have ended when Smith asked for his attorney and confirmed he did not want to sign the waiver form.[196] And the interrogation should only have proceeded from that point if Smith initiated it.[197] Smith did not initiate, but the officer did: "So the question, then, is: do you want to talk to me?"[198] A better question: if Smith needed to sign the waiver *before* the officer could talk to him,[199] and if Smith not only refused to sign it but also asked for an attorney, how can the question "do you want to talk to me?" still be unanswered? Better yet, the question should not have been asked at all. That Smith eventually agreed to talk to the officer[200] is nothing more than the product of coercion.[201] Nor does it support the court's presumption that a valid waiver was given simply because Smith complied in the end.[202]

The *Smith* decision is another example of how individuals in custody, through no fault of their own, are not equipped to assert the *Miranda* rights. While Smith was familiar with his *Miranda* rights, "including his right to cut off questioning at any time and ask for counsel,"[203] the warnings said nothing of his need to specify during what portion of custody he wished to have the assistance of counsel. Was it signing the waiver form? Participating in questioning? Both? How was he to know? The court was likewise silent on this issue.

Moreover, the court held that because Smith invoked his right to counsel as to signing the form, not as to police questioning, *Miranda* and *Edwards* do not require suppression of his statements.[204] But such a distinction does not exist. Under *Miranda*, "once the warnings have been given, the subsequent procedure is clear. If the individual [invokes his rights] in any manner, *at any time prior to* or during questioning . . . the interrogation must cease."[205] *Edwards* echoes the *Miranda* directive.[206] Smith merits the protections of

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[196] Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) (holding that the invocation of counsel terminates an interrogation).

[197] Edwards v. Arizona, 451 U.S. 477, 484–85 (1981) (holding that an interrogation cannot continue post-invocation unless the defendant initiates the communication).

[198] Smith v. Commonwealth, 520 S.W.3d 340, 349 (Ky. 2017).

[199] *Id.* ("If you would sign [it] for me before I talk to you, I'd appreciate it.").

[200] *Id.* ("I'll answer as many questions as I can.").

[201] *See Miranda*, 384 U.S. at 474 (holding that "any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise").

[202] *Smith*, 520 S.W.3d at 349–50. *See also Miranda*, 384 U.S. at 475 (holding that "a valid waiver will not be presumed . . . simply from the fact that a confession was in fact eventually obtained").

[203] *Smith*, 520 S.W.3d at 349.

[204] *Id.* at 350.

[205] *Miranda*, 384 U.S. at 473–74 (emphasis added).

[206] Edwards v. Arizona, 451 U.S. 477, 485 (1981).

Miranda and *Edwards*: the *Miranda* warnings were given and he invoked his right to counsel "prior to . . . questioning,"[207] so the interrogation should have ceased, at least until an attorney was present.[208] Thus, the *Smith* court failed to give Smith's words their proper legal effect.

In *Smith*, the court held that an unambiguous and unequivocal invocation can nevertheless fail if it does not rise to a certain level of specificity.[209] As a result, should anyone in Kentucky manage to utter a statement that meets the stringent *Davis-Berghuis* requirements, they still may fail to achieve an effective assertion of their rights.

C. The Contrastive Ease of Waiver

Whereas the mark for invocation is set immoderately high, the bar for waiver is low enough to overlook. In *North Carolina v. Butler*, the Court held that a waiver of the *Miranda* rights "can be clearly inferred from the actions and words of the person interrogated."[210] Justice Brennan argued that this standard flouts the "very premise of *Miranda*" because ambiguity should be interpreted against the interrogator, not the individual.[211] In *Berghuis*, which builds upon *Butler*, the Court added: "the prosecution . . . does not need to show that a waiver . . . was express."[212] The *Berghuis* holding also conflicts with *Miranda*, which provides that "a heavy burden rests on the government" to establish that the defendant waived his or her rights.[213]

Because a waiver need not be express and intent to waive can be inferred, the "heavy burden" *Miranda* placed on the government has lost significant weight.[214] Indeed, the only real threshold the government must meet is to prove that the *Miranda* rights were given and that the individual understood them.[215] Once the government meets this light burden, defendants, by

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[207] *Miranda*, 384 U.S. at 473–74.

[208] *Edwards*, 451 U.S. at 482 (citing *Miranda*, 384 U.S. at 474).

[209] *See Smith*, 520 S.W.3d at 350.

[210] North Carolina v. Butler, 441 U.S. 369, 373 (1979). Examples of courts applying the *Butler* implied waiver standard include: United States v. Mejia, 600 F.3d 12, 17–18 (1st Cir. 2010); United States v. Umaña, 750 F.3d 320, 344 (4th Cir. 2014); United States v. Lawrence, 735 F.3d 385, 437 (6th Cir. 2013); United States v. Brown, 664 F.3d 1115, 1118 (7th Cir. 2011); State v. Hernandez, 911 N.W.2d 524, 543–44 (Neb. 2018).

[211] *Butler*, 441 U.S. at 377 (Brennan, J., dissenting).

[212] Berghuis v. Thompkins, 560 U.S. 370, 384 (2010). Examples of courts applying the non-express waiver requirement include: United States v. Plugh, 648 F.3d 118, 127–28 (2d Cir. 2011); State v. Watson, 185 A.3d 845, 849 (N.H. 2018).

[213] *Miranda*, 384 U.S. at 475.

[214] *See* Dickerson v. United States, 530 U.S. 428, 443–44 (2000) ("If anything, our [post-*Miranda*] cases have reduced the impact of [*Miranda* on law enforcement].").

[215] *See Berghuis*, 560 U.S. at 383; *Butler*, 441 U.S. at 374; Davis v. United States, 512 U.S. 452, 460 (1994) (holding that "the primary protection afforded suspects subject to custodial interrogation is [not to

contrast, are weighed down by the *Davis-Berghuis* threshold of clarity.

In point, the practical effect of the Court's doctrines of waiver and invocation is this: if an utterance *might* benefit the government, then it does; but if an utterance *might* benefit the individual in custody, then it does not. A clear example of this pro-prosecution bias is the contrast between invoking and waiving the right to remain silent. As to invocation, silence alone *might* indicate the desire to remain silent, so courts rule that it does not.[216] But as to waiver, silence *might* also indicate the desire to waive the *Miranda* rights, so courts have ruled that it does.[217] Courts are willing and able to infer intent, just not when it favors the defendant.

D. Toward a Resolution

Not all invocation attempts fail.[218] Nor is it always unduly difficult to succeed. In *State v. McNaughton*, for instance, the Supreme Court of Maine held that "I'll take Mariah"—as opposed to Miranda—was sufficiently clear.[219] But as the case law illustrates, not all invocation attempts succeed either. This failure, as has been argued to this point, stems largely from the *Davis-Berghuis* regime, which, as currently applied, leaves judges and law enforcement with an unworkable prescription supported by inconsistent rationales.

Yet overturning *Davis-Berghuis* is unlikely—and unnecessary. The requirement that invocations be unambiguous and unequivocal should remain the law. But courts themselves need to provide greater clarity, and

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actually assert the right to counsel but to simply receive] the *Miranda* warnings themselves").

[216] "The high Court held that an individual in police custody subject to interrogation must affirmatively invoke his or her *Miranda* rights; thus, mere silence in the face of police questioning after being given *Miranda* warnings is insufficient to invoke *Miranda* rights." Commonwealth v. Briggs, 12 A.3d 291, 318 n.27 (Pa. 2011) (citing *Berghuis*, 560 U.S. 370). *See also* Doyle v. Ohio, 426 U.S. 610, 617 (1976) (holding that silence is insolubly ambiguous).

[217] *See Butler*, 441 U.S. at 373 (holding that waiver can be implied through the defendant's silence). *See also* Fletcher v. Weir, 455 U.S. 603 (1982) (holding that silence—post-arrest but pre-*Miranda*-warning—may also be used against a suspect to impeach him or her as a witness); Harvey Gee, *Salinas v. Texas: Pre-*Miranda *Silence Can Be Used Against a Defendant*, 47 SUFFOLK U. L. REV. 727 (2014).

[218] Recent examples include: State v. S.S., 162 A.3d 1058, 1060 (N.J. 2017) ("No, that's all I got to say. That's it."); State v. McNaughton, 168 A.3d 807, 811 (Me. 2017) ("I really don't want to speak any more on the subject," and "I'll take Mariah."); Vargas-Salguero v. State, 185 A.3d 793 (Md. Ct. Spec. App. 2018) ("[I]f I am being accused of something. . .I better want an attorney."); Daniel v. State, 238 So. 3d 1283 (Fla. Ct. App. 2018) ("Can I have a lawyer?"); Grueninger v. Dir., Va. Dept. of Corrs., 813 F.3d 517 (4th Cir. 2016) ("These are felonies, I need an attorney."); Sessoms v. Grounds, 776 F.3d 615 (9th Cir. 2015) ("[G]ive me a lawyer."); Commonwealth v. Lukach, 195 A.3d 176 (Pa. 2018) ("Yeah. I don't know just, I'm done talking. I don't have nothing to talk about.").

[219] State v. McNaughton, 168 A.3d 807, 810–11 (Me. 2017). The *McNaughton* holding is an intentionalist one, as it "den[ies] that it is possible for an utterance to fail to mean what the utterer intends, even when the utterer has made a mistake." SLOCUM, *supra* note 54, at 16.

thereby uniformity, on what is ambiguous and what is equivocal, such that individuals wishing to assert their *Miranda* rights can do so with some level of confidence that their invocation will work.

What follows is a proposed method that upholds the principles set out in *Miranda*[220] and *Davis-Berghuis*, while also making satisfaction of those requirements more feasible for individuals in custody. The intentionalist approach enables courts to view a statement like Demesne's as an unambiguous and unequivocal request for counsel, thus giving invocations their intended legal effect.

IV. RESOLUTION

Suppose a gentleman walks into a car dealership. An over-zealous sales associate assures that he will leave TODAY! in the car of his dreams, which he shortly after finds sitting on the lot. But when the man produces a barrel of coins in the price-tag amount, the sales associate, unaccustomed to being the one nickeled-and-dimed, says, "This *might* be enough, but I cannot be sure." So too with *Miranda*.

Judges and police officers are unwilling to count certain denominations of linguistic currency tendered by suspects, even when it would add up to an invocation in any other setting.[221] Arbiters of *Miranda* disputes should reappraise their counting of custodial coins, as it were, by applying intentionalist principles of interpretation in combination with linguistic theory. The result is an approach that harmonizes the *Davis-Berghuis* standard with *Miranda* and with the intentions of individuals in custody.

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[220] Note that overturning *Miranda* is also unlikely and unnecessary. True, *Miranda* has never enjoyed popularity. Initial media reactions included political cartoons of Justice Warren "coddling criminals" and reportage of the Supreme Court releasing rapists, murderers, and robbers with its newly minted jurisprudence. NISSMAN & HAGEN, *supra* note 120, at 22. More recent criticisms of the doctrine range from citing its untenable societal costs, *see* Paul Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of Miranda's Harmful Effects on Law Enforcement*, 97 B.U.L. REV. 685 (2017), to more soberly wondering "whether it opened the door to more crime [or] led to better and more humane interrogation methods." LAWRENCE M. FRIEDMAN, IMPACT: HOW LAW AFFECTS BEHAVIOR 129 (2016). But "despite years of direct attack and many changes in the Court's lineup, [*Miranda*] has tenaciously remained the law." NISSMAN & HAGEN, *supra* note 120, at 22. Endurance, general acceptance, and precedential stability have made *Miranda* practically immune to reversal, which is said to give the decision superprecedent status. BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 235 (2016).

[221] *See supra* Part III.

A. Miranda Invocations: An Intentionalist Approach

1. Reanalyzing Demesne

Where statutory language does not lend itself to a clear judicial interpretation, judges often look to legislative history to glean the intent of the legislature.[222] No such record exists to support statements made by individuals in custody, but linguistic theory can play the same role. The task is to determine what Demesne intended, for example, when he said, "if y'all, this is how I feel, if y'all think I did it, I know that I didn't do it so why don't you just give me a lawyer dog cause this is not what's up."[223] The court said no invocation, but as detailed below, an intentionalist approach says otherwise.

Assuming the language in *Demesne* was ambiguous on its face, the analysis, under an intentionalist framework, is still incomplete. The court should have consulted linguistic theory, an analog for legislative history. Grice, a prominent linguist, theorized that speakers will abide by certain conversational maxims.[224] A speaker ideally provides the right amount of information (quantity), with the utterance being truthful (quality), relevant (relation), and clear (manner).[225] But should an individual flout one of these standards—e.g. Demesne allegedly failed to be clear—Grice presumes it is done intentionally.[226] The intentional failure to meet one or more maxims triggers a search for implication,[227] a search that involves interpreting the language "as though it were in accordance" with the maxims.[228] Such a reading of the language, here, would be as though Demesne had been clear.

In *Demesne*, the search for implication begins by recognizing the context of his statements: he was in custody and responding to an officer who had just read his *Miranda* rights. Those rights serve as the guidepost for measuring the fidelity of Demesne's utterance against the Gricean maxims.

a. The Quantity Maxim

First, Demesne provided sufficient information. He stated that he did not

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[222] Milner v. Dep't of the Navy, 562 U.S. 562, 572 (2011) (noting the utility of legislative history).

[223] State v. Demesne, 228 So. 3d 1206 (La. 2017) (Crichton, J., concurring).

[224] Poggi, *supra* note 102, at 24–25. The maxims, in no particular order, are quantity, quality, relation, and manner. *Id.*

[225] The assumption is that, in the main, speakers are economic with their words, that they do not seek to deceive each other, that they stay on topic, and that they avoid ambiguity and vagueness. Poggi, *supra* note 102, at 24–25.

[226] CULPEPER & HAUGH, *supra* note 106, at 96.

[227] Mason, *supra* note 90, at 214.

[228] Poggi, *supra* note 102, at 24.

commit the alleged crime ("I know that I didn't do it") and expressed his frustration with being considered a suspect ("cause this is not what's up").[229] In addition, he referenced wanting an attorney ("why don't you just give me a lawyer dog").[230] All of these words indicate his opposition to interrogation and his desire to have counsel present.

Doubts that Demesne's statement lacked sufficient information to constitute an assertion of his right to counsel are offset by considering that no measurable information suggests that he *might not* have invoked. Indeed, he did not state, nor did he hint or imply, that he wished to waive his rights, or that he wanted to proceed with the interrogation.

Logic insists that a statement *might* mean *X* only if it also *might not* mean *X*. Or, as *Davis* provided, a statement is either an invocation or it is not.[231] Without a showing that Demesne's utterance might not be an invocation, the court erred in holding his words lacked sufficient information to be unambiguous and unequivocal.[232]

b. The Quality Maxim

Second, the maxim of quality turns on the truthfulness of the speaker. Nowhere in the record is an allegation that Demesne was untruthful in his statements, that he was not conveying his actual feelings about the situation. "This is how I feel," stated Demesne, "If y'all think I did it, I know I didn't do it so why don't you just give me a lawyer dog."[233]

Without any allegations of untruthfulness, it is difficult to determine that Demesne was in fact expressing his wish to forego the presence of counsel and to confess to the crime. The record instead offers what appears to be a sincere protest to the situation: "this is not what's up."[234] Concluding that Demesne made his plea for counsel in jest, or that he somehow intended the opposite meaning of his words, requires quite a stretch in argumentation. Just as Demesne provided adequate quantity, he did not flout the maxim of quality. Accordingly, the court should have recognized that Demesne meant what he said.

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229 State v. Demesne, 228 So. 3d 1206 (La. 2017) (Crichton, J., concurring).

230 *Id.*

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

232 *See Demesne*, 228 So. 3d at 1207 (Crichton, J., concurring).

233 *Id.* at 1206.

234 *Id.*

c. The Relation Maxim

Third is the maxim of relation, which measures the relevance of a statement to the conversation in which it is given. Here, Demesne was told he had the right to an attorney. As a result, his response, "why don't you just give me a lawyer dog,"[235] was unmistakably relevant. The same would be true if he had, in fact, waived the right to counsel, as the *Miranda* rights give you the option of one or the other.

The rest of Demesne's statement also satisfies the maxim of relation. He was in custody and had been given the *Miranda* warnings because he was suspected of having committed a crime. Thus, his assertion that he had not committed the alleged crime, and that he was not okay with being held in custody, was relevant.

In everything that Demesne said to the police, he spoke in relation to the circumstances. Never did he attempt to sidetrack the exchange by bringing up a random topic or try to stall the interrogation with non sequiturs. Instead, he kept his contributions to the exchange relevant and within the bounds of the maxim of relation. The court should have given weight to the relevance of Demesne's words.

d. The Clarity Maxim

Last in the search for implication of intent is the clarity maxim, which the concurring justice in *Demesne* argued, if unwittingly, was not met.[236] Assuming he was correct, the intentionalist approach calls for interpreting the language "as though it were in accordance" with the clarity maxim.[237] Two pieces of the *Demesne* record help guide this interpretation.

First, as to the word "if" and the phrase "why don't you," the context offsets any ambiguity or equivocation they might entail. "[I]f y'all think I did it"[238] does nothing more than state the obvious, for Demesne would not have been in custody if the officer did not think he did it. Thus, any conditions of the conditional "if" were met *ab initio*, that is, before Demesne even spoke, changing the tenor of his statement. The Gricean gloss would be something along the lines of, "I acknowledge you think I did it, and I want a lawyer."

Second, the reference to a "lawyer dog,"[239] with which the concurring justice mainly took issue, also reads differently through the Gricean lens, though the difference is subtle: "You think I did it, I know I didn't; just give

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[235] *Id.*

[236] *See id.*

[237] Poggi, *supra* note 102, at 24.

[238] *Demesne*, 228 So. 3d at 1206 (Crichton, J., concurring).

[239] *Id.*

me a lawyer[,] dog, because this is not right." The change is simply an added comma, which grammatically dispels the notion that Demesne was calling for a canine with legal credentials. But if the word "dog" remained a challenge, the judge could have inserted his referent of choice—sir, officer, man, dude, bro, homie, etc.

Interpreting language "as though it were in accordance"[240] with Grice's maxims adheres to the empirically supported premise that "people frequently use indirect and modified forms of imperatives that are nevertheless intended to be interpreted as unequivocal demands."[241] In like manner, Demesne modified his *Miranda* invocation such that his intent was unequivocal. To claim otherwise, that the interrogating officer was left, *faute de mieux*, "to make a difficult judgment call" or even "guess"[242] as to Demesne's intent, is to cast aspersions on the officer. There was no *might* about it: just give him a lawyer, dog.

2. A New Outcome in *Demesne*

Intentionalism, as applied here, focuses on substance and consults linguistic theory to better illuminate the language in question. The approach helps to discern what Demesne intended his words to achieve.[243] And applying the Gricean maxims supports the conclusion that Demesne invoked his right to counsel, which would have led to a different outcome in his case.[244]

Interpreting Demesne's statement "as though it were in accordance"[245] with Grice's maxims harmonizes *Davis-Berghuis* with *Miranda*. On one hand, it allows the court to find the utterance was sufficiently clear within the parameters of *Davis-Berghuis* because quantity, quality, and relation of the statement preclude a *might not* interpretation.[246] On the other, it enables Demesne to invoke his right to counsel "in any manner."[247]

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[240] Poggi, *supra* note 102, at 24.

[241] Ainsworth, *supra* note 2, at 11.

[242] Davis v. United States, 512 U.S. 452, 461 (1994) ("[I]f we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney . . . [p]olice officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong.").

[243] *See supra* text accompanying note 16.

[244] *See* State v. Demesne, 228 So. 3d 1206 (La. 2017) (Crichton, J., concurring).

[245] Poggi, *supra* note 102, at 24.

[246] *See supra* notes 229–32 and accompanying text.

[247] Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

B. State Courts and Intentionalism

The *Miranda* court encouraged the States "to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws."[248] New Jersey is one example of a state that, conscious of *Miranda*, has established its own state law privilege against self-incrimination. Under New Jersey law, "[a]ny words or conduct that reasonably appear to be inconsistent with defendant's willingness to discuss his case with the police are tantamount to an invocation of the privilege against self-incrimination."[249] Such is the implication of intent found by interpreting language as though all of Grice's maxims have been met.

State courts must not underestimate their ability to influence constitutional jurisprudence. Free speech and equal protection are two examples of areas in which state courts have played a persuasive role.[250] Fifth Amendment jurisprudence similarly stands to benefit as state courts apply the intentionalist approach outlined in this Note. Indeed, had the four-part *Demesne* analysis above been applied in the other cases discussed in this Note—*Hernandez*,[251] *Bartelt*,[252] *Rushing*,[253] *Jett*,[254] *Mattox*,[255] *Gupta*,[256] *Smith*[257]—the courts would likely have found in favor of each defendant.

Giving effect to the intended meaning of invocations is not meant to turn every criminal case into *Jarndyce and Jarndyce*.[258] Quite the opposite. One

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[248] *Id.* at 467.

[249] State v. S.S., 162 A.3d 1058, 1071 (N.J. 2017) (citing State v. Bey, 548 A.2d 887, 893 (1988)).

[250] *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018). Also note that in 2018, the Supreme Court of Washington held the death penalty unconstitutional under state law, bringing the number of states that have banned capital punishment to twenty. State v. Gregory, 427 P.3d 621 (Wash. 2018). While the states may differ as to their rationales, the net effect of ruling out the death penalty may very well influence the High Court's approach to Eighth Amendment jurisprudence. *See id.* at 643.

[251] State v. Hernandez, 911 N.W.2d 524 (Neb. 2018).

[252] State v. Bartelt, 906 N.W.2d 684 (Wis. 2018).

[253] State v. Rushing, 404 P.3d 240 (Ariz. 2017).

[254] State v. Jett, 814 S.E.2d 635 (S.C. Ct. App. 2018).

[255] State v. Mattox, 390 P.3d 514 (Kan. 2017).

[256] Gupta v. State, 156 A.3d 785 (Md. 2017).

[257] Smith v. Commonwealth, 520 S.W.3d 340 (Ky. 2017).

[258] A fictional case, *Jarndyce and Jarndyce*, has

> in the course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled, has grown up, possessed

objective of the intentionalist approach, in keeping with *Miranda*'s encouragement, is to promote more effective law enforcement.[259] Progress comes by eliminating senseless debates over whether a defendant, while musing[260] and pondering[261] in custody, was trying—notwithstanding the gravity of the circumstances—to engage the officer in a friendly dialectic, to perform, extempore, a soliloquy on the theme of "What to do?"[262] or perhaps to summon a one-of-a-kind lawyer dog.

Because the primary purpose of applying the intentionalist approach is to help ensure that American citizens can access their Fifth Amendment protections, it is consistent with the *Miranda* Court's encouragement.[263] If an individual truly need not speak as an "Oxford don,"[264] the courts must also recognize the speech of the "average Joe."[265] Judges "appear quite capable of

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himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; there are not three Jarndyces left upon the earth . . . but Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless.

DICKENS, *supra* note 145, at 16–17.

[259] *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[260] State v. Hernandez, 911 N.W.2d 524, 544 (Neb. 2018).

[261] State v. Jett, 814 S.E.2d 635, 638 (S.C. Ct. App. 2018).

[262] In the opening scenes of *Anna Karenina*, Prince Stepan Arkadyich Oblonsky, detained in the custody of his conscience, wonders repeatedly, despairingly, and without answer, "What to do?" LEO TOLSTOY, ANNA KARENINA 3–4 (Richard Pevear & Larissa Volokhonsky trans., Penguin Classics 2004) (1877).

[263] *Miranda*, 384 U.S. at 467.

[264] Davis v. United States, 512 U.S. 452, 476 (1994) (Souter, J., concurring).

[265] Sveen v. Melin, 138 S. Ct. 1815, 1819 (2018) (though not controlling in the *Miranda* context, this is the first time the Court has used the colloquial phrase "average Joe" to reference a group of people). Consider also the Fourteenth Amendment implications for recognizing all forms of speech. While the "unambiguous or unequivocal" appears, at least on its face, to be an objective and non-discriminatory standard, the *Davis-Berghuis* standard shows a decided preference for one type of language. *See* Davis v. United States, 512 U.S. 452, 462 (1994). It follows that other types—the ambiguous and equivocal—are not preferred. Courts sometimes analyze syntactic patterns, word choice, and even voice tone, *see* State v. S.S., 162 A.3d 1058, 1065 (N.J. 2017) (citing an amicus brief where the ACLU-NJ "condemn[ed] the [lower court's] references to defendant's composure and "even" and "quiet" tone of voice as a basis for its rejection of defendant's unambiguous invocation of the right to silence." The ACLU-NJ also stated, "that when a court disregards an explicit invocation of a right based on tone of voice, equal-protection concerns are implicated because 'tone,' in part, is a factor of race and culture." And it contended that because "young black men are often counseled to take a conciliatory approach when interacting with the police"). This can easily venture into discrimination territory, be it based on race, gender, *see* Ainsworth, *supra* note 90 (describing the female register of speaking and discussing the disparate impact of post-*Miranda* police practices on women), or another classification, *see* Jesse-Justin Cuevas & Tonja Jacobi, *The Hidden Psychology of Constitutional Criminal Procedure*, 37 CARDOZO L. REV. 2161 (2016) (noting in addition to the bias against women in the Court's *Miranda* jurisprudence, the differences in speech based on age and intellectual disability that likewise affect the administration of criminal procedure), since dialectic diversity is often tethered to immutable characteristics. *See* WALT WOLFRAM & NATALIE SCHILLING, AMERICAN ENGLISH: DIALECTS AND VARIATION (3d ed. 2015). If *Miranda* protections can be invoked by one, they must be accessible to all.

implicating non-literal meaning"[266] when waivers are at issue, but whether the implicature is one of waiver or invocation, the same attention ought to be given to a defendant's words. The intentionalist approach provides that attention.

V. CONCLUSION

The courts have forgotten "how long it has taken to establish the privilege against self-incrimination, the sources from which it came, and the fervor with which it was defended."[267] As observed in *Miranda*, the Fifth Amendment protection against self-incrimination was "designed to approach immortality as nearly as human institutions can approach it,"[268] but this envisioned potential has withered under the *Davis-Berghuis* regime. State courts can resume the intended course, however, by reinstating the "in any manner"[269] ethos of *Miranda*—and the road is paved with good intentionalism.

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[266] Ainsworth, *supra* note 2, at 14. *See also supra* notes 184–191 and accompanying text.

[267] *Miranda*, 384 U.S. at 458.

[268] *Id.* at 443 (citing Cohens v. Virginia, 6 Wheat. 264, 387 (1821)).

[269] *Id.* at 444–45.