Entering onto the Path of Inference: Textualism and Contextualism in the *Bruton* Trilogy

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Introduction

THE "NEW TEXTUALISM" associated with the interpretive theory of United States Supreme Court Justice Antonin Scalia has generated a large body of scholarly commentary, and many of Scalia's own decisions have been scrutinized through the lens of this debate.[1] One of Scalia's opinions that has not yet been so analyzed but that cries out for such treatment is *Richardson v. Marsh*[2] ("*Richardson*"), which is the second of the United States Supreme Court's *Bruton* trilogy of cases consisting of *Bruton v. United States*[3] ("*Bruton*"), *Richardson*, and *Gray v.*

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1. The main, and, in my opinion, the most theoretically sophisticated academic exegetist of Scalia's textualism is William N. Eskridge, Jr., whose works I refer to frequently below. WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 235–45 (2d ed. 2006) [hereinafter ESKRIDGE, INTERPRETATION]; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) [hereinafter Eskridge, *New Textualism*]; William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509 (1998) [hereinafter Eskridge, *Unknown Ideal*].

Articles on the relationship between Scalia's textualism and his judicial opinions include Bryan H. Wildenthal, *The Right of Confrontation, Justice Scalia, and the Power and Limits of Textualism*, 48 WASH. & LEE L. REV. 1323 (1991), and David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377 (1999).

More recent articles on the continuing influence of textualism include Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006), and Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769 (2008).

2. 481 U.S. 200 (1987).

3. 391 U.S. 123 (1968).

Maryland[4] ("*Gray*").[5] *Bruton* law focuses on whether a jury will find a codefendant's confession incriminating to a defendant at a joint trial, even if the defendant's name is redacted from the confession. This Article traces the theoretical confusion that has arisen in *Bruton* law as a result of Justice Scalia's argument—first raised in his majority opinion in *Richardson* and subsequently elaborated in his dissenting opinion in *Gray*—that the trial court must base its interpretation of whether the redacted confession is incriminating to the defendant based only on the "face" of the text of the confession and need not consider other information introduced at trial.[6] Contra Scalia, as I argue below, the whole movement of modern literary theory has been towards rejecting textual formalism and towards recognizing the central role of context in determining meaning. Indeed, as I trace below, the evolution of *Bruton* doctrine from *Richardson* to *Gray* illustrates a crisis of textual formalism that parallels the movement from New Criticism to Deconstruction in literary theory.

Prior commentary has been practically unanimous in criticizing the confusion and uncertainty in *Bruton* doctrine that has followed the Supreme Court's decisions in *Richardson* and *Gray*.[7] But prior commentary has failed to grasp that the fundamental problem with *Bruton*

4. 523 U.S. 185 (1998).

5. This trilogy of cases defines the redaction problem. The Supreme Court decided another *Bruton* case, *Cruz v. New York*, 481 U.S. 186 (1987), unrelated to redaction. *Cruz* holds that *Bruton* applies even when a defendant's confession that would corroborate the statement of the non-testifying codefendant confessor is admitted. *Id.* at 188, 193.

6. *See infra* Part II.C.

7. *See* Alfredo Garcia, *The Winding Path of* Bruton v. United States*: A Case of Doctrinal Inconsistency*, 26 AM. CRIM. L. REV. 401, 402 (1988) (arguing that "the Court's decisions issued since *Bruton* have been marked by a lack of doctrinal consistency and by a steady erosion of the fundamental values supporting the [S]ixth [A]mendment's confrontation clause"); Bryant M. Richardson, *Casting Light on the* Gray *Area: An Analysis of the Use of Neutral Pronouns in Non-Testifying Codefendant Redacted Confessions under* Bruton, Richardson, *and* Gray, 55 U. MIAMI L. REV. 825, 843 (2001) (arguing that "*Gray* left unanswered, or perhaps unclear the constitutionality of admitting non-testifying codefendant confessions redacted" with neutral pronouns); Judith L. Ritter, *The X Files: Joint Trials, Redacted Confessions and Thirty Years of Sidestepping* Bruton, 42 VILL L. REV. 855, 923 (1997) (arguing that a variety of redactions of the defendant's identity, ostensibly justified under *Richardson*, are "transparent and worthless disguises"); Benjamin E. Rosenberg, *The Future of Codefendant Confessions*, 30 SETON HALL L. REV. 516, 549 (2000) ("*Gray*'s observation that it is not the fact of, but the kind of, inferences that is important is opaque."); Bryan M. Shay, Note, *"So I Says to 'The Guy,' I Says . . .": The Constitutionality of Neutral Pronoun Redaction in Multidefendant Criminal Trials*, 48 WM. & MARY L. REV. 345, 389 (2006) (arguing that the *Bruton* trilogy has produced "*too many* standards, and none of them is clear enough to guarantee consistent application"). In my opinion, Ritter's article, which was published just before *Gray*, remains the strongest contribution to *Bruton* scholarship, and I draw on it frequently below.

doctrine after *Richardson* and *Gray* is that the incriminating on-the-face-of-the-text standard is inherently contradictory. Analyzing *Bruton* doctrine in the light of Scalia's theoretical pronouncements about textualism not only clarifies the problems in *Bruton* doctrine following *Richardson*, but also reveals textualism's theoretical flaws more strikingly than prior critiques. As I will argue, the central theoretical flaw of Scalia's textualism is that it seeks to restrict the consideration of context to a limited number of "special" interpretive situations, rather than acknowledging that context constitutes the inescapable horizon of all meaning.[8] Because Scalia sees no special contextual issue at stake in the redacted confessions at issue in *Bruton*, he, consistent with his textualist theory, feels free to ignore the role context plays in determining the meaning that a jury will find in them. But, with *Bruton* doctrine, to ignore the role of context in considering the meaning a jury will find in a codefendant's statement is to completely undermine the validity of the court's determination of prejudice to the defendant from the admission of that evidence.

In short, the core of Scalia's textualism is *eliminating context*. There are significant parallels therefore between Scalia's desire, in statutory interpretation, to remove the interpretive context provided by legislative history and his desire, in *Bruton* doctrine, to remove the context of other evidence produced at trial for evaluating prejudice to the defendant. But, as I will argue, based on the lessons of literary theory, eliminating context also eliminates the possibility of finding a valid interpretation. This Article draws on the Scalian textualist debate in legal theory and the analogous debate in literary theory to argue that a complete rejection of *Richardson*'s facial incrimination standard is necessary to restore any sort of coherence to *Bruton* doctrine. I conclude that, once the facial incrimination standard has been dispelled, there remains no principled reason for excluding from *Bruton* analysis the consideration of other evidence introduced at trial.

I. The Interpretative Issue Raised by *Bruton*

A *Bruton* problem arises when a codefendant's confession implicating the defendant is introduced into evidence at a joint trial.[9] State-

8. For prior critiques of Scalia's textualism for failing to consider the role of context, see Paul E. McGreal, *Slighting Context: On the Illogic of Ordinary Speech in Statutory Interpretation*, 52 U. KAN. L. REV. 325 (2004), and Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990).

9. Bruton v. United States, 391 U.S. 123, 132 (1968).

ments the codefendant makes in the confession about the defendant are often incriminating to the defendant, but the prejudice from these incriminating statements "cannot be dispelled by cross-examination if the co-defendant does not take the stand."[10] In *Bruton*, the Supreme Court held that it would violate a defendant's rights under the Confrontation Clause if a non-testifying codefendant's confession implicating the defendant were admitted at a joint trial, even if the jury was instructed to disregard that confession in determining the guilt or innocence of the defendant.[11] In reaction to the *Bruton* decision, prosecutors sought to admit a codefendant's confession at a joint trial by redacting the confession so that the non-confessor defendant was not directly named.[12] The problem then arose whether, despite the redaction, the jury would nonetheless figure out that the non-confessor defendant was implicated by the confession.

Bruton issues are raised at trial through *in limine* motions, by which counsel for the non-confessor defendant seeks to exclude the confession (or have the trials of the codefendants severed), and the prosecution typically seeks to have it admitted in a redacted form in a joint trial.[13] The legal issue is whether the jury would find the redacted confession so "powerfully incriminating" to the non-confessor defendant that a limiting instruction could not cure the prejudice.[14] Resolving this legal issue depends, in turn, on how one would expect a reasonable jury to interpret the redacted confession at issue.[15] In effect, the court bases its analysis on the court's own general assump-

10. *Id.* (quoting 34 F.R.D. 411, 419 (1964)). Of course, "[i]f the declarant codefendant invokes the Fifth Amendment right against self-incrimination and declines to testify, the implicated defendant is unable to cross-examine the declarant codefendant regarding the content of the confession." People v. Lewis, 181 P.3d 947, 976 (Cal. 2008). A codefendant's extrajudicial statement implicating the defendant need not be excluded when the codefendant testifies and is available for cross-examination. Nelson v. O'Neil, 402 U.S. 622, 629–30 (1971).

11. *Bruton*, 391 U.S. at 127–28, 135–37.

12. *See infra* Part III.B–D.

13. A pragmatic argument for limiting the analysis of *Bruton* prejudice to the "face" of the confession is that the trial court typically rules on the admissibility of the confession challenged under *Bruton* before other evidence has been presented at trial. *See infra* Part III.E.4.

14. *Bruton*, 391 U.S. at 135–36.

15. Since *Bruton* issues are typically argued in pretrial motions prior to the empanelling of the jury, trial courts are justified in basing their analysis on hypothetical rather than actual jurors. On a more fundamental level, as with many legal issues relating to jury instructions, the law traditionally makes assumptions based on the reasonable juror, even in the face of empirical research that actual jurors may not correspond to such assumptions. *See* Judith L. Ritter, *Your Lips Are Moving . . . But the Words Aren't Clear: Dissecting the Presumption that Jurors Understand Instructions*, 69 MO. L. REV. 163 (2004).

tions about interpretation. In *Richardson*, Scalia fundamentally changed *Bruton* analysis by casting the account of interpretation in textualist terms, namely, that the meaning of the confession should be determined solely by the face of text, not in combination with other evidence presented at trial.

By pronouncing a textualist theory of interpretation, *Richardson* implicates one of the central theoretical oppositions in modern hermeneutics: textual formalism versus contextualism. Textual formalism is any theory of interpretation that holds that the meaning of a text can be determined solely by the meaning of the words alone, or, to define it in the negative, any theory of interpretation that holds that meaning can be determined without regard to *context*.[16] Contextualism, to the contrary, holds that meaning always depends on context, no matter how "plain" that meaning may appear. This Article recounts how the opposition between textual formalism and contextualism has been defined in the debates over Scalia's "textualism" and in the remarkably similar debates in literary theory. The Article then uses these theoretical concepts to illuminate the contradictions in *Bruton* doctrine following *Richardson*.

II. Theories of Interpretation

A. Scalia's Textualism

Scalia's Tanner Lectures at Princeton University, published with commentaries and a response by the author in *A Matter of Interpretation*, are the fullest theoretical expression of his textualism.[17] The backdrop of Scalia's discussion is the proper relation of the Anglo-American common-law tradition of judging to the modern body of

16. In literary theory, the term "formalism" usually stands for what I am calling "textual formalism." *See, e.g.*, Stanley Fish, *Going Down the Anti-Formalist Road*, *in* DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 1–33 (Duke Univ. Press 1989). In legal theory, the term "formalism" is often used more broadly as an opposite to legal pragmatism or realism, and includes various legal methodologies of which textual formalism is one, but not the sole, type. *See, e.g.*, Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638–39 (1999). Theories of legal formalism generally entail three commitments: "to promoting compliance with all applicable legal formalities . . . , to ensuring rule-bound law . . . , and to constraining the discretion of judges in deciding cases." *Id.* at 638.

17. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Princeton Univ. Press 1997). *Richardson* was decided in 1987, but *A Matter of Interpretation* was not published until 1997. As discussed below, however, the full implications of *Richardson* are expressed in Scalia's dissenting opinion in *Gray*, which was decided in 1998. Therefore, it is appropriate to criticize Scalia's approach to *Bruton* prejudice in relation to his mature theoretical pronouncements in *A Matter of Interpretation*.

extensive federal statutory law. Scalia describes the common-law courts as having two functions: (1) applying established law to facts, and (2) making new law.[18] As Scalia describes it, no rule of decision previously announced could be erased, but a common-law judge could create new law by distinguishing the facts of the current case and enunciating a new principle of law based on those new facts.[19] Because the facts of cases are seldom exactly similar in all respects, there was no practical restraint on the ability of the common-law judge to create new law by distinguishing prior cases.[20] Scalia does not directly criticize the quality of the body of law created by common-law judges, whom he portrays as an aristocratic class essentially unaccountable to the will of the people.[21] He does, however, argue that this individual and unaccountable method of common-law judging is fundamentally incompatible with the modern era of legislation, in which most new law is statutory.[22] He concludes that another method of judging is required, one that recognizes that the judge's role is to interpret the meaning of the text of the statute honestly, rather than to create new law in the common-law style based on the judge's personal belief about the just outcome of the case.[23]

Scalia also argues that the common-law method of judging is similarly inappropriate for determining federal constitutional issues.[24] Scalia argues against what he sees as mistaken theories of a "dynamic" Constitution that allow for a common-law way of making law to be applied to constitutional issues.[25] He argues that the purpose of the Constitution is not to authorize the changing of constitutional rights to reflect the changing times, but, rather, the Constitution's purpose is to "prevent change," that is, "to embed certain rights in such a manner that future generations cannot readily take them away."[26] Scalia uses the term "textualism" to describe the approach to judicial decision-making that upholds this conception of the Constitution.[27]

18. *Id.* at 6.

19. *Id.* at 8–9.

20. *See id.* at 7–11. Scalia acknowledges that the self-conception of the common-law tradition was that it was *discovering* existing law rather than *creating* new law, but argues that the work of legal realist scholarship in this century had shown that common law judges were in fact creating new law. *Id.* at 10.

21. *See id.* at 9–12.

22. *Id.* at 12–13.

23. *Id.* at 13, 17–18.

24. *Id.* at 40.

25. *Id.*

26. *Id.*

27. *Id.* at 23–25.

Through textualism, Scalia proposes that a text "should be construed reasonably, to contain all that it fairly means."[28] He denies he is a "literalist," and he acknowledges that "the principal determinant of meaning is context."[29] However, he asserts that words "have a limited range of meaning, and no interpretation that goes beyond that range is permissible."[30] The principal change Scalia proposes to judicial decisionmaking is that judges should give little or no consideration to arguments based on legislative history in determining statutory meaning.[31] He argues that "the objective indication of the words, rather than the intent of the legislature, is what constitutes the law,"[32] that legislative history materials add nothing to determining the meaning of the words, and that arguments based on them are therefore a time-consuming waste of judicial resources.[33]

In contrast to his dismissal of the value of legislative history in determining statutory meaning, Scalia will, however, consult the *Federalist* papers in interpreting the Federal Constitution. He states that he consults the *Federalist* papers not in order to determine the intent of the Framers of the Constitution—some of whom, of course, also wrote the *Federalist* papers—but rather because, "like those of other intelligent and informed people of the time," the *Federalist* papers "display how the text of the Constitution was originally understood."[34]

In response to Scalia's textualism, a substantial and sophisticated body of literature has developed around theories of interpretation for statutory and constitutional texts. William N. Eskridge, Jr., who has presented the most extensive theoretical explication of what he calls Scalia's "New Textualism," characterizes Scalia's approach as a sophisticated close scrutiny of the text and distinguishes this New Textualism from the traditional legal concept of "plain meaning."[35] Like traditional "plain meaning" approaches, Scalia's textualism starts with the meaning an ordinary reading would draw from the text, but Scalia's textualism then delves deeper into what other textual sources

28. *Id.* at 23.
29. *Id.* at 24, 135.
30. *Id.* at 24.
31. *Id.* at 36.
32. *Id.* at 29.
33. *Id.* at 36–37.
34. *Id.* at 38. This reflects Scalia's originalist approach to constitutional interpretation, a topic too vast to be comprehensively treated here. For a recent extensive analytical survey of theories of originalism, see Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009). A thorough examination of the complicated, and perhaps contradictory, relationship between Scalia's textualism and his originalism is also beyond the scope of this article.
35. Eskridge, *Unknown Ideal*, *supra* note 1, at 1512. **R**

might indicate about the text's meaning.[36] For example, for statutory interpretation, the Scalian interpreter applies the regular rules of grammar, syntax, and word use to the text, but also considers which interpretation is consistent with the statutes as a whole, whether similar language has been used elsewhere in the United States Code, and if so, how it has been interpreted.[37] These "structural" techniques of interpretation, as Eskridge dubs it, involve close readings of texts, which, as I discuss below in Part II.B, are similar to those associated with the school of literary criticism known as the New Criticism.[38] The appeal of Scalia's New Textualism is the same as that of literary New Criticism. Both use a close scrutiny of the text, which reveals its complexities and nuances.[39] But, as I will discuss below, both of them go wrong in positing that close scrutiny can reveal the meaning determined by the "text itself," which is independent of context.

The greatest controversy about Scalia's textualism has focused on his claim that legislative history is irrelevant to determining the meaning of statutes.[40] Scalia argues against judges using the *unexpressed intent* of the legislature as reflected in legislative history as a *substitute* for the statute as actually written.[41] But he does not explain why legislative history should not be considered as relevant contextual information in determining the meaning of a statute *as written*.[42] Such an approach

36. *Id.*

37. *Id.* In this way, all of the United States Code can be interpreted horizontally as one text, as opposed to being interpreted vertically as a series of laws enacted at different times with different legislative histories. *See* Eskridge, *New Textualism*, *supra* note 1, at 678–79. R

38. For an account of structural arguments used in New Textual interpretation, see Eskridge, *New Textualism*, *supra* note 1, at 660–63. R

39. A striking parallel between literary New Criticism and Scalia's New Textualism is their appeal as a teachable method of interpretation. The close readings of New Criticism were well suited to classroom instruction. Eskridge similarly describes how New Textualism is well received by students. Eskridge, *Unknown Ideal*, *supra* note 1, 1513–14 n.16 ("Many law students take to the new textualism like rats to a maze. Even some law students who dislike most of the results Scalia reaches find his methodology potentially attractive."). R

40. *See, e.g.*, *id.* at 1519; Ronald Dworkin, Comment, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 17, 115–27. For an overview, see ESKRIDGE, INTERPRETATION, *supra* note 1, 238–45. R R

41. *See* SCALIA, *supra* note 17, at 29–37. As he states, "'legislative intent' divorced from text" is a "subterfuge" for judges to impose their policy preferences. *Id.* at 22. R

42. *See* ESKRIDGE, INTERPRETATION, *supra* note 1, at 310 (observing that "a further role for consulting legislative history . . . especially for statutes adopted long ago," is that "it is instructive for the current interpreter to see how the legislators used statutory terms. . . . Even a textualist might find something of value in legislative history, which might be a more democratically legitimate guide to meaning than the commonly deployed dictionaries that so fascinate the current Supreme Court."). R

appears completely analogous to Scalia's own use of the *Federalist* papers to determine the "original" understanding of the Constitution.[43]

As I will turn to next, beyond the specific disputes in statutory and constitutional interpretation, Scalia's central theoretical claim is that textualism is the only method that constrains interpretation. Scalia's textualism is based on the principle that the text itself can dictate legitimate interpretation, or, at the least, that the text itself can constrain illegitimate interpretation. Scalia regards contextual approaches to interpretation with suspicion because he sees them as allowing judges to ignore or alter the plain meaning of the text in order to impose their own policy preferences.[44] Eskridge summarizes this central concern of textualism when he states: "Sometimes that context will suggest a meaning at war with the apparent acontextual meaning suggested by the statute's language."[45] Consequently, Scalia wants to restrict the use of context in interpretation to a limited set of "special" situations.[46] The main special situation is constitutional interpretation, where, reflecting his constitutional originalism, Scalia favors a contextual analysis based on word usage in the eighteenth century.[47]

But, as discussed below, contextualism shows us that there is no such thing as an "acontextual meaning." As Stanley Fish points out, setting forth an opposition between "acontextual" plain meaning, on the one hand, and contextual meaning, on the other, is the first erro-

43. *See* SCALIA, *supra* note 17, at 38. R

44. Scalia has noted:

> When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean—which is precisely how judges decide things under the common law.

SCALIA, *supra* note 17, at 18. *See also* Eskridge, *New Textualism*, *supra* note 1, at 648. R

45. Eskridge, *New Textualism*, *supra* note 1, at 621. R

46. In addition to "the distinctive problem of constitutional interpretation," Scalia recognizes that cases of "scrivener's error" are so "extreme" as to permit "giv[ing] the totality of context precedence over a single word." SCALIA, *supra* note 17, at 37, 20. R

47. *Id.* at 38–39. See also Scalia's recent opinion in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), in which he engages in an extensive review of eighteenth century usage of the phrase "bear arms" in order to support a conclusion about the meaning of these words in the Second Amendment. *Heller* also illustrates the complicated relationship between Scalia's textualism and his constitutional originalism. The detailed historical approach used by *Heller* would also be used by an interpreter seeking the framers' original intent. Fish, who relentlessly criticizes Scalia's textualism, embraces *Heller* as an acknowledgement that interpretation always implicitly involves determining authorial intent. Stanley Fish, *What Did the Framers Have in Mind?*, NEW YORK TIMES, July 6, 2008, http://fish.blogs.nytimes.com/2008/07/06/what-did-the-framers-have-in-mind (last visited Aug. 6, 2009).

neous step that theorists make in going down the formalist road.[48] The central contextualist insight is that, for an interpreter to find any meaning whatsoever in a text, that meaning will always already be situated within a framework of contextual information.[49] What Eskridge calls the apparent "acontextual" meaning of a text is always already a contextualized meaning, although it might be one the interpreter understands without consulting obviously "outside" contextual information, such as legislative history materials.

Once one recognizes the fundamental theoretical mistake in trying to distinguish the "acontextual" plain meaning, on the one hand, from "special" contextual meanings, on the other, one can, of course, still meaningfully talk about different types of contextual information and argue that some types of contextual information are more relevant than others for certain types of interpretation. One is still free to make *practical* arguments for restricting the type of contextual information that should be considered by a court. For example, those who advocate rejecting the use of legislative history materials for interpreting statutes can still make the practical argument that considering legislative history is a waste of time and resources because, so the argument goes, in many cases the statutory history does not resolve the legal question any more effectively than an analysis of the text itself does.[50] But advocates of rejecting legislative history cannot make the *theoretical* argument that the text itself dictates an "acontextual" plain meaning that the interpreter can choose over a contextual meaning.

B. Literary New Criticism and Its Legacy

Scalia's central concern with asserting the primacy of the text in the face of the dangers of unconstrained interpretation echoes, whether consciously or not, the debates associated with the "culture wars" of the 1980s and 1990s in which Deconstruction was criticized for undermining the meaning of the great works of the Western ca-

48. *See* Fish, *supra* note 16, at 1–33. Fish states that formalist thinking presupposes an opposition between the literal and the metaphorical, the literal being understood as that which is "direct, transparent, without difficulties, unmediated, independently verified, unproblematic, preinterpretive, and sure," whereas the metaphorical is "indirect, opaque, context-dependent, unconstrained, derivative, and full of risk." *Id.* at 41. R

49. *See infra* Part II.C.

50. *See* ESKRIDGE, INTERPRETATION, *supra* note 1, 244–45. As discussed below, for the determination of *Bruton* prejudice, no such efficiency argument can be made for banning the consideration of other evidence presented at trial, since this evidence is going to be heard by the jury anyway. R

non of literature and philosophy.[51] Indeed, Scalia's depiction in *A Matter of Interpretation* of the common-law judge as willfully creating new law against the restraint of past precedents reminds one of the "strong reader" postulated by Yale critic Harold Bloom, who willfully misreads a literary work in the act of interpreting it.[52] It is not surprising, however, that the debate over Scalia's textualism parallels debates in literary criticism. The crisis of meaning associated with Deconstruction turns on the question of how the "text itself" can dictate its own interpretation. This question was first raised by the literary critical movement called the "New Criticism," whose emphasis on scrutinizing the text itself to determine meaning shows striking parallels to Scalia's "New Textualism."[53]

The New Criticism dominated Anglo-American literary studies from roughly the 1930s through the 1970s.[54] It used as its distinctive method a "close reading" of the text, which scrutinized the language and imagery of a work and explicated its internal tensions and multi-

51. *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."). For a review of the impact of deconstruction on legal studies, see Stephen M. Feldman, *An Arrow to the Heart: The Love and Death of Postmodern Legal Scholarship*, 54 VAND. L. REV. 2351 (2001), and Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505 (1992).

52. "[M]ost so-called 'accurate' interpretations of poetry are worse than mistakes; perhaps there are only more or less creative or interesting misreadings . . . ." HAROLD BLOOM, THE ANXIETY OF INFLUENCE: A THEORY OF POETRY 43 (Oxford Univ. Press 1973).

53. Despite its prominence in literary interpretation, New Criticism is rarely mentioned in discussions of legal interpretation and has never, as far as I can tell, been discussed in connection with Scalia's textualism. Judge Richard A. Posner, however, who often applies literary analysis to the law, sometimes discusses New Criticism. *See, e.g.*, RICHARD A. POSNER, LAW AND LITERATURE 219–46 (Harv. Univ. Press 1998); *see also* William M. Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 Mich. L. Rev. 487, 488 n.2, 501-03 (2007) (criticizing Akhil Amar's close reading of the Bill of Rights as reflecting New Critical methods and assumptions); Michael L. Boyer, *Contract as Text: Interpretive Overlap in Law and Literature*, 12 S. CAL. INTERDISC. L.J. 167, 171–75 (2003) (analyzing structural similarities between New Criticism and Professor Williston's conception of the parol evidence rule).

54. This timeline begins with the publication of William Empson's *Seven Types of Ambiguity* in 1930 (New Directions Publ'g Corp.), an early seminal New Critical text, and ends with the publication in 1974 of the English translation of Jacques Derrida's *Of Grammatology* (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press), which arguably signaled the ascendance of deconstruction in literary studies. For an overview of the New Criticism, see 6 RENÉ WELLEK, A HISTORY OF MODERN CRITICISM: 1750-1950, AMERICAN CRITICISM: 1900-1950 144–58 (Yale Univ. Press 1986).

ple meanings.[55] Because New Criticism emphasized close readings, it became associated with the idea that interpretation should be based on the "text itself," rather than on the historical context in which a work was created or the apparent historical intention of the author.[56] An example of a classic New Critical reading of a literary work is Cleanth Brooks' reading of William Wordsworth's, "A Slumber Did My Spirit Seal."[57] Cleanth Brooks is widely acknowledged as one of the most influential of the New Critics, and one of the seminal essays of New Criticism is his "*Irony as a Principle of Structure*."[58] There he presented a close reading of "A Slumber Did My Spirit Seal," which is one of Wordsworth's so-called "Lucy" poems, a series of short lyrical poems about a mysterious girl, or perhaps nature sprite, who grows up in harmony with nature and then inexplicably dies.[59] The poem describes the effect of her death on the narrator:

A slumber did my spirit seal;
I had no human fears:
She seemed a thing that could not feel
The touch of earthly years.

No motion has she now, no force;
She neither hears nor sees,
Rolled round in earth's diurnal course,
With rocks, and stones, and trees.[60]

Brooks considered irony to be the distinctive feature of poetry, and for him the word "irony" broadly connotes a "dynamic structure" of a poem, a "pattern of thrust and counterthrust," which is expressed

55. Cleanth Brooks and Robert Penn Warren popularized this approach in their textbook, UNDERSTANDING POETRY (1938). WELLEK, *supra* note 54, at 153. As Wellek puts it, the New Critics believed in "the organicity of poetry" and in their readings constantly examined "attitudes, tones, tensions, irony, and paradox." *Id.* at 151. R

56. The New Critics reacted against and criticized the dominance of traditional academic historical scholarship. *Id.* at 148. They did not deny the value of historical background for interpretation, but they did insist that the act of interpretation must begin with the particularities of the literary work. *Id.* at 148, 153.

57. I have adopted this reading from E. D. Hirsch's influential article on contextualism in literary criticism, *Objective Interpretation*. E.D. Hirsch, *Objective Interpretation*, *in* CRITICAL THEORY SINCE PLATO 1100–15 (Hazard Adams ed., Harcourt 1992). Hirsch contrasts readings of the poem by two literary critics, Cleanth Brooks and F. W. Bateson. *Id.* at 1108–09. Discussions of interpretation frequently cite this poem and its readings. *See, e.g.*, POSNER, *supra* note 53, 233–34. R

58. Cleanth Brooks, *Irony as a Principle of Structure*, *in* CRITICAL THEORY SINCE PLATO 968–74 (Hazard Adams ed., Harcourt 1992). For an overview of Brooks' criticism, see WELLEK, *supra* note 54, at 188–213. R

59. For an extensive analysis of the "Lucy" poems, see Geoffrey H. Hartman, WORDSWORTH'S POETRY: 1787–1814 157–162 (Harv. Univ. Press 1987).

60. WILLIAM WORDSWORTH, WORDSWORTH POETICAL WORKS 149 (Thomas Hutchinson & Ernest de Selincourt eds., Oxford Univ. Press 1981).

by the relationship between the language in parts of the poem.[61] In this poem, Brooks describes the ironic tension surrounding the word "feeling" in the poem. He points to the optimism of the first stanza, in which the phrase "She . . . could not feel / The touch of earthly years" has a positive connotation. That is to say, Lucy appeared to be someone not affected by ordinary human aging or mortality. This contrasts with the language of the second stanza, "She neither hears nor sees," in which her lack of "feeling" now connotes that she is an inanimate object like the rocks, stones, and trees.[62]

Brooks closely scrutinizes the text of the poem and points out a tension or irony between its first and second stanzas. Nevertheless, while Brooks' close reading draws attention to a possible tension in the poem, the language alone does not decide the question of whether the poem is ironic in the sense he describes. Whether one sees a tension or irony in the poem depends on how one interprets the narrator's attitude towards nature. According to a purely materialistic view of nature, to be like the rocks and stones is to be an inanimate material object. If the narrator holds such a view, for Lucy to be "rolled around" with objects understood to be as dead as stones implies a sad fate for her. On the other hand, the narrator might hold a pantheistic view of nature, in which all of nature, even the rocks and stones, are imbued with the spirit of the divine. Such a narrator might see Lucy as still alive in some sense as a presence in nature.[63]

How one interprets the attitude of the narrator depends on the kind of context one presupposes for the poem. The context the reader presupposes may depend on any or all of the following, in ascending order of larger contextual frameworks: the other "Lucy" poems, Wordsworth's other poetry, Wordsworth's biography, and the religious or philosophical sentiments of his day.[64] The point of this example is that while it is crucial to carefully scrutinize the structure and language of the text, the interpretation will not be determined by the text itself, but by the text understood within a contextual frame-

61. Brooks, *supra* note 58, at 973. R

62. *Id.* at 972–73.

63. This is the interpretation made by F. W. Bateson, who states: "The vague living-Lucy of this poem is opposed to the grander dead-Lucy who has become involved in the sublime processes of nature." Hirsch, *supra* note 57, at 1108. R

64. As Hirsch puts it, "The interpreter's primary task is to reproduce in himself the author's 'logic,' his attitudes, his cultural givens, in short his world." *Id.* at 1114.

work.[65] Such a contextual framework is, by definition, "outside of" or "beyond" the four corners of the text itself. A close scrutiny of the text, as done by a New Critic like Brooks, can reveal the *possible* meanings of a text. But rather than the text itself, it is the context in which the reader places the text that determines how the reader interprets it.

Under New Criticism, close readings explicating the complexities and ambiguities of literary works became the mainstream of literary criticism for several decades. By the late 1970s, however, New Criticism was eclipsed by Deconstruction as the dominant theoretical movement in literary studies. Especially at the height of its influence, Deconstruction was seen, both by its champions and its critics, as being a radical break from traditional literary studies.[66] Despite this apparent break, Deconstruction carried on the New Critical enterprise of text-centered close readings.[67] What made Deconstruction seem so radical was that it highlighted the epistemological consequences of the ambiguities and irony that New Critical readings had long uncovered. Thus, for example, the influential Deconstructionist critic Paul de Man argued that although New Criticism proclaimed an organic unity to the text, the actual practice of close reading exploded the unity of the text by revealing multiple and contradictory meanings.[68] In this way, Deconstruction brought to a theoretical crisis the interpre-

65. Before New Criticism, biographical and other historical information were the primary interpretive context through which literature was viewed. *See* WELLEK, *supra* note 54, at 188–213. R

66. For a review of academic conflict over literary deconstruction, see Paul A. Bové, *Variations on Authority: Some Deconstructive Transformations of the New Criticism*, *in* THE YALE CRITICS: DECONSTRUCTION IN AMERICA 3-19 (Jonathan Arac, et al. eds., Univ. of Minn. Press 1983).

67. As Fish has noted:

> [I]n fact deconstruction is no more or less than a particularly arresting formula of principles and procedures that have been constitutive of literary and other studies for some time. Indeed deconstruction would have been literally unthinkable were it not already an article of faith that literary texts are characterized by a plurality of meanings and were it not already the established methodology of literary studies to produce for a supposedly "great text" as many meanings as possible.

Fish, *supra* note 16, at 154–55; *see also* Bové, *supra* note 66, at 5 ("The authority and dissemination of deconstruction can be accounted for by seeing it as a transformation of the critical variation called 'New Criticism.'"). R

68. "As it refines its interpretations more and more, American criticism does not discover a single meaning, but a plurality of significations that can be radically opposed to each other. Instead of revealing a continuity affiliated with the coherence of the natural world, it takes us into a discontinuous world of reflective irony and ambiguity." Paul de Man, *Form and Intent in the American New Criticism*, *in* BLINDNESS AND INSIGHT: ESSAYS IN THE RHETORIC OF CONTEMPORARY CRITICISM 28 (2nd ed. Univ. of Minn. Press 1983).

tive issue that had been raised by New Criticism, namely, how meaning was produced by "the text itself."[69] From the perspective of the theoretical debates in literary studies, there is a certain irony to Scalia's appeal to the text itself as the solution to the problem of legal interpretation. As the experience of New Criticism and Deconstruction has shown, close scrutiny of the text, on its own, will produce multiple interpretations and will not settle the question of which interpretation is the correct one.

C. Contextualism

Alongside the New Critical and deconstructive emphasis on producing a multiplicity of readings, there arose attempts to define how one might distinguish a valid reading from an invalid one through the recognition of the central role context plays in determining meaning.[70] Such "contextualists" include E. D. Hirsch, Steven Knapp, Walter Benn Michaels, and, most influentially for legal interpretation, Stanley Fish.[71]

As discussed above, Scalia holds that texts display an "acontextual" plain meaning. Supporting this premise is the argument that, if there were no such thing as an "acontextual" plain meaning, all texts would be rendered ambiguous and would be open to any meaning that an interpreter might wish to impose on them. As discussed above, some Deconstructionists denied the existence of plain meaning and celebrated the idea that all texts are inherently ambiguous. A contextualist like Fish, however, rejects the idea that one can either accept or reject the "acontextual" plain meaning of a text. Fish rejects the whole notion of "acontextual" meaning because he asserts the fundamentally contextual nature of all meaning:

> [S]entences never appear in any but an already contextualized form, and a sentence one hears as ambiguous (for example, "I like

69. Thus, Posner describes one aspect of Deconstruction as "a style of textual interpretation far wilder than anything dreamed of by the New Critics but recognizable as an extension of New Criticism by its fascination with the extravagant ambiguities of meaning that emerge when a text is inspected minutely, obsessively, with little regard for stabilizing contextual features." Richard A. Posner, *What Has Modern Literary Theory to Offer Law?*, 53 STAN. L. REV. 195, 205 (2000).

70. *See* David Kaiser & Paul Lufkin, *Deconstructing* Davis v. United States: *Intention and Meaning in Ambiguous Requests for Counsel*, 32 HASTINGS CONST. L.Q., 737, 742–48 (2005).

71. Fish's work has also been associated with the terms "postmodern pragmatism" and "neopragmatism." Schanck, *supra* note 51, at 2539–73. I use the term contextualism because it makes the contrast with textualism clearer. Furthermore, the term "pragmatism" in legal studies is often associated with instrumentalist accounts of judging. *See* Sunstein, *supra* note 16, at 638–39. R R

> her cooking") is simply a sentence for which one is imagining, at the moment of hearing, more than one set of contextual circumstances. Any sentence can be heard in that way, but there are conditions under which such imaginings are not being encouraged (although they are still possible), and under these conditions any sentence can be heard as having only a single obvious meaning. The point is these conditions (of ambiguity and straightforwardness) are not linguistic, but contextual or institutional.[72]

Contextualism acknowledges that the same text can have different meanings in different contexts. But contextualism does not therefore conclude that the text is inherently ambiguous and without meaning. Because the interpreter is always already situated in a context, the interpreter will always find a determinate meaning in the text. Indeed, as Fish points out in the above quotation and throughout his whole body of criticism, an interpreter cannot get outside of being contextually situated even if he or she tried.[73] Consequently, contextualism rejects the premise, held by both Deconstruction and textualism, that the consequence of rejecting the existence of acontextual plain meaning is that the interpreter will be left without any determinate meaning because he or she will face limitless possible meanings in interpreting a text.[74]

The contextualist, no less than the textualist, can share the goal of making the correct interpretation of a text. Thus, Fish acknowledges that the central concern of legal hermeneutics is "that there be a constraint, something that allows us to say there are right and wrong interpretations," and asserts that "[i]nterpretation cannot be a rational activity in the absence of such a constraint."[75] But contextualism asserts that interpretive constraint cannot be based merely on a scrutiny of "the text itself." As the movement from New Criticism to Deconstruction illustrates, scrutinizing the text without regard to context merely generates possible readings and leaves the interpreter without any basis for asserting the validity of one interpretation over another. The analysis of the short lyrical poem by Wordsworth showed that an argument about interpretation is not about the words them-

72. Fish, *supra* note 16, at 129. R

73. Thus, one commentator describes Fish's work as epitomizing "metamodernism." *See* Feldman, *supra* note 51, at 2376. "Metamodernists tend to emphasize our situatedness: R we are always situated in a communal or cultural context." *Id.* at 2374.

74. For a review of deconstructionist arguments in legal theory that posit there is no way to distinguish a valid from an invalid interpretation because a text has an unlimited number of possible meanings, see Jack M. Balkin, *Deconstruction's Legal Career*, 27 CARDOZO L. REV. 719, 727 (2005).

75. Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109, 1114 (2008).

selves, but rather the implicit circumstantial contexts that one accepts for those words.

The intention of the author is one of the central contextual circumstances determining meaning (if not *the* central one). That is to say, whenever a reader finds meaning in a text, the reader implicitly presupposes a hypothesis about what the author intended to communicate in that text.[76] This is the position taken by Knapp and Michaels in their article, *Against Theory*,[77] which has been endorsed and characterized by Fish in legal interpretation as "intentional originalism."[78] Intentionalist interpretation is frequently misunderstood as requiring meaning to be based on the determination of the actual psychological state of the author, which, as critics are eager to point out, is fundamentally unknowable.[79] Such objections, however, confuse the issue of the determination of the actual psychological state of the author with the interpretive concept that the recognition of meaning in any text implicitly presupposes an authorial intention to communicate that meaning.[80] Thus, the intentionalist theory of meaning is a subset of contextualism.[81]

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76. For example:

> The array of possibilities [of meaning] only begins to become a more selective system of *probabilities* when, instead of confronting merely a word sequence, we also posit a speaker who very likely means something. Then and only then does the most usual sense of the word sequence become the most probable or "obvious" sense.

Hirsch, *supra* note 57, at 1107. R

77. Steven Knapp & Walter Benn Michaels, *Against Theory*, *in* AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM 11–30 (W. J. T. Mitchell ed., Univ. of Chi. Press 1985).

78. Fish, *supra* note 75, at 1109, 1111 n.9. R

79. For a review of traditional intentionalist approaches to statutory construction, see ESKRIDGE, INTERPRETATION, *supra* note 1, at 221–30. R

80. For example:

> The assertion that the act of interpreting is always and necessarily the act of determining intention is not the answer to the question "What is going on in the interpreter's mind?"—a question that *would* require research into brain waves, cognitive processes, institutional practices, and much more. Rather, it is the answer to the question "What must be the case—what must we presuppose—if notions like agreement, disagreement, error, correction, and revision—are to make any sense?"

Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 647 (2005).

81. For a detailed account of Steven Knapp's and Walter Benn Michaels' intentionalist theory of meaning, see Kaiser & Lufkin, *supra* note 70, at 742–47. Even those, like Fish, who advocate the intentionalist theory of meaning, acknowledge that there are additional considerations involved with texts such as statutes that, being the result of the legislative process, have, in some sense, multiple authors. *See* Fish, *supra* note 80, at 648. For an overview of approaches to determining legislative intent through legislative history, see ESKRIDGE, INTERPRETATION, *supra* note 1, at 303–22. R R R

Scalia criticizes contextualist approaches, such as a consideration of legislative history, as allowing the interpreter to manipulate the meaning of the text. To the contrary, removing a text from its context is what allows invalid interpretation.[82] For *Bruton* doctrine, ignoring the essential role of context means ignoring the actual meaning a jury will find in the codefendant's confession, which is at the heart of the inquiry into possible prejudice to the defendant. In the next sections, I will make the following contextualist critique of *Bruton* doctrine: since *Gray*, the central issue for *Bruton* analysis is whether a jury would find a redacted confession to be immediately or obviously incriminating to a defendant. However, what a jury finds to be immediately or obviously incriminating is not a built-in feature of the text of the confession itself, but rather a function of the contextual circumstances in which the jury encounters the confession. *Richardson*, however, introduced a facially incriminating standard for *Bruton* analysis, which limited it to the four corners of the text and allowed trial courts to ignore the essential role of contextual information in making determinations of whether a defendant is incriminated by a confession. In *Gray*, the Supreme Court recognized that a jury would always draw "inferences" about a redacted confession based on the circumstances surrounding it. Thus, *Gray* implicitly acknowledged that some consideration of context is always involved in *Bruton* analysis. But despite its implicit acknowledgment of the centrality of context, *Gray* retained *Richardson*'s facial incrimination standard. The result is that *Bruton* analysis has been left in a confused and contradictory state.

III. *Bruton* Doctrine

A. Bruton v. United States

Bruton dealt with two codefendants, Bruton and Evans, who were jointly tried and convicted by a jury in federal district court on a federal charge of armed postal robbery.[83] At trial, a postal inspector testified that Evans orally confessed to him that Evans and Bruton committed the armed robbery.[84] Evans did not testify at trial.[85] The trial judge instructed the jury that although Evans' confession was

82. *See* ESKRIDGE, INTERPRETATION, *supra* note 1, at 240 (acknowledging that "it is mildly counterintuitive" that statutory interpretation based on more contextual information, such as a review of legislative history, leaves a court with more interpretive discretion than an approach such as textualism, which is based on less contextual information). R

83. Bruton v. United States, 391 U.S. 123, 123 (1968).

84. *Id.*

85. *Id.* at 136.

competent evidence against Evans, it was inadmissible hearsay against Bruton and therefore had to be disregarded in determining Bruton's guilt or innocence.[86] The Supreme Court reversed Bruton's conviction, holding that his Sixth Amendment right to confrontation had been violated by the admission of Evans' confession incriminating Bruton, notwithstanding the trial court's instruction to the jury about the limited way it could use the confession.[87] The Court reasoned that, although one can reasonably expect juries to follow instructions, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."[88] Such a context is presented when "the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial."[89]

In light of the later developments in *Bruton* doctrine, it is useful to note the issues *Bruton* left open. The confession of Bruton's codefendant Evans, about which the postal inspector testified, referred to Bruton by name or otherwise expressly identified him to the jury.[90] There was therefore no question that the confessor's statement "inculpat[ed] the nonconfessor" and that it was "powerfully incriminating."[91] *Bruton* noted that some lower court cases had sought to avoid violating a defendant's rights in *Bruton*-type cases by requiring the deletion of references to codefendants in a confessor's statement.[92] The *Bruton* court, however, did not reach the issue of whether deletion in and of itself would prevent the violation of the defendant's Confrontation Clause rights.[93] It was left to the next two cases of the *Bruton* trilogy to explain when a deletion or redaction of a reference to a non-confessor defendant was or was not sufficient to prevent the in-

86. *Id.*

87. *Id.* at 126. In doing so, the Supreme Court overturned its earlier ruling in *Delli Paoli v. United States*, 352 U.S. 232 (1957). For a detailed account of the background to *Bruton*, see Ritter, *supra* note 7, at 862–68. R

88. *Bruton*, 391 U.S. at 135.

89. *Id.* at 135–36.

90. *Id.* at 124 n.1 (noting that the confession expressly implicated Bruton).

91. *Id.* at 126, 135.

92. *Id.* at 134 n.10.

93. *Id.* The Supreme Court did note that in Bruton's case, the confession was offered in evidence through the oral testimony of the postal inspector, and that even if a witness in such a situation were instructed to delete references to the non-confessor defendant, he or she was likely to accidentally slip up and mention the non-confessor defendant. *Id.* Typically, *Bruton* redaction cases deal with confessions that are presented in *written* form to the jury.

crimination of the non-confessor defendant. *Bruton* also left open the factors the court could consider in determining whether a codefendant's confession "powerfully incriminated" the defendant, including the contextual information provided by other evidence introduced at trial. In fact, it was the majority opinion in *Richardson*, penned by Justice Scalia, which introduced a textualist model for *Bruton* analysis and limited it to what could be determined from the face of the confession.

B. Between *Bruton* and *Richardson*

Nineteen years elapsed between the *Bruton* decision in 1968 and the second case in the trilogy, *Richardson*, which was decided in 1987.[94] During this time, lower courts took different approaches to what came to be known as "contextual implication" analysis.[95] Contextual implication analysis became important because many *Bruton* issue cases involved situations in which the prosecution sought to use confessions at joint trials where the references to the nonconfessor defendant had been "redacted," that is, deleted or otherwise altered.[96] Contextual implication examines a redacted confession in the context of all of the evidence admitted at trial.[97] One commentator provides a useful hypothetical to explain the method: Suppose a prosecutor has the written confession of Dick where he wrote that, after eating lunch at a pizza parlor with Jane, he and Jane robbed the bank next door.[98] At the joint trial of Dick and Jane, Dick's confession is introduced as evidence, but all references to Jane's name in the text are replaced with "a friend." However, other evidence at trial establishes that Jane ate lunch with Dick at the pizza parlor next door to the bank the day of the robbery. Under contextual implication analysis, a court would find *Bruton* error even though Jane is not directly named in the confession, because the other information at trial provides a context by which the confession incriminates Jane. In the years between *Bruton* and *Richardson*, the United States Courts of Appeals were divided over using contextual implication analysis.[99] It is against this background

94. My account of this period draws on the excellent account in Ritter, *supra* note 7, at 872–76. R

95. *See* Richardson v. March, 481 U.S. 200, 206 (1987). Cases have also used the phrase "evidentiary linkage analysis." *Id.*

96. Following the case law and scholarship, I will use the term "redacted" as the general term for any change made in a *Bruton* confession.

97. Ritter, *supra* note 7, at 874. R

98. This hypothetical and analysis is adopted from Ritter, *supra* note 7, at 873–75. R

99. *See id.* at 876, and the cases cited therein at notes 131–32.

that Justice Scalia in *Richardson* promulgated an anti-contextual, "facially incriminating" standard for the analysis of *Bruton* prejudice.

C. Richardson v. Marsh

1. Facts and Holding

It is necessary to describe the facts of *Richardson* in some detail because they are unusual for a *Bruton* case. Three individuals, Clarissa Marsh, Benjamin Williams, and Kareem Martin, were charged with the assault of Cynthia Knighton, and the murder of her four-year-old son, Koran, and her aunt, Ollie Scott.[100] Marsh and Williams were jointly tried (as Martin was a fugitive at the time).[101] At trial, Knighton testified that Marsh, Williams, and Martin came to Scott's house looking for money that they believed Scott had in her possession from some previous criminal activity.[102] Unfortunately, the Knightons happened to be visiting Scott when the three arrived.[103] Armed with guns, Martin and Williams forced Scott to locate the money.[104] Marsh watched over the Knightons and, at one point, prevented their escape.[105] After Martin and Williams obtained what they were looking for from Scott, they forced Scott and the Knightons into the basement where Martin shot them; only Cynthia Knighton survived.[106]

In addition to Knighton's testimony, the State introduced, over the objection of codefendant Marsh, a confession that Williams gave shortly after his arrest.[107] His confession was redacted so that only the activities of Williams and Martin were described.[108] There was no reference to a third perpetrator in the confession, let alone any direct or indirect reference to Marsh.[109] Williams' redacted confession largely corroborated Knighton's account of what Williams and Martin did at the house.[110] His confession also recounted a conversation Williams had with Martin as they drove to the Scott's house, in which Martin

100. *Richardson*, 481 U.S. at 202.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 203.
108. *Id.*
109. *Id.*
110. *Id.* at 204.

said he would have to kill the victims after the robbery.[111] Williams did not testify at trial.[112]

Codefendant Marsh testified in her own defense.[113] She claimed she had no prior knowledge that Martin or Williams were planning to rob or kill the victims, and she thought the purpose of the visit to Scott was to ask her for a loan.[114] She testified she was too scared to leave once the robbery began.[115] Her testimony indicated that she rode to Scott's house in the same car as Martin and Williams, and she was aware that they were talking, but could not hear their conversation over the sound of the radio.[116]

During his closing argument, the prosecutor admonished the jury not to use Williams' confession against Marsh.[117] Despite this admonishment, later in his argument he linked Marsh to the part of Williams' confession that described his conversation with Martin in the car.[118] The prosecutor argued that Marsh's testimony about not hearing any of the conversation between Williams and Martin was implausible and that, if she had indeed heard that conversation, she was aware of the plan to rob and kill the victims and was therefore an accomplice.[119] After closing argument, the trial court again instructed the jury that Williams' confession was not to be considered against Marsh.[120] The jury convicted Marsh of two counts of felony murder in the perpetration of an armed robbery and one count of assault with intent to commit murder.[121]

Marsh sought federal habeas corpus relief and prevailed in the Sixth Circuit, which reversed her conviction.[122] The Sixth Circuit held that, in analyzing "whether *Bruton* bars the admission of a nontestifying codefendant's confession, a court must assess the confession's 'inculpatory value' by examining not only the face of the confession, but also all of the evidence introduced at trial."[123] The Sixth Circuit noted that the confession's account of the conversation in the car was the

111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 205.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 205–06 (citing Marsh v. Richardson, 781 F.2d 1201, 1212 (6th Cir. 1986)).

only direct evidence that Marsh knew, before entering Scott's house, about the plan to rob and kill the victims, and that Marsh's testimony at trial had placed her in the same car in which the confession described the incriminating conversation.[124]

Scalia, writing for the majority in *Richardson*, reversed the Sixth Circuit and held "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence."[125] The Court acknowledged, however, that the effect of the limiting instructions might have been undone by the prosecutor's comments during closing argument urging the jury to use Williams' confession in evaluating Marsh's case.[126] Thus, the case was remanded for determination of whether, in light of Marsh's failure to object to the prosecutor's comments, the prosecutor's error could serve as the basis for granting a writ of habeas corpus.[127]

2. The Facial Incrimination Standard

The *Bruton* issue in *Richardson* was unusual because it dealt with a "complete redaction" confession; that is, not only Marsh's name, but also any mention of her existence had been removed from the confession. Also unusual for a *Bruton* case was that Marsh performed *no actions* in the unredacted confession. The only incriminating fact in the unredacted confession was her mere *presence* in the car, which supported accomplice culpability based on her being aware that her companions planned to rob and kill the victims. As discussed below, in most *Bruton* cases the incriminating effect of the confession arises precisely because the *actions* of a defendant are described in the redacted confession, although his or her name is hidden. In a footnote, the *Richardson* majority acknowledged that "we express no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun."[128]

Even though *Richardson*'s holding was only applicable to completely redacted confessions, *Richardson* radically re-characterized all of *Bruton* analysis by introducing the concept of "facial incrimination." *Richardson* characterized *Bruton* as holding that "a defendant is de-

124. *Id.* at 206.
125. *Id.* at 211.
126. *Id.*
127. *Id.*
128. *Id.* at 211 n.5.

prived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant."[129] However, the concept of facial incrimination was not central to the original *Bruton* decision. In retrospect, one could describe the confession at issue in *Bruton* as being facially incriminating in the sense that Bruton was apparently "expressly" named in it.[130] But this does not mean that the original *Bruton* decision was limited only to cases in which the confession facially incriminates a defendant.[131] By casting *Bruton* prejudice in terms of "facial incrimination," *Richardson* presupposes its conclusion that Marsh was not prejudiced because "the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony)."[132] Using this logic, no fully redacted confession, as was at issue in *Richardson*, could ever "facially incriminate" a defendant because *by definition* a fully redacted confession *has nothing on its face* that incriminates the defendant. That is to say, there is no word or symbolic signifier, like an "X" or blank space, within the four corners of the text pointing an accusatory finger at the defendant.

Responding to the dissent, the *Richardson* majority asserted that it was not assuming that Williams' confession did not prejudice Marsh simply on the basis that she was not directly named in the confession.[133] Rather, the *Richardson* majority argues that Marsh was not prejudiced both because she was not directly named and because the court issued a limiting instruction on the use of the confession.[134] Thus, the *Richardson* majority characterizes its disagreement with the dissent as not being about "whether the confession incriminated respondent" but rather about "whether the trial court could properly assume the jury did not use it against her."[135] *Richardson* draws a distinction between the types of incriminating information for which a limiting instruction can be expected to be effective.[136] The Court

129. *Id.* at 207.

130. *See* Bruton v. United States, 391 U.S. 123, 124 n.1 (1968) (noting that the confession expressly implicated Bruton).

131. *Richardson*, 481 U.S. at 217 n.4 (Stevens, J., dissenting) (noting that "the dissenting opinion in *Bruton* did not regard the Court's decision as limited to codefendant confessions expressly implicating the defendant").

132. *Id.* at 208 (majority opinion).

133. *Id.* at 208 n.3.

134. *Id.*

135. *Id.*

136. *Id.* at 208.

found that "[s]pecific testimony that 'the defendant helped me commit the crime' is more vivid than inferential incrimination, and hence more difficult to thrust out of mind."[137] With such explicit statements, the Court noted:

> [T]he only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget.[138]

Richardson also justifies its holding on the pragmatic ground that extending the *Bruton* exception to the assumed efficacy of limiting instructions to anything beyond facially incriminating statements would have the result of requiring separate rather than joint trials in many cases, and this, in turn, would impair both the efficiency and the fairness of the criminal justice system.[139]

By limiting *Bruton* analysis to the face of the text and excluding consideration of other evidence introduced at trial, Scalia's approach in *Richardson* reflects the privileging of the text expressed in *A Matter of Interpretation*. *Richardson* privileges the face of the text over evidence outside the text on the ground that the former incriminates directly while the later only incriminates inferentially. But, just as contextualist analysis undercuts Scalia's pronouncements in *A Matter of Interpretation*, it also undercuts the distinction *Richardson* draws between textual incrimination and incrimination by inference. Contextualism reveals the problems of trying to distinguish what meanings are "inside" or "outside" the face of the text. What a text means depends on its context, and context necessarily includes information "outside" the four corners of the text. In fact, even instances of "direct naming" presuppose a context outside the face of the text.

Stevens' dissent criticized *Richardson*'s shifting of *Bruton* analysis to the issue of whether the confession contained the *name* of the de-

137. *Id.*

138. *Id.*

139. *Id.* at 208–09. The *Richardson* majority is undoubtedly correct that, from the *pragmatic* perspective of legal efficiency, a narrower interpretation of *Bruton* is likely to allow more joint trials than a more expansive interpretation of *Bruton*. But the *Richardson* dissent points to the fundamental legal point that it would be too high a price to pay to trade the "fundamental principles of constitutional liberty" to "secure greater speed, economy and convenience in the administration of the law." *Id.* at 218 (Stevens, J., dissenting) (quoting People v. Fisher, 164 N.E. 336, 341 (N.Y. 1928)). Since this article analyzes the ramifications of Scalia's textualism to *Bruton* doctrine, I focus on the *legal* arguments in *Richardson* rather than its pragmatic announcements.

fendant. Stevens correctly notes that, "*Bruton* has always required trial judges to answer the question whether a particular confession is or is not 'powerfully incriminating' on a case-by-case basis; they should follow the same analysis whether or not the defendant is actually named by his or her codefendant."[140] Stevens thus correctly points out that the formal feature of direct naming does not, in itself, constitute "powerful incrimination" under *Bruton*. Being named within the confession is only one factor to be considered in determining whether a confession is powerfully incriminating. Indeed, as Stevens notes, "I have no doubt that there are some codefendant confessions that expressly mention the defendant but nevertheless need not be excluded under *Bruton* because they are not prejudicial."[141]

The *Richardson* dissent also questions Scalia's assertions that incrimination based on the face of the confession is different in kind from incrimination gained inferentially, and that limiting instructions are sufficient to prevent inferential incrimination because they prevent the jury from going down "the path of inference." Stevens trenchantly notes: "If we presume, as we must, that jurors give their full and vigorous attention to every witness and each item of evidence, the very acts of listening and seeing will sometimes lead them down 'the path of inference.'"[142] Stevens is correct, but the case against *Richardson*'s textualism can and should be made more broadly. Not only will the very acts of listening and seeing *sometimes* lead the jury down the path of inference, they will *always* lead them down the path of inference. Making such inferences is part and parcel of placing language in context, which is involved in any instance of interpretation, including instances of direct naming.

Richardson draws a distinction between instances in which the defendant is named in the confession and those in which the jury has to "enter onto the path of inference" to discover the identity of the defendant. The validity of this distinction depends on the premise that direct naming is somehow inference-free, and that direct naming provides the jury with meaning that involves nothing outside the face of the text. But, as discussed above, a reader's interpretation of a text always involves the presupposition of a context within which the text has meaning; that is, the interpreter always assumes some body of background information.[143] This is true even when a defendant is di-

140. *Id.* at 214 (Stevens, J., dissenting).
141. *Id.* at 214 n.2.
142. *Id.* at 213.
143. *See supra* Part II.C.

rectly named in a confession. Suppose the defendant is named John Smith, and John Smith is directly named in the confession. As direct as this seems, the jury will only find this naming incriminating after it engages in a series of "inferences," by which it applies information from outside the face of the text of the confession. For example, the juror/interpreter will rely at least on the following facts outside the face of the text: the juror is serving on a trial, and, in this trial, one of the defendants is named John Smith.

One might object that such background facts are so obvious that they go without saying. Admittedly, these background facts are obvious, and normally we would not make the effort to specify them. We do not usually appreciate the importance of such background information until we are reminded that, given a different context, the same words can take on a different meaning. For example, recall Fish's example of the potential ambiguity of the sentence, "I like her cooking."[144] Under "ordinary" circumstances, one would interpret this to mean that the speaker is fond of the food this woman makes. However, the sentence takes on a new meaning if we know that the speaker is an old-fashioned sexist who believes that a woman's place is in the home. Given such a context, the sentence could mean "I like her *when she is cooking*," that is, the speaker implies that she should be cooking rather than working outside the home. What if we know the speaker is a cannibal? The sentence could mean "I like her *being cooked*." Contextualism reminds us that when the meaning of words appears obvious, it is not because the meaning of the words is context-free, but rather because the interpreter encounters the words within a certain context that makes them appear obvious. Change the context, and the same "obvious" words suddenly offer a different meaning.

Whether a jury interprets a confession as incriminating to the non-confessor defendant is likewise based on the context in which the jury encounters the text. In a trial in which the indictment lists John Smith as one of the defendants, a jury will find it obvious that the John Smith named in the confession is the same one they see before them in court. Once again, this background information is so obvious that the jury's underlying inference appears not to involve an inference at all. But it is an inference nonetheless, as can be seen from the number of possible circumstances in which the same inference could be false. For example, the inference could be false if there were two different

144. Fish, *supra* note 16, at 129. **R**

individuals named John Smith involved in the crime, and the one in court is not the one mentioned in the confession.

Background information and inference can therefore come into play even when the inferences seem obvious, and this includes instances of direct naming. Contra *Richardson*, there is no hard and fast line between "direct" and "indirect" naming. Context determines what seems "direct" in any particular instance.[145] John Smith is a very common name. Let's consider another example, the slightly less common name, John Lee Smith. Everyone would agree that the use in the confession of the defendant's full legal name, John Lee Smith, is an example of direct naming. But what about a slightly shortened version of his name, like John *L.* Smith? Under most circumstances, the slightly shortened version of the name would be just as "direct" for the purposes of incrimination; although, of course, one could imagine circumstances in which the use of an initial rather than the full middle name would be significant, for example, where another individual, with a name such as John Langford Smith, was involved in the case. What about John Smith (middle initial unspecified)? What about J. Smith? What about J. S.? Is this still "direct" enough, or have we now officially entered onto what Scalia calls "the path of inference"? The answer that contextualism gives is that we entered onto the path of inference for all versions of the names, although we drew some of the inferences so quickly and unselfconsciously that we did not notice we were making them at all.

Recognizing the inescapability of context even in instances of "direct" naming does not, however, entail giving up on the idea of obvious inferences. Contextualism recognizes that there are different types and degrees of inferences, and acknowledges that a jury might find some inferences more obvious than others given a certain set of background facts. But *Richardson*'s "facially incriminating" standard seeks to do more than just distinguish between more or less obvious inferences that a jury can draw from a confession. *Richardson* seeks to draw a hard theoretical line between incrimination that a jury realizes through inferences and those that it receives without the use of inferences. And on the basis of this hard theoretical line, *Richardson* advances a quasi-psychological argument to justify limiting *Bruton* to instances in which the defendant is "facially incriminated." *Richardson* argues that for incrimination which the jury arrives at inferentially,

145. As discussed later in Part III.E.3, in his dissent to *Gray*, Scalia himself acknowledges this point in the course of attacking the *Gray* majority's finding that deletion redaction as a class is facially incriminating. Gray v. Maryland, 523 U.S. 185, 201–02 (1998).

limiting instructions can dissuade the jury "from entering onto the path of inference in the first place, so that there is no incrimination to forget."[146] But if one rejects the idea that direct naming is a special category of inference-free incrimination, one can appreciate that *Bruton* issues involve a spectrum of incriminating inferences, ranging from ones that are obvious and grasped almost immediately to those that are complex and might only be realized after a fair amount of information has been absorbed by the jury over the course of a trial.

If one acknowledges the essential role that contextual information plays in a jury's interpretation of whether a confession is incriminating to a defendant, then *Richardson*'s psychological distinctions appear all the more dubious.[147] *Richardson* argues that a jury has the most trouble following a limiting instruction in instances of direct naming because direct naming is "more vivid than inferential incrimination, and hence more difficult to thrust out of mind."[148] But non-direct-naming instances of incrimination present the opposite problem; the jury may make the incriminating inference without being aware of doing so in the first place.[149] Jurors by the very nature of the role given them must assimilate vast amounts of discrete information into a whole. At trial, a large body of background information is built up across time as evidence is presented, and it can become extremely hard for the jurors to trace and segregate the inferences that emerge from the various sources of information—which is what they would have to do to follow the limiting instruction.

Even prosecutors, who, as lawyers, are specifically trained in segregating inferences based on the law of evidence, can have problems in segregating the information obtained in a *Bruton* redacted confession and can inadvertently and impermissibly use such information

146. *Richardson*, 481 U.S. at 208.

147. *Richardson* does not point to any empirical research in psychology to support its presuppositions about when a jury is more or less likely to follow a limiting instruction. For a discussion of how courts create rules based on factual presuppositions, despite the fact that such presuppositions have not been established by empirical research, see Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435 (2007).

148. *Richardson*, 481 U.S. at 208.

149. Ritter makes a related point:

> The jury's natural inclination to figure out the identity of "another" could not be deterred by the limiting instruction because it would not be until after making the link to Marsh that the jury would even realize that the confession described the actions of the defendant against whom it was not to be considered.

Ritter, *supra* note 7, at 886. **R**

against the non-confessor defendant.[150] Notably, the prosecutor in *Richardson* made this very mistake. In his closing argument, although he started by admonishing the jury not to use William's confession against Marsh, he later did so himself by linking Marsh to the portion of Williams' confession describing his conversation with Martin in the car.[151]

The prosecutor's mistake, however, was quite understandable. Marsh's own testimony, in effect, highlighted the importance of the conversation in the car described in Williams' confession. Marsh stated that she rode in the car with Martin and Williams and acknowledged she knew that the two were talking, but stated she could not hear their conversation over the sound of the radio.[152] The jury might wonder why Marsh would bother to mention a conversation she claimed she could not hear unless the asserted fact of her not hearing it was somehow relevant to her defense. In fact, the content of the conversation in the car described in the Williams' confession provided an explanation of why Marsh would testify that she had not heard it; the conversation gave her notice of the plan to rob and kill the victims and, therefore, contradicted her defense that she thought the visit to Scott was merely to ask for a loan.

Conceptually, Williams' confession filled in a question raised by Marsh's own testimony. Legally, however, neither the jury nor the prosecutor was allowed to use any part of Williams' confession against Marsh. Psychologically, it would have taken a superhuman effort to segregate the inferences arising from the confession, as the prosecutor's own error illustrates. But the power of these inferences was not based on "facial incrimination." The text of the confession had been thoroughly redacted to remove all trace of Marsh. The power and corresponding inevitability of the inferences arose out of the contextual relationships between the various bits of evidence raised at trial, precisely the area that *Richardson*'s facially incriminating standard would exclude from *Bruton* analysis.

D. Between *Richardson* and *Gray*

Although *Richardson* introduced the "facially incriminating" standard, it left unclear the exact relationship between several conceptual

150. *See, e.g.*, People v. Lewis, 181 P.3d 947, 984 (Cal. 2008) (where the prosecutor, in closing argument, relied heavily on confessor codefendant's statement in establishing guilt of non-confessor codefendant).

151. *Richardson*, 481 U.S. at 205.

152. *Id.* at 204.

issues implicated by the standard. Facial incrimination in *Richardson* raises at least the following four concepts: (1) presence of a signifier pointing to the defendant within the four corners of the text; (2) direct naming as a class of inherently incriminating descriptions; (3) "immediately" apparent textual incrimination; and (4) exclusion of consideration of other evidence introduced at trial. In *Richardson*, because of the peculiar nature of its facts, all of these concepts were aligned. Because any mention of defendant Marsh was completely removed from the confession, there was no signifier in the text pointing to her. Therefore, there was also no direct naming and no immediately apparent textual incrimination. On the basis of this, *Richardson* justified the exclusion of the consideration of other evidence introduced at trial. However, other types of redacted confessions involve different relationships between the concepts implicated by *Richardson*'s facially incriminating standard. Unlike the "complete" redaction involved in *Richardson*, most *Bruton* issues facing courts involve what has come to be called "partial redaction" confessions; that is, the defendant's presence and actions are indicated by signifiers in the redacted confession, but the defendant is not directly named. The defendant's name is redacted to conceal his or her identity by the use of symbols such as "X" and "____," blank spaces, and, most commonly, pronouns and descriptions such as "another," "friend," "they," or "someone."[153] After *Richardson*, courts adopted different approaches to partial redaction cases.[154] Some extended the facially incriminating standard of *Richardson* to partial redaction cases and held that if the defendant is not directly named in the confession, but rather is only referred to via a symbol or redacted expression, there is no violation of *Bruton*.[155] Such an approach, of course, is the most egregious use of formalism to ignore contextual meaning. At least in *Richardson*, there was no signifier in the text of the confession pointing an accusing finger at the defendant, even though other contextual information at trial allowed the jury to figure out that Marsh was incriminated by the confession. In the case of a partially redacted confession, however, there is a signifier in the text pointing to someone, and thus it is all

153. Ritter, *supra* note 7, at 884 nn.190–97 (listing cases for the types of partial redaction). A form of redaction halfway between *complete* and *partial* redaction is "passive voice redaction," in which the actions of the defendant are represented by the passive voice with no actor attributed (e.g., "the victim was shot"). *See* People v. Lewis, 181 P.3d 947, 982–83 (Cal. 2008); People v. Archer, 99 Cal. Rptr. 2d 230, 236 (Ct. App. 2000). R

154. My account of the period between *Richardson* and *Gray* draws on the excellent account in Ritter, *supra* note 7, at 883–912. R

155. *See id.* at 882–98 and the cases cited therein.

the more likely that the jury will use contextual information introduced at trial to adduce that someone is the defendant. Furthermore, often the very form of the redaction—such as an obviously blanked out word or an "X"—alerts the jury that something is being hidden from them, which increases the possibility they will draw the inference that the concealed individual is the defendant.

After *Richardson*, two approaches emerged for determining how a partially redacted confession could still be incriminating to a defendant.[156] First was the "degree of inference" test, which evaluated how likely it was that the jury would, in light of the evidence that was expected to be admitted at trial, infer that the defendant was the person indicated by the redacted expression in the confession.[157] This test uses contextual analysis, but it uses it prospectively to evaluate the possible risk, and thus is meant to allow a court to make pretrial determinations of admissibility.[158] The second approach was dubbed the "invitation to speculate" test.[159] For many courts, this test focused on whether the *form* of the redaction itself, such as a blank space or "X," was likely to convey to the jury that names of known accomplices were intentionally being concealed.[160] Unlike the "degree of inference test," the "invitation to speculate" test does not take into account other contextual evidence that might link the defendant to the redacted confession.[161] In the words of one commentator, it is only concerned with excluding confessions redacted in such a way that they "entice the jury to try to solve the mystery."[162]

The "invitation to speculate" test is a type of textual formalist analysis. It involves a close scrutiny of the redacted confession that parallels a New Critical close reading of a literary text. Just as a New Critical close reading scrutinized literary texts for their internal tensions and contradictions, an invitation to speculate analysis also scruti-

156. *Id.* at 899–900.

157. *See id.* at 900–08 and the cases cited therein. People v. Fletcher, 917 P.2d 187, 196 (Cal. 1996) (presenting a typical formulation: "[R]edaction that replaces the nondeclarant's name with a pronoun or similar neutral . . . term will adequately safeguard the nondeclarant's confrontation rights unless the average juror . . . could not avoid drawing the inference that the nondeclarant is the person so designated in the confession . . . ."). "[T]he sufficiency of this form of editing must be determined on a case-by-case basis in light of the statement [the redacted confession] as a whole and the other evidence presented at the trial." *Id.* at 197.

158. *See* Ritter, *supra* note 7, at 900–08 and the cases cited therein.

159. *Id.* at 908–12.

160. *Id.* at 908.

161. *Id.* at 910.

162. *Id.* (internal quotation marks omitted).

nizes the redacted confession for any internal features that might signal to the jury that the text has been redacted. These indications in the text might be relatively subtle, such as ungrammatical sentences resulting from the redaction,[163] or they might be obvious, such as the use of an "X" or an obvious blank space for the defendant's name. The latter is the type of redaction dealt with in *Gray*.

The "invitation to speculate" analysis therefore complements the *Richardson* facial incrimination standard in several ways. *Richardson* based the presumed success of a limiting instruction on its being able to prevent the jury from "entering onto the path of inference in the first place."[164] The invitation to speculate test makes an assessment of this necessary precondition; that is, it analyzes the extent to which the *form* of the redacted confession itself encourages the jury to enter onto the path of inference. As with the facial incriminating standard of *Richardson*, the "invitation to speculate" test has the apparent advantage of being easily applicable pretrial because it entails only an analysis of the form of the text, not consideration of other evidence that might be introduced at trial.

In *Gray*, the Supreme Court used "invitation to speculate" analysis to support its holding that blank space redaction violates *Bruton*.[165] As I will discuss below, although "invitation to speculate" analysis is a useful supplement to *Richardson*'s restrictive facial incrimination standard, "invitation to speculate" analysis remains within the artificial boundaries of the textual formalism defined by *Richardson*.

E. Gray v. Maryland

1. Facts and Holding

Defendant Kevin Gray and codefendant Anthony Bell were jointly tried for murder.[166] Bell had given a confession to the police in which he stated that he, Gray, and another individual, Jacquin Vanlandingham, had participated in the beating that resulted in the victim's death.[167] The trial judge admitted a redacted version of Bell's confession into evidence. In this redacted version, the police detective who read the confession into evidence said the word "deleted" or "dele-

163. *See* People v. Archer, 99 Cal. Rptr. 2d 230 (Ct. App. 2000).

164. Richardson v. Marsh, 481 U.S. 200, 208 (1987).

165. *See infra* Part III.E.2.

166. Gray v. Maryland, 523 U.S. 185, 188 (1998).

167. *Id.* (Vanlandingham died before he could be tried).

tion" whenever Gray's or Vanlandingham's name appeared.[168] A written copy of the confession was also introduced into evidence with the two names omitted, leaving in their place blank white spaces separated by commas.[169] Gray testified and denied participating in the beating.[170] Bell did not testify.[171] The jury was instructed that the confession was only evidence against Bell, and that it should not be used against Gray.[172] The jury convicted both Bell and Gray, and Gray appealed.[173] Maryland's intermediate appellate court overturned Gray's conviction, but Maryland's highest court reinstated it.[174] The United States Supreme Court granted certiorari to consider *Bruton*'s application to redactions using an obvious blank space or symbol or words such as "deleted."[175]

Justice Breyer, joined by Justices Stevens, O'Connor, Souter, and Ginsberg, concluded that the admission of Gray's edited statement violated *Bruton* for the following reason:

> Redactions that simply replace a name with an obvious blank space or a word such as "deleted" or a symbol or other similarly obvious indications of alteration . . . leave statements that, considered as a class, so closely resemble *Bruton*'s unredacted statements that . . . the law must require the same result.[176]

The *Gray* majority noted that "an obvious blank will not likely fool anyone."[177] A juror who wonders to whom the blank space in the codefendant's confession might refer "need only lift his eyes" to see the defendant sitting at his table with his attorney "to find what will seem the obvious answer."[178] *Gray* noted that the judge's instruction not to consider the confession against the defendant can itself encourage a

168. *Id.* Immediately after the police detective read the redacted confession to the jury, the prosecutor asked, "after he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?" *Id.* at 188–89. The officer responded, "That's correct." *Id.* at 189. Thus, as in *Richardson v. Marsh*, 481 U.S. 200 (1987), whatever the merits of the prosecution's attempts at redaction, the prosecutor himself let the cat out of the bag by "blatantly link[ing] the defendant to the deleted name." *Gray*, 523 U.S. at 193. But, while the prosecutor's own remarks here arguably provided an independent ground for reversing the conviction, *Gray* went on to consider the validity of the redaction technique itself to settle the issue. *Id.*

169. *Gray*, 523 U.S. at 189.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 192.

177. *Id.* at 193.

178. *Id.*

juror to conclude that the defendant is the person blanked out in the confession.[179] *Gray* also remarked how the form of the redaction can contribute to prejudice against the defendant: "[T]he obvious deletion may well call the jurors' attention specially to the removed name. By encouraging the jury to speculate about the reference, the redaction may overemphasize the importance of the confession's accusation—once the jurors work out the reference."[180]

Gray concluded that *Richardson* was not controlling here.[181] *Gray* conceded that "*Richardson* placed outside the scope of *Bruton*'s rule those statements that incriminate inferentially," and that Gray's jury would have had to use inference to connect the statement in the redacted confession with Gray.[182] But *Gray* concluded that the critical difference was not "inference pure and simple," but rather "the *kind* of . . . inference."[183] If all inference were prohibited, *Gray* notes, *Richardson* "would also place outside *Bruton*'s scope confessions that use shortened first names, nicknames, descriptions as unique as the 'red-haired, bearded, one-eyed man-with-a-limp,' [ ] and perhaps even full names of defendants who are always known by a nickname."[184] *Gray* rejected this application of *Richardson* on the grounds that the Supreme Court had always assumed that nicknames and specific descriptions fell within *Bruton*'s protections.[185]

Having rejected the proposition that *Richardson* categorically prohibited the consideration of any type of inference in determining prejudice under *Bruton*, *Gray* distinguished the types of inference involved in the present case: "[T]he inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial."[186] *Gray* concluded that "the redacted confession with the blank prominent on its face, in *Richardson*'s words, '*facially* incriminat[es]' the codefendant."[187]

Justice Scalia authored a dissent—joined by Chief Justice Rehnquist, and Justices Kennedy and Thomas—in which he criticized the

179. *Id.*
180. *Id.* (using a version of the "invitation to speculate" test).
181. *Id.* at 195.
182. *Id.*
183. *Id.* at 195–96.
184. *Id.* at 195 (internal citations omitted).
185. *Id.*
186. *Id.* at 196.
187. *Id.* (citing Richardson v. Marsh, 481 U.S. 200, 209 (1987)).

Gray majority for "struggl[ing] to decide whether a confession redacted to omit the defendant's name is incriminating on its face or by inference."[188] Scalia pointed to the apparent contradiction between the *Gray* majority's initial assertion that "the jury must use inference to connect the statement in this redacted confession with the defendant," and its later assertion that "the redacted confession with the blank prominent on its face . . . '*facially* incriminates' him."[189]

2. Inferences and Contextualism

Gray acknowledges that *Bruton* is violated when it is obvious that a jury will figure out the identity of a defendant even though—and, perhaps, *because*—his name has been redacted by blank spaces. But contextualism shows us that obviousness cannot be determined solely by the textual features of the redacted confession, which was the basic fallacy adopted by *Richardson*. In *Richardson*, with its odd set of facts—there was no textual trace of the defendant in the confession—Scalia made the facial incrimination standard seem plausible and rejected contextualist analysis. However, in *Gray*, the artificiality of Scalia's textualism in *Richardson* became apparent because the incrimination to defendant Gray from the redacted confession was obvious, notwithstanding that Scalia was correct in his dissent that the defendant in *Gray* was not "facially incriminated," in the way *Richardson* had meant.

In effect, the *Gray* majority rejected the absurdity of a facial incrimination standard that would ignore immediate and obvious incriminating inferences. It acknowledged that it was not the act of inference itself but the type of inference that makes the difference.[190] In the end, however, *Gray* retained the facial incrimination standard and rejected the necessity of considering other evidence presented at trial.[191] The consequence has been that the *Gray* majority made what appear to be ad hoc distinctions between the types of information outside the face of the confession that a court must consider for incriminating inferences. *Gray* appears to acknowledge the relevance of any information outside the face of the text, as long as it is not evidence to be produced at trial, and as long as the incriminating inference based on it is evident before any evidence is produced at trial.[192] However, by acknowledging the inescapability of inference, but not

188. *Id.* at 201.
189. *Id.*
190. *Gray*, 523 U.S. at 195–96.
191. *Id.*
192. *Id.*

embracing the full consequences of that acknowledgement, *Gray* left *Bruton* law in its current state of theoretical conflict and confusion.

The *Gray* majority acknowledged that blank spaces used to redact the confession at issue in *Gray* were incriminating because they invited the jury to speculate about what had been omitted.[193] The Court therefore accepted the "invitation to speculate" test as a legitimate extension of *Richardson*'s "facial incrimination" standard. In doing so, the Court followed the same formalistic method of New Criticism in scrutinizing a literary text for tensions and contradictions and then considering these tensions or contradictions in determining the text's meaning.[194] The blank spaces discussed in *Gray* express a meaning to the reader, namely that the confession had been altered, and that some name had been omitted. While the blank spaces themselves are within the four corners of the text, the meaning those blank spaces point to are based on information outside of the text, namely the identity of the person concealed by the blank space. Because the identity of the redacted defendant is outside the four corners of the text, *Gray* acknowledged the incrimination caused by the blank spaces was based on an "inference."[195]

The word "inference" as used by *Gray* is conceptually the same as the word "context" as it has been used in literary and legal hermeneutical theory. To make an inference is to use facts to reach a conclusion through inductive reasoning. As discussed above, this is the same process by which a reader uses context to determine meaning in interpreting a text.[196] Context is the background set of facts and presuppositions through which the reader determines one meaning out of a range of possible meanings. The inferences *Gray* describes are part of the process of contextualization by which the jury would find meaning in the confession presented to it, or, more specifically, understand the confession to be incriminating to the defendant. As *Gray* described it, because of certain facts known to the jurors—that two codefendants are sitting before them in court—the jurors are able to draw inferences about the identity of the redacted party in the confession—that the blanked out name refers to the non-confessor codefendant.[197]

193. *Id.* at 193.

194. *See supra* Part II.B.

195. *Gray*, 523 U.S. at 195.

196. *See supra* Part II.C.

197. *Gray*, 523 U.S. at 193.

When one regards the evolution of *Bruton* doctrine from *Richardson* to *Gray*, one can see how it illustrates a crisis of textual formalism that is similar to the one discussed above in the movement from New Criticism to Deconstruction. New Critical readings of a text revealed internal tensions or ambiguities in the text, which, in turn, led to multiple interpretations.[198] Some Deconstructionist critics celebrated the multiplicity of readings for revealing the essential ambiguity of texts.[199] In order to make the case that one reading is correct and another incorrect, however, the interpreter cannot simply continue to point to the face of the text. In order to support one interpretation over another, the interpreter has to describe the background contexts that give rise to one meaning over another and then argue that one specified context is more plausible or convincing than the other.

In the evolution of *Bruton* doctrine, the need to move beyond the face of the text was triggered by an even more explicit crisis. *Richardson* had fixed the scrutiny of the confession to the face of the text. But, with the use of blank space redaction as a technique, a scrutiny of the face of the text itself led the jurors to infer that something was missing. In the redacted confession under consideration in *Gray,* the blank spaces themselves indicated that a hidden meaning of this text was based on information outside the text.

3. Scalia's Dissent

Scalia's dissent addresses the central contradiction in *Gray*, namely, that while *Gray* purports to retain *Richardson*'s "facial incrimination" standard, it expands its scope to include inferences based on information beyond the face of the confession. However, in criticizing the *Gray* majority's apparently contradictory use of *Richardson*'s facial incrimination standard, Scalia raises the fundamental theoretical problem with the concept of facial incrimination itself.

Scalia analyzes and criticizes the *Gray* majority's use of examples of facially incriminating descriptions—the "red-haired, bearded, one-eyed man-with-a-limp" and "Me, Kevin Gray, and a few other guys."[200] He argues that these descriptions would be facially incriminating, that is to say, incriminating without reference to evidence introduced at trial, *only under certain circumstances*, and that, under other circumstances, these same descriptions would be incriminating only in com-

198. *See supra* Part II.B.

199. *See* de Man, *supra* note 68. R

200. *Gray*, 523 U.S. at 200–02.

bination with evidence introduced at trial.[201] The jury would immediately find the description, "red-haired, bearded, one-eyed man-with-a-limp," incriminating if the defendant had not changed his appearance prior to trial.[202] However, under different circumstances, namely, when the defendant changed his appearance prior to trial by dying his hair black and shaving off his beard, the jury would not find the description incriminating unless the jury possessed additional contextual information, such as evidence introduced at trial describing his former appearance.[203] Similarly, a confession listing "Me, Kevin Gray, and a few other guys" would facially incriminate Kevin Gray only if the name "Kevin Gray" was used in the indictment.[204] But if the defendant's name as set forth in the indictment was not "Kevin Gray," then, in order for the jurors to find the name incriminating, they would have to be given the information that defendant sometimes used "Kevin Gray" as an alias.[205]

Scalia goes on to contrast the blank redaction technique used in Gray's case with the specific descriptions and direct names he has just analyzed. As he argued, direct names and specific descriptions could, under some, but not all circumstances, be immediately incriminating without reference to evidence introduced at trial.[206] But, he notes, "the person to whom 'deleted' refers in 'Me, deleted, deleted, and a few other guys' is not apparent from anything the jury knows independent of the evidence at trial."[207] Just like the deletion technique used in "Me, deleted, deleted, and a few other guys," the blank redaction technique used in Gray's case leaves it *unclear* as to whom the blank refers. Scalia acknowledges the jury may speculate about the redacted reference.[208] However, he asserts that this speculation is not "so powerful" that "we must depart from the normal presumption that the jury follows its [limiting] instructions."[209]

Scalia's point is to undercut the *Gray* majority's examples of facial incrimination. Ironically, however, in doing so, Scalia engages in precisely the type of contextualist critique that can be turned against the whole concept of facial incrimination itself. Scalia's assertion in the

201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* at 202.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*

dissent that the facial incrimination of direct names depends on circumstances is particularly damaging to the arguments he made in *Richardson* to justify the facial incrimination standard. There, Scalia distinguished direct naming as a category of expression that a jury would find to be facially incriminating, that is, the jury would find it to be incriminating immediately and without the use of inference.[210] While *Richardson* did not expressly state that direct naming was the only category that produced facial incrimination, direct naming and facial incrimination are essentially used interchangeably.[211] In *Richardson*, Scalia purported to present a principled argument for reserving *Bruton* for instances of direct naming because limiting instructions have no effect on direct naming because it is an inference-free form of incrimination.[212] In contrast, he argued, limiting instructions would be adequate for incrimination arrived at through inference.[213]

In seeming contradiction to *Richardson*, Scalia acknowledges through his "Me, Kevin Gray, and a few other guys" example in the *Gray* dissent, that, even for instances of direct naming, context determines incrimination. It is not the *form* of the expression as a direct name but the whole background *context* that produces incrimination. If context always determines incrimination, even in the case of a direct name, then the sharp theoretical line that *Richardson* draws between facial and non-facial incrimination disappears. If not even direct naming is "facially incriminating," in *Richardson*'s sense of inference-free incrimination, then what is? The answer, contextualism tells us, is that no category of expression is facially incriminating as a form. *Richardson*'s argument for the facial incrimination standard is therefore self-contradictory.

Scalia's dissent does not address how to reconcile his contextualist critiques of the *Gray* majority with his earlier arguments in *Richardson* about facial incrimination. That is the prerogative of Scalia's dissent, whose goal is to raise problems in the majority opinion, rather than present solutions to the conceptual problems raised by *Richardson*'s facial incrimination standard. However, as discussed below, the *Gray* majority itself failed to explain its apparently contradictory position that *Richardson*'s facial incrimination standard could apply to incriminating inferences based on information outside the face of the text.

210. *See supra* Part III.C.2.
211. *Id.*
212. Richardson v. Marsh, 481 U.S. 200, 208 (1987).
213. *Id.*

4. Revisiting Contextual Analysis

The *Gray* majority expanded the definition of facial incrimination to include "statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial."[214] What *Gray* sees as giving rise to these immediate and obvious incriminating inferences is a combination of textual features and information outside the face of the text. The incriminating textual feature of the confession in *Gray* was the blank space redaction itself, which was an "obvious deletion" that "may well call the jurors' attention specially to the removed name."[215] The main bit of non-textual incriminating information was the presence of the defendant in the courtroom, along with his codefendant the confessor. The judge's limiting instruction not to consider the confession against the defendant also provided an additional piece of non-textual incriminating information because "that instruction will provide an obvious reason for the blank."[216]

Gray does not provide guidance as to how a court should determine whether an inference is "immediate." The more fundamental problem, however, is that "immediate" in *Gray* implies two senses of the word, and the majority opinion in *Gray* relies on both senses of the word to make its position persuasive. But the two senses of the word "immediate" are not always present in every *Bruton* situation. In its first sense, an "immediate" inference is an empirically obvious inference; that is, one that any reasonable person, given the same information, would draw. In its second sense, immediate inference means one arrived at first in time; that is, arrived at quickly. Of course, these two senses, the empirical and the temporal, often go together; inferences that are empirically obvious are often quickly drawn by people.

Nevertheless, the process of a criminal trial complicates the relationship between the empirical and the temporal senses of an "immediate inference." In a criminal trial, the jury is given information throughout the course of the trial. Jurors have, of course, significantly more information at the end of the trial—when they have heard all the evidence—than they do at the beginning—when no evidence has been presented. After they have heard some or all of the evidence presented at trial, certain inferences, such as the identity of the per-

214. *Gray*, 523 U.S. at 196.
215. *Id.* at 193.
216. *Id.*

son behind a redacted name in the confession, may well appear obvious. Jurors may arrive at this conclusion immediately upon being given the relevant pieces of information at trial. But this moment may come late in the temporal process of the trial.

Gray defines "immediate" inferences as those that take place at a certain early point in the temporal process of the trial, namely, those "that a jury ordinarily could make . . . even were the confession the very first item introduced at trial."[217] Thus, the incriminating inferences discussed in *Gray* are immediate in both the temporal and empirical senses of the word. These inferences are so obvious that they would be immediately grasped even if the confession were the very first item introduced at trial. However, there might be inferences that would be no less empirically obvious to the jury, but that the jury would not make until other evidence was introduced at trial. When that evidence is introduced, these inferences may well be grasped "immediately," that is in the sense of being obviously apparent. But chronologically they will come later in the trial, and, therefore, will not be "immediate" in the temporal sense that *Gray* also demands.

The *Gray* majority gives no reason why inferences that will appear obvious after evidence is presented at trial should be considered less "immediate" than those whose obviousness can be grasped before any evidence, other than the confession, is introduced at trial. *Richardson* at least purported to present a principled argument for limiting "immediate" inferences to the face of the text.[218] *Richardson* argued that incrimination could be determined from the face of the text itself, and thus there was no need to consider any other information, let alone evidence produced at trial.[219] In contrast, *Gray* allows consideration of information outside the face of the text—i.e., the fact of the defendant sitting in front of them, the judge's limiting instruction, etc.—but draws the line at evidence introduced at trial.[220] Given *Gray*'s acknowledgement of the inescapable role that inference plays in determining incrimination, this line drawing appears artificial, arbitrary, and certainly does not correspond to the actual duties of the jury, which is to consider all the evidence at trial in relation to each other and make a final determination of fact.[221]

217. *Id.* at 196.

218. *See supra* Part III.C.2.

219. *See id.*

220. *See supra* Part III.E.2.

221. See, e.g., the following excerpts from the California Criminal Jury Instructions: "As jurors, you may discuss the case together *only after all of the evidence has been presented* . . . ." CALIFORNIA JURY INSTRUCTIONS: CRIMINAL 101 (2008) [hereinafter CALCRIM] (em-

Gray's exclusion of the consideration of other evidence offered at trial appears to arise out of the desire to preserve, at all costs, the procedural simplicity that *Richardson*'s facial incrimination standard provides for allowing the trial court to consider the admissibility of a redacted confession through a pretrial motion. *Richardson* pointed out that a procedural difficulty with contextual implication analysis was that it "would presumably require the trial judge to assess at the end of each trial whether, in light of all the evidence, a nontestifying codefendant's confession has been so 'powerfully incriminating' that a new, separate trial is required for the defendant."[222] But procedural considerations should follow the determination of the proper constitutional standard, not vice versa. Furthermore, there have been various plausible proposals for how a trial court could consider a pretrial *Bruton* motion in relation to evidence presented at trial. The *Richardson* dissent proposed one solution: "In most such cases the trial judge can comply with the dictates of *Bruton* by postponing his or her decision on the admissibility of the confession until the prosecution rests, at which time its potentially inculpatory effect can be evaluated in light of the government's entire case."[223] However, even the more modest proposal of having the trial court consider the major evidence anticipated to be presented at trial in connection with a *Bruton* motion would prevent the most egregious effects of the facial incrimination standard. The *Richardson* majority acknowledged that a good deal of the possible prejudice could be foreseen if the trial court conducted a pretrial hearing at which the prosecutor and defense could indicate how evidence they plan to introduce would bear on the redacted confession that was being proposed for admission.[224] Admittedly, such anticipation of the evidence is, in the words of the *Richardson* majority, "far from foolproof."[225] But given the current

phasis added); "In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially *compare and consider all the evidence that was received throughout the entire trial.*" CALCRIM 103.

222. Richardson v. Marsh, 481 U.S. 200, 209 (1987).

223. *Id.* at 220 (Stevens, J., dissenting).

224. *Id.* at 209.

225. *Id.* Ritter, who otherwise criticizes *Richardson*, argues it is too difficult to assess pretrial the likelihood the redaction will be unmasked during the course of the trial. Ritter, *supra* note 7, at 916. Her solution is to call for a per se rule of exclusion of the confession where there is the possibility that the redaction could be uncovered. *Id.* I agree that such a rule would prevent any possible prejudice to the defendant. However, I think that such a rule would require a radical revision in *Bruton* law; whereas consideration of anticipated evidence is a more modest change that would allow the courts to continue their current individualized assessment of prejudice, while acknowledging relevant contextual information. R

state of *Bruton* law, consideration of evidence anticipated at trial would be a step forward in acknowledging contextualism in *Bruton* analysis.

Conclusion

The theoretical issue discussed in this Article is returning a sense of analytical clarity to *Bruton* analysis. As this Article has argued, contextualism is the central insight of both modern literary and legal hermeneutics. Contextualism shows us that all meaning is determined by context, and that all context is potentially relevant. *Bruton* analysis therefore should consider all relevant contextual information that might contribute to the jury's understanding of the confession, including information presented at trial.

Richardson sought to enshrine a strict textualist standard of meaning for the analysis of *Bruton* prejudice, in effect limiting *Bruton*'s application to cases where the full form of the defendant's name was found within the "four corners" of the text, and thus "facially incriminated" the defendant. The unique facts behind *Richardson*—defendant was not referred to *at all* in the confession—masked the contradictions of this extreme textualist approach. In *Gray*, the Supreme Court decided a case with facts more typical of the *Bruton* redaction problem faced by courts, namely, the confession referred to the defendant but was redacted to conceal his name. *Gray* ultimately rejected *Richardson*'s extreme form of textualism and recognized that an analysis of the prejudice to a defendant does not depend only on the *form* of the defendant's name used in the confession, but rather on the *inferences* that a jury could draw from the confession, even if a defendant's name were formally redacted.[226]

Gray acknowledged that assessing a *Bruton* violation depends on "the *kind* of, not the simple *fact* of, inference,"[227] but *Gray* did not present a principled reason for the limited body of materials from which it allowed inferences.[228] Thus, while *Gray* acknowledged the essential role of context in determining meaning, it ultimately retained much of *Richardson*'s textual formalism, including the "facially incriminating" standard, and the refusal to consider contextual information from other evidence presented at trial.[229] The result has been the continuation of a contradictory standard of "facial incrimination," which

226. *See supra* Part III.E.2.
227. Gray v. Maryland, 523 U.S. 185, 195–96 (1998).
228. *See supra* Part III.E.4.
229. *See supra* Part III.E.2.

allows a consideration of some information outside of the "face" of the confession, but which draws apparently arbitrary distinctions concerning the *types* of contextual information a court must consider. A complete rejection of textual formalism is necessary in order to restore any coherence to *Bruton* analysis.