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CONSTITUTIONAL ROAD MAPS

ERIK LUNA*

INTRODUCTION

Generations of constitutional scholars have obsessed over the Supreme Court's unique power of review, reiterating the anti-democratic perils that attend judicial scrutiny of majoritarian legislation.¹ To some, "judicial review is a deviant institution in the American democracy,"² allowing unelected members of a politically insular, life-long fraternity to second-guess the policy choices of the people or their elected representatives. Others seem less disturbed by the countermajoritarian nature of judicial review, noting that although "[d]emocracy does not insist on judges having the last word, . . . it does not insist that they must *not* have it."³ As such, the focus of the countermajoritarian difficulty might be narrowed to the ensuing reaction or "dialogue" between the judicial and political branches. This dialogue is not unlike interpersonal communication, with one party (usually the legislative branch) suggesting a solution to a given problem and the other party (usually the judicial branch) critiquing the solution against important background principles (the Constitution, for instance). Whether the dialogue continues is the true difficulty of countermajoritarianism: Can law-

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¹ See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334-39 (1998) (reviewing "the countermajoritarian obsession").

² ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 18 (1962).

³ RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 7 (1996) (emphasis added).

makers or law enforcers affirmatively respond to a judicial decision and, if so, what form can the reaction take?

These questions are, in fact, part and parcel of a related academic debate—*increasing* interbranch dialogue. For decades, some of the most respected legal scholars have sought to enhance the discourse of judges and politicians—particularly between the Supreme Court⁴ and lawmakers⁵—suggesting that the lack of communication coupled with obstinate decisionmaking resulted in inferior legislation or judicial imperialism. Better government, these commentators argued, requires an ongoing conversation among the branches of government on the fundamental principles in a constitutional democracy.⁶ Yet no advocate of interbranch dialogue takes lightly the Court's authority to invalidate majoritarian decisionmaking. When striking down legislation pursuant to the Constitution, the Justices not only void a particular law but may also stifle future legislation. By its constitutional pedigree, a decision can dissuade further debate and political action, as lawmakers seldom rally around a law that will be dead on arrival at the Supreme Court.⁷

In the course of striking down legislation, however, the Court can also *spur* political discourse and lawmaking through the crafting of opinions. It is true, of course, that the Justices rarely speak *solo voce*. Instead, nine separate individuals offer their views, often in voting blocks, without a prefabricated "game plan" of vote distribution and opinion content to achieve

⁴ Although the dialogue between the lower courts (both state and federal) and political actors is exceptionally rich and important, this article will focus solely on the interaction between the U.S. Supreme Court and legislative bodies.

⁵ There are important distinctions between federal and state statutes, and even between state and local legislation. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) ("When we are required to pass on the constitutionality of an Act of Congress, we assume 'the gravest and most delicate duty that this Court is called on to perform.'") (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)); *Johnson v. City of Minneapolis*, 152 F.3d 859, 862 (8th Cir. 1998) ("enactments by home rule cities . . . are usurped when the state legislature has 'expressly or impliedly restricted the municipality's power over these matters'" (internal citation omitted)). But for the purposes of this article, I will not distinguish among federal, state, and local legislation.

⁶ See Part III, *infra* (discussing the dialogic theories of Cardozo, Bickel, Sunstein, and Calabresi).

⁷ But see notes 272-73, *infra* (noting Congress' enactment of child labor laws and a flag desecration statute despite prior adverse rulings by the Supreme Court).

optimal interbranch dialogue.⁸ But the Court's nature as a group of distinct jurists rather than a monolithic entity does not prevent it from being anthropomorphized by the political branches and the public. To legislators, the written decision is a holistic instrument of a single "being"—the United States Supreme Court—that either allows or prohibits a political reaction. And although the Court does not have human will, opinions demonstrate a type of "intent" or *mens legis* that can inform the actions of lawmakers. In particular, an opinion can: (1) actively encourage political dialogue; (2) actively discourage such dialogue; or (3) have no dialogic aspirations whatsoever. While the second option largely precludes normal lawmaking,⁹ the first option (and possibly the third) leaves the door open for a legislative response.

Among the more radical forms of post-invalidating encouragement is what I call a "constitutional road map." Under this judicial strategy, the Supreme Court strikes down the law in question but then suggests legislative alternatives consistent with the Constitution. In other words, the opinion offers a "road map" for lawmakers to follow in creating a constitutional stat-

⁸ For example, it is pretty hard to imagine the Chief Justice saying the following at conference:

Okay, it sounds like a majority of us believe that this statute must fall. But if I hear you correctly, we don't want to stifle legislative reform on [*insert your favorite social issue*] either. So I think this should be a 5-4 decision, demonstrating how close a call this was for us. Sandra, why don't you concur in the judgment and offer some possible alternatives—you know, kind of a road map for legislators to follow in enacting a constitutional statute. And Nino, I want you to write a biting dissent; that should give a little encouragement to lawmakers.

Although group dynamics and strategic behavior play a part in any voting system, including that of the Court, *see, e.g.*, Youngsik Lim, *An Empirical Analysis of Supreme Court Justices' Decision Making*, 29 J. LEGAL STUD. 721 (2000); Gregory A. Caldeira et al., *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549 (1999); Joan Biskupic, *The Art of 'Holding Five' in Peak Season*, WASH. POST, June 7, 1999, at A17; this level of collusion among the Justices on vote distribution and opinion content seems unlikely (or at least rare). But throughout the article, I will assume that the Court "intends" an opinion's dialogic message as *perceived* by political actors, commentators, and the general public. I will therefore refer to the Court's "intent" or "goals" as a rhetorical tool for exploring the political consequences of judicial decisionmaking and opinion writing.

⁹ The constitutional amendment process always remains open, *see* U.S. CONST. art. V, although the difficulty of this option is evidenced by the relative infrequency of its occurrence. In the more than two centuries since its adoption, the U.S. Constitution has been amended only 27 times; this number drops to 14 if the Bill of Rights and the Reconstruction amendments are excluded.

ute. Although not unprecedented in First Amendment doctrine, for example,¹⁰ the strategy was foreign to criminal procedure jurisprudence. This changed, however, with the Court's recent decision in *City of Chicago v. Morales*.¹¹ At issue was the constitutionality of Chicago's gang-loitering law,¹² a statute that empowered law enforcement to prevent public congregation of gang members and their associates; and in a splintered opinion, the Supreme Court held that the ordinance violated due process. Yet the most significant portion of *Morales* was not the judgment or its rationale but the concurrence of Justice Sandra Day O'Connor. Despite agreeing that the gang-loitering ordinance was unconstitutional, O'Connor suggested that Chicago had lawful alternatives at its disposal. Her concurrence then sketched out potential statutory provisions that would survive judicial scrutiny,¹³ offering a constitutional road map for lawmakers to follow in reenacting the ordinance.

Just this past term, the Supreme Court had another opportunity to employ the road mapping strategy in a criminal procedure case. In *Dickerson v. United States*,¹⁴ the Court addressed for the first time a 32-year-old federal law¹⁵ purporting to overrule *Miranda v. Arizona*¹⁶ and its consequences for custodial interrogation. For any number of reasons, both legal and pragmatic, this statute had real difficulty withstanding judicial review. But even if the Justices felt compelled to invalidate the law, they could have encouraged further political dialogue and possibly offered a road map toward constitutional legislation. The Court did not choose this path and instead struck down the statute without offering encouragement, let alone guidance, for any political response.

Was the road mapping strategy appropriate in *Morales* and should it have been employed in *Dickerson*? The answer depends on, among other things, the ability of less aggressive judicial techniques to encourage political responses, the Court's

¹⁰ See text and notes 332-54, *infra* (giving examples of constitutional road maps).

¹¹ 527 U.S. 41 (1999).

¹² CHICAGO, ILL. MUN. CODE § 8-4-015 (added June 17, 1992; repealed Feb. 16, 2000).

¹³ *Morales*, 527 U.S. at 67-68 (O'Connor, J., concurring).

¹⁴ 120 S. Ct. 2326 (2000).

¹⁵ 18 U.S.C. § 3501 (1968).

¹⁶ 384 U.S. 436 (1966).

past experience with the road mapping strategy, and the balance of arguments for and against constitutional road maps both in the abstract and in particular cases. The goal of this Article, then, is to explore the concepts of interbranch dialogue and judge-made road maps in light of the Supreme Court's opinions in *Morales* and *Dickerson*. Part I details the background of Chicago's gang-loitering ordinance, the noteworthy aspects of *Morales*, the law's reenactment pursuant to the O'Connor road map, and the likely court challenges to the new ordinance. Part II describes the Court's seminal decision on custodial interrogation, Congress' attempt to abrogate *Miranda* by statute, the intervening three decades of relative desuetude, the invalidation of the federal confession law in *Dickerson*, and the improbability of congressional reenactment in its wake. Part III considers leading dialogic theories, their limited application to the criminal process, and the prospects of road mapping as an alternative judicial technique. Finally, Part IV presents the likely arguments for and against constitutional road maps and offers a framework for analyzing the propriety of this judicial strategy in specific disputes. This Part then applies the framework to Supreme Court cases and, in particular, *Morales* and *Dickerson*.

I. STREET GANGS, VAGRANCY-TYPE LAWS, AND *MORALES*

The history of vagrancy-type laws¹⁷ is long and complex, dating back to the decline of feudalism and the economic devastation that accompanied the Black Plague.¹⁸ As a surrogate for serfdom, vagrancy tied workers to their jobs by criminalizing both able-bodied idleness and migration for higher wages,¹⁹ thereby buttressing a European caste system against the threat of class instability and social disorder.²⁰ The concept of vagrancy was carried over to the British colonies and remained a

¹⁷ By "vagrancy-type laws," I am referring to statutory schemes that criminalize an individual's status (such as being a gang-member), activities that are inextricably connected to one's status (such as the homeless sleeping in public places), and/or otherwise innocuous conduct (such as loitering).

¹⁸ See Caleb Foote, *Vagrancy-Type Law and its Administration*, 104 U. PA. L. REV. 603, 615-16 (1956).

¹⁹ *Id.* at 615.

²⁰ See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 103 (1993).

tool of government after the American Revolution.²¹ Although primarily aimed at vagabonds,²² vagrancy-type laws were also used to harass prostitutes and gamblers and to arrest suspicious characters without proof of crime.²³ Vagrancy was part of the "Black Codes" as well, offering the antebellum South another means of racial subjugation in the absence of slavery.²⁴

Scholars and activists of the mid-twentieth century challenged the continued validity of vagrancy-type laws under modern notions of due process.²⁵ The Supreme Court eventually agreed that the Constitution does not allow unduly vague statutes used to sweep the streets of undesirables or detain suspicious individuals.²⁶ It was also aware that vagrancy weighed heavily on minority communities and served as a blunt instrument against civil rights activists.²⁷ Over two decades, the Court struck down pure vagrancy and loitering laws,²⁸ anti-congregation bans,²⁹ and statutes requiring, on demand, proof of identification and a valid purpose.³⁰

²¹ See *id.*; Foote, *supra* note 18, at 616.

²² See FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 20, at 102.

²³ See *id.* at 104. See generally William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960).

²⁴ See FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 20, at 94; LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 505 (2d ed. 1995); Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2258-62 (1998). See also Harvey Grossman, *The Failed Policy of Street Sweeps*, CHI. TRIB., July 1, 1999, at 23 ("Enforcement of [vagrancy-type] laws first was used to maintain racial divisions between neighborhoods. The practice involved discouraging young men of color from being on the streets of 'white' communities by taking them into police custody for loitering. In the eyes of the police these men had no appropriate purpose in being outside their neighborhood.").

²⁵ See, e.g., Foote, *supra* note 18; Douglas, *supra* note 23; Rollin M. Perkins, *The Vagrancy Concept*, 9 HASTINGS L.J. 237 (1958); Arthur H. Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CAL. L. REV. 557 (1960).

²⁶ See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

²⁷ See, e.g., *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 101-02 (1965) (Fortas, J., concurring).

²⁸ *Papachristou*, 405 U.S. at 156 n.1 (striking down ordinance criminalizing a variety of disreputable conduct and shady characters); *Shuttlesworth*, 382 U.S. at 88 (striking down ordinance making it "unlawful for any person or any number of persons to so stand, loiter or walk upon any street or sidewalk in the city as to obstruct free passage over, on or along said street or sidewalk . . . [or] to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on").

²⁹ *Coates v. City of Cincinnati*, 402 U.S. 611, 611 n.1 (1971) (striking down city ordinance making it "unlawful for three or more persons to assemble . . . on any of the

Against this background, the entire *Morales* affair can be seen as a series of interactions between Chicago's local government and the judiciary on the fitness of specialized loitering laws. This section describes the initial three rounds of this exchange—ordinance enactment, adjudication, and reenactment—as well as the possible hurdles facing the new law in the next round of adjudication.

A. ROUND 1—ENACTMENT

Like most metropolitan cities, Chicago has a gang problem. Many of its urban neighborhoods are dominated by street gangs and their tactics—staking out turf, selling drugs, and commanding authority through violence. Even stalwarts of the city are intimidated by the hostile environment created by gangland activity, while law-abiding citizens become prisoners in their own homes.³¹ More police officers on the streets—as well as employment opportunities, job training, and community outreach programs for at-risk youth—would obviously be a move in the right direction, but the electorate and its chosen officials provided insufficient resources toward these ends.³²

sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings").

³⁰ *Kolendar v. Lawson*, 461 U.S. 352 (1983) (striking down law requiring loiterers to provide on demand credible identification and account for their presence).

³¹ According to one long-time resident:

I have never had the terror that I feel everyday when I walk down the streets of Chicago. . . . I have had my windows broken out. I have had guns pulled on me. I have been threatened. I get intimidated on a daily basis, and it's come to the point where I say, well, do I go out today. Do I put my ax in my briefcase. Do I walk around dressed like a bum so I am not looking rich or got any money or anything like that.

Transcript of Proceedings before the City Council of Chicago, Committee on Police and Fire 124-25 (May 15, 1997).

³² See, e.g., Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. L.F. 215, 218, n.19 (noting minority community frustration with "the lack of adequate police protection in their neighborhoods"); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 823 (1999) (similar); David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1088 (1999) ("In the best of all possible worlds, inner-city residents might well prefer increased investments in job training, public schools, economic development, and afterschool programs to an expansion of police discretion and aggressive quality-of-life policing. But if the larger community is unwilling to provide the former investment, . . . residents will have less

It is unsurprising, then, that Chicago sought an alternative means of fighting street gangs. Rather than putting more cops on the beat, it decided to give greater discretionary powers to the existing force. After extensive debate and deliberation, the Chicago City Council enacted a loitering ordinance targeting gang members and preventing them from public congregation.³³ Pursuant to this law, police officers were empowered to order suspected gangsters and their associates to "move along"; failure to comply with an order was grounds for arrest and punishable by up to six-months incarceration.³⁴

On first blush, Chicago's ordinance appeared to revive the vagrancy laws of past generations³⁵ with an implicit call for police to sweep the streets of undesirables. But some legal scholars argued that the statute was part of a larger trend in police science, variously referred to as "broken windows," order-maintenance, or community policing.³⁶ Visible signs of disorder

than a free hand in striking the appropriate balance."); Editorial, *Loiter of the Law*, PITT. POST-GAZETTE, June 19, 1999, at A18 ("A beefed-up police presence on the street not only provides a window on 'hanging out' that is a prelude to drug-dealing or the harassment of passersby; it also has a deterrent effect on such behavior. But it is expensive—more expensive than enacting a law that gives vast discretion to fewer police but runs afoul of the rights of innocent people."). See also Pratt v. Chicago Hous. Auth., 848 F. Supp. 792, 796 (N.D. Ill. 1994) ("Many tenants within CHA housing, apparently convinced by sad experience that the larger community will not provide normal law enforcement services to them, are prepared to forgo their own constitutional rights.").

³³ The Chicago City Counsel included a number of findings in the preamble to the ordinance. See Appendix A.

³⁴ CHICAGO, ILL. MUN. CODE § 8-4-015 (added June 17, 1992; repealed Feb. 16, 2000). See Appendix A for the full text of the ordinance. During the three years of active enforcement, "police broke up some 89,000 public gatherings and arrested 42,000 people who didn't move fast enough or far enough to suit the cops." Steven Chapman, *Court Upholds America's Right to Hang Out*, CHI. TRIB., June 13, 1999, at 19. See also Gary Marx & Terry Wilson, *Anti-Gang Law's Loss Won't Have Big Impact*, CHI. TRIB., June 13, 1999, at 1 ("Chicago police records show that 41,741 people were arrested under the Gang Congregation Ordinance between 1992, when the City Counsel approved it, and 1995, when an Illinois Appellate Court ruled the ordinance unconstitutional and the city stopped enforcing it").

³⁵ See notes 28-30, *supra*; note 74, *infra*.

³⁶ These terms are used in an interchangeable and somewhat indiscriminate manner. Broken windows or order-maintenance policing "involves the use of law enforcement resources to attack visible signs of disorder." Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 L. & SOC'Y REV. 805, 822 (1998). In contrast, community policing seeks working relationships between police and community members so that the latter has "a greater voice in setting local police priorities and involv[es] them in efforts to improve the overall quality of life in their

have a malignant meaning—"a signal that no one cares"³⁷—and a criminogenic influence on impressionable individuals. By suppressing the cues of rampant criminality such as gang congregation, law can alter the social meaning of gang membership and the influence of gang norms. Chicago's loitering ordinance, these scholars suggested, was not a tool of oppression but a moderate strategy to counter the harmful effects of gang-related activity.³⁸

The effect of the ordinance in particular and order-maintenance policing in general, however, were exceptionally controversial. A number of academics criticized the social meaning theory and its alleged legal justification as ill-informed and imprudent.³⁹ Bernard Harcourt, for instance, reevaluated

neighborhoods." ROBERT TROJANOWICZ & BONNIE BUCQUEROUX, *COMMUNITY POLICING* 5 (1990). See also HERMAN GOLDSTEIN, *PROBLEM-ORIENTED POLICING* (1990) (articulating a policing methodology directed at solving specific problems in the community).

³⁷ James Q. Wilson & George L. Kelling, *Broken Windows*, *ATLANTIC MONTHLY*, Mar. 1982, at 29, 31.

³⁸ See, e.g., Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1163-65 (1998); Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. L.F. 197, 210, 213; Tracey L. Meares & Dan M. Kahan, *Black, White and Gray: A Reply to Alschuler and Schulhofer*, 1998 U. CHI. L.F. 245, 259. See also Meares & Kahan, *Law and (Norms of) Order*, *supra* note 36; Tracey L. Meares & Dan M. Kahan, *When Rights are Wrong*, in *The New Democracy Forum*, *BOSTON REV.*, Apr./May 1999. See also RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 76-167 (1998); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996); Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1256 (1994).

³⁹ See, e.g., Roberts, *Foreword*, *supra* note 32; Cole, *supra* note 32; Alschuler & Schulhofer, *supra* note 32; Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998). Ironically, Professor Randall Kennedy, a noted proponent of protecting minority communities through greater police discretion, split ranks with the leading advocates of the "new community policing." Professors Dan Kahan and Tracey Meares, on the issue of Chicago's gang-loitering ordinance. See Brief of Chicago Alliance for Neighborhood Safety et al., as Amici Curiae in Support of Respondents, *City of Chicago v. Morales*, 1998 WL 642555 (U.S. Sept. 11, 1998) (No. 97-1121) (Profs. Randall L. Kennedy, Stephen J. Schulhofer & Randolph N. Stone, attorneys for amici curiae); Brief of Chicago Neighborhood Organizations as Amicus Curiae in Support of Petitioner, *City of Chicago v. Morales*, 1998 WL 328366 (U.S. June 19, 1998) (No. 97-1121) (Profs. Dan M. Kahan & Tracey L. Meares, attorneys for amicus curiae).

one study claiming a connection between order-maintenance policing and crime reduction;⁴⁰ with a more discerning analysis, he found that the alleged correlation evaporated.⁴¹ Professor Harcourt also refuted the obtuse cause-and-effect rhetoric that associated the decline in crime with a broken windows-style approach to law enforcement.⁴²

B. ROUND 2—ADJUDICATION

After a series of trial court proceedings, a state appellate court held that the gang-loitering ordinance was unconstitutional⁴³ and the Illinois Supreme Court affirmed.⁴⁴ The U.S. Supreme Court granted certiorari and, in a splintered opinion, held that Chicago's ordinance was inconsistent with principles of due process.⁴⁵

1. *Stevens' Opinion*

Justice John Paul Stevens, speaking for either a six-person majority or a three-member plurality, offered a handful of fundamental flaws in the gang-loitering law. Joined by Justices David Souter and Ruth Bader Ginsburg, Stevens suggested that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth

To the consternation of Kahan and Meares, Kennedy signed on to a brief *opposing* the Chicago anti-gang ordinance. "I was definitely surprised and a little disappointed by that," says Kahan. "I mean, he's the person who inspired this whole new conception of how criminal law and policing and race relate to each other." Kennedy, who is largely sympathetic to quality-of-life policing initiatives ("I think laws against littering and spitting and jumping through turnstiles do make people feel they can use the streets"), says he can understand Kahan's disappointment. "A good number of people wrote and e-mailed me to say, 'Gee, I read your book, I thought you'd be on the other side,'" he says. But Kennedy stands by his position. "Do the police have to have discretion—of course they do. The question is, Do they need that authority *augmented*? I think, to the contrary, we need to make sure they are doing what they're supposed to do." Kahan and Meares, he adds, "seem to think political power has changed so much that racial minorities don't have to worry about the police as armies of occupation. I think they are much too sanguine on that."

Eyal Press, *The Color Test*, LINGUA FRANCA, Oct. 2000, at 58.

⁴⁰ WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* (1990).

⁴¹ Harcourt, *supra* note 39, at 309-329.

⁴² *Id.* at 331-39.

⁴³ *City of Chicago v. Youkhana*, 660 N.E.2d 34 (Ill. App. Ct. 1995).

⁴⁴ *City of Chicago v. Morales*, 687 N.E.2d 53 (Ill. 1997).

⁴⁵ *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999).

Amendment.”⁴⁶ There is, in other words, a basic right to peacefully stand on the corner, sit on a park bench, or stroll down the street.⁴⁷

Justice Stevens, however, saw no need to decide whether the ordinance sufficiently infringed on constitutionally protected liberty.⁴⁸ Instead, he found that the statutory scheme was so permeated with ambiguities as to render it unenforceable consistent with the Constitution. Specifically, he articulated two independent reasons that doomed the ordinance under the doctrinal rubric of void-for-vagueness. First, the loitering law failed to provide ordinary citizens with adequate notice of proscribed conduct. Loitering was statutorily defined as “remain[ing] in any one place with no apparent purpose,” a description that Stevens found loaded with uncertainty.⁴⁹

Stevens also dismissed the idea that notice is provided when police order loiterers to disperse, a necessary prerequisite to a valid arrest under the ordinance.⁵⁰ A command to “move along” offers no indication of the boundaries between lawful and unlawful conduct—it is a direction backed by force, not a civics les-

⁴⁶ *Id.* at 53 (Stevens, J., joined by Souter and Ginsburg, JJ.).

⁴⁷ This harks back to the words of Justice Douglas in his *Papachristou* opinion:

“Wandering or strolling” are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.

Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972). Referring to this language, the Illinois Supreme Court had previously held that Chicago’s law violated substantive due process rights to travel, locomotion, freedom of movement, and association with others. *Morales*, 687 N.E.2d at 65.

⁴⁸ *Morales*, 527 U.S. at 55. Stevens’ analysis of the right to loiter was only offered as a potential justification for a facial, rather than as-applied, challenge to the loitering ordinance. *Id.* at 52-54. The dissenters, however, painted this portion of the plurality opinion as pure substantive due process which infected the entire opinion. See *id.* at 83-86 (Scalia, J., dissenting).

⁴⁹ *Id.* at 56-57 (Stevens, J., joined by Souter and Ginsburg, JJ.):

It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an “apparent purpose.” If she were talking to another person, would she have an apparent purpose? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose?

⁵⁰ *Id.* at 58-60.

son—nor can it retroactively provide sufficient warning after the predicate activity has already occurred.⁵¹ Moreover, any dispersal order has its own ambiguities: “After such an order issues, how long must the loiterers remain apart? How far must they move?”⁵² To Stevens, these uncertainties further compounded the definitional vagueness of prohibited conduct.

Although he was only able to muster two additional votes on the issue of notice, Justice Stevens garnered a majority of the Court under the second prong of the void-for-vagueness doctrine. Criminal laws can also violate due process by authorizing or encouraging arbitrary and discriminatory enforcement.⁵³ Unless a legislative body establishes minimal guidelines to govern and circumscribe the use of official coercion, a statute “necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat.”⁵⁴ That type of unbridled discretion is inconsistent with a constitutional scheme geared against the threat of government tyranny.

According to the *Morales* majority, Chicago’s ordinance suffers from precisely that evil. Police officers are vested with absolute discretion to denominate certain conduct as “loitering,” subject to a dispersal order and possible arrest.⁵⁵ Whether a street congregation contains a suspected gang member, whether they have an “apparent purpose,” and whether they have sufficiently complied with a dispersal order are questions solely within the ambit of law enforcement.⁵⁶ Such official power might be conscientiously employed by a beat cop, with an eye toward filling in missing details consistent with the legislative intent. But it seems equally plausible that broad grants of discretionary authority will be used as blunt street-sweeping devices against suspicious characters rather than suspicious conduct.⁵⁷ The gang-loitering ordinance, the Court concluded, was simply too dangerous a tool to be left in the hands of law enforcement.⁵⁸

⁵¹ *Id.* at 58-59.

⁵² *Id.* at 59.

⁵³ *Id.* at 60 (Stevens, J., for the Court).

⁵⁴ *Id.* (quoting *Kolendar v. Lawson*, 461 U.S. 352, 359 (1983)).

⁵⁵ *Id.* at 60-64.

⁵⁶ *Id.* See also *id.* at 56-60 (Stevens, J., joined by Souter and Ginsburg, JJ.).

⁵⁷ *Id.* at 60-62 (Stevens, J., for the Court).

⁵⁸ *Id.* at 64.

2. *Scalia's Dissent*

The *Morales* decision aroused sharp disapproval from three members of the Court, most notably Justice Antonin Scalia.⁵⁹ Critics have become accustomed to his often witty but sometimes heavy-handed dissents, respecting his intellect while ignoring the rhetoric as just Scalia being Scalia.⁶⁰ His salvos in *Morales*, however, might represent a new high (or low) in Scalian lore,⁶¹ chock full of stinging one-liners, historical analogies, and artistic references.⁶²

Core to his worldview are deference to majoritarian decisionmaking by the political branches and a limited role for judicial review, stances reaffirmed in Scalia's analysis of Chicago's gang-loitering law. Readers are reminded that Chicagoans were once free to "drive about the city at whatever speed they wished" or "stand around and gawk at the scene of an accident."⁶³ But

⁵⁹ In his separate dissent, Justice Thomas began by noting the "inestimable" "human costs exacted by criminal street gangs," *id.* at 98 (Thomas, J., dissenting), and arguing that Chicago's gang-loitering ordinance was "the product of [a] democratic process—the council's attempt to address these social ills." *Id.* at 101. He criticized the plurality for derogating the Court's substantive due process framework, ignoring America's long history with vagrancy laws, and distorting precedents to concoct a fundamental right to loiter. *Id.* at 102-06. Thomas then argued that the ordinance provided adequate standards to guide police in their discretionary role as peace officers, *id.* at 107-11, and offered sufficient notice for "[p]ersons of ordinary intelligence." *Id.* at 112-14. "By focusing exclusively on the imagined 'rights' of" gang members and their associates, Thomas concluded, "the Court today has denied our most vulnerable citizens the very thing that Justice Stevens elevates above all else—the 'freedom of movement.' And that is a shame." *Id.* at 115.

⁶⁰ See, e.g., David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1387 n.56 (1999) ("[I]f we recognize the personal nature with which Scalia presses his points, excesses we find in his analysis might properly be attributed to emotional zeal rather than to a failure of his vaunted intellect.").

⁶¹ Justice Scalia apparently has groupies. See, e.g., <<http://members.aol.com/schwenkler/scalia/>> (web-site entitled "Cult of Scalia"); <www.uchicago.edu/~jfmitch/scalia/index.html> (web-site entitled "The Scalia Shrine") (visited May 1, 1999); Charles Krauthammer, *Supreme Hypocrisy*, WASH. POST, June 30, 2000, at A31 ("Some people have John Grisham. Others Tom Clancy. Not me. For sheer power, stiletto prose and verbal savagery, I'll take Antonin Scalia.").

⁶² The dissent was sprinkled with allusions to *West Side Story* and *Through the Looking Glass*. *Morales*, 527 U.S. at 81-82, n.5 (Scalia, J., dissenting) ("With apologies for taking creative license with the work of Messrs. Bernstein, Sondheim, and Laurents."), *id.* at 94 ("This side of the looking glass, just the opposite is true."), and an analogy to President Eisenhower's use of force to desegregate public schools in Little Rock. *Id.* at 90-91.

⁶³ *Id.* at 73.

the citizens of Chicago, through their duly elected representatives, determined that it was eminently reasonable to place a mild limit on individual freedom by erecting speed limits and forcing spectators to move along.⁶⁴ Similar prophylactic laws prohibit "riding a motorcycle without a safety helmet, . . . starting a campfire in a national forest, or selling a safe and effective drug not yet approved by the FDA"⁶⁵—all of which undoubtedly pass constitutional muster.

So it was with the loitering law, Justice Scalia contended: "[T]he city has been afflicted with criminal street gangs . . . congregat[ing] in public places to deal drugs and to terrorize the neighborhoods by demonstrating control over their 'turf' . . . [making] residents of the inner city [feel] that they [are] prisoners in their own homes."⁶⁶ Preventing gang members and their entourage from congregating on street corners seemed, to Scalia, just as reasonable as requiring drivers to buckle-up. In "our democratic system" of majority rule, "[t]his Court has no business second-guessing either the degree of necessity or the fairness" of a publicly supported municipal ordinance.⁶⁷

Along the way to this conclusion, Justice Scalia took a number of jabs at his colleagues. Evoking the lineage of *Marbury v. Madison*,⁶⁸ he paid heed to the problems of countermajoritarian adjudication and the role that standing plays in limiting the ensuing difficulty.⁶⁹ In particular, Scalia argued that the Court oversteps its boundaries when advisory opinions in the guise of facial challenges are free from the case-or-controversy requirements of the Constitution.⁷⁰ It is bad enough that legal standing in "hot-button social issues" is subject to "a 'political correctness' exception"; those cases were "at least predictable," Scalia noted, and arguably connected to substantive rights.⁷¹ Yet in *Morales*, only the imaginary "Fundamental Freedom to Loiter" is

⁶⁴ *Id.*

⁶⁵ *Id.* at 98.

⁶⁶ *Id.* at 73-74.

⁶⁷ *Id.* at 97-98.

⁶⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁶⁹ *Morales*, 527 U.S. at 74-75 (Scalia, J., dissenting).

⁷⁰ *Id.* at 74-83.

⁷¹ *Id.* at 81.

at stake, a term that “utterly impoverishes our constitutional discourse.”⁷²

3. O'Connor's Concurrence

The *Morales* majority/plurality leaves many questions unanswered for future litigants and criminal procedure doctrine in general, while the dissents merely deconstructed the Court's decision. At a minimum, other loitering or vagrancy statutes will be exposed to renewed constitutional suspicion. The invalidated Chicago law seems less blunt and far-reaching than a Jacksonville ordinance struck down by the Court in 1972, which punished a litany of shady characters and disreputable conduct.⁷³ As such, *Morales* arguably places tighter restraints on legislative bans of facially innocuous activity.⁷⁴ But the boundaries set by the majority/plurality opinion are fuzzy at best.

Enter Justice O'Connor. Her concurrence recognized the grave consequences of gangland violence and the need for a degree

⁷² *Id.* at 84. Justice Scalia also dismissed his colleagues' legal interpretations as hermeneutic gymnastics. *See, e.g., id.* at 94 n.12 (referring to the Court's statutory construction as “interpretive inanity”); *id.* at 90 n.9 (“This notion that a prescription which is itself not unconstitutionally vague can somehow contribute to the unconstitutional vagueness of the entire scheme is full of mystery—suspending, as it does, the metaphysical principle that nothing can confer what it does not possess.”).

⁷³ *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). The statute in *Papachristou* read:

Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished . . . by 90 days' imprisonment, \$500 fine, or both.

Id. at 156 n.1.

⁷⁴ As suggested earlier, the sweep of heightened constitutional scrutiny includes not only pure vagrancy laws like the one in *Papachristou* (*see also* *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965) (striking down loitering law)), and anti-congregation bans such as Chicago's ordinance (*see also* *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (striking down anti-congregation law)), but also statutes requiring loiterers to provide on demand credible identification and account for their presence. *See* *Kolendar v. Lawson*, 461 U.S. 352 (1983).

of discretion in law enforcement,⁷⁵ while at the same time agreeing with the Court that the ordinance provides police with virtually limitless authority to implement its provisions.⁷⁶ Yet O'Connor believed it inadequate to merely strike down the law without guidance for the future and instead suggested that "there remain open to Chicago reasonable alternatives to combat the very real threat posed by gang intimidation."⁷⁷ She then offered a road map for legislatures to follow in enacting a constitutional gang loitering ordinance:

For example, the Court properly and expressly distinguishes the ordinance from laws that require loiterers to have a "harmful purpose," from laws that target only gang members, and from laws that incorporate limits on the area and manner in which the laws may be enforced. In addition, the ordinance here is unlike a law that "directly prohibit[s]" the "presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways," that "intimidates residents." . . . The term "loiter" might possibly be construed in a more limited fashion to mean "to remain in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities." . . . [Lawmakers might also place] limitations that restricted the ordinance's criminal penalties to gang members or that more carefully delineated the circumstances in which those penalties would apply to non-gang members.⁷⁸

Justice O'Connor noted that such a scheme would be consistent with the findings of the Chicago City Council while avoiding the unconstitutional vagueness of the original ordinance.⁷⁹

⁷⁵ *Morales*, 527 U.S. at 65 (O'Connor, J., concurring in part and concurring in the judgment).

⁷⁶ *Id.* at 64-67.

⁷⁷ *Id.* at 67.

⁷⁸ *Id.* at 67-68.

⁷⁹ *Id.* at 68. In his brief concurrence, Justice Kennedy argued that an order to disperse by itself was not "sufficient to eliminate doubts regarding the adequacy of notice under this ordinance." *Id.* at 69 (Kennedy, J., concurring in part and concurring in the judgment). Although there are circumstances where an individual can be prosecuted for not complying with police commands, "[i]t does not follow . . . that any unexplained police order must be obeyed without notice of the lawfulness of the order." *Id.* Justice Breyer also issued a concurring opinion, contending that "the ordinance violates the Constitution because it delegates too much discretion to a police officer to decide whom to order to move on, and in what circumstances." *Id.* at 71 (Breyer, J., concurring in part and concurring in the judgment). In particular, Breyer argued that a facial challenge was appropriate in this context, as "the city of Chicago may no more apply this law to the defendants, no matter how they behaved,

C. ROUND 3—REENACTMENT

Immediately following the announcement of the *Morales* decision, legal commentators, government officials, and the media were characterizing Justice O'Connor's concurrence as a "road map"⁸⁰ to constructing a constitutional gang-loitering law. "[T]he Court's decision should be viewed not as a barrier," argued Dan Kahan and Tracey Meares, "but as a guide to preserving public order."⁸¹ But others were less sanguine; Stephen Schulhofer, for instance, failed to see "anything new in the decision about what cities can and can't do."⁸² "There's no question that they could write something that would be constitutional,"

than could it apply an (imaginary) statute that said, 'It is a crime to do wrong,' even to the worst of murderers." *Id.*

⁸⁰ Jan Crawford Greenburg, *Top Court Ruling Shows Way to a Legal Anti-Loitering Law*, CHI. TRIB., June 11, 1999, at A1 ("O'Connor's concurrence . . . was remarkable because it gave government officials what several discerned to be a 'road map' for writing similar laws that would pass constitutional scrutiny."); Editorial, *The End of An Anti-Gang Law*, CHI. TRIB., June 13, 1999, at A18 ("Despite losing, City Corporation Counsel Brian Crowe applauded the ruling for offering 'a partial road map as to where we should go in the future.'"). See also Editorial, *High Court Gangs Up on Bad Law*, BUFF. NEWS, June 20, 1999, at H2 ("[T]he choice is not between this bad law or none at all In this case, the nation's High Court offered excellent advice to Chicago and other communities with gang problems: You can do better. Try again with laws containing more specific provisions to better guide police and inform citizens."). But see Edwin C. Yohnka, *Anti-Loitering Spin*, CHI. TRIB., June 18, 1999, at 30 ("The attempt by City Hall to spin the [*Morales*] decision as a victory is overreaching and unsupportable It is important to note that the High Court's ruling is not a victory for a legal argument, nor does it legitimize a political posture. It's a vindication for the thousands of young, African-American and Latino males who were subjected to unnecessary arrests under the ordinance."); Al Knight, *When may a cop say, 'move on'?*, DENV. POST, June 17, 1999, at B11 ("There are a lot of objectionable elements to the Court's ruling, but the most objectionable of all is the reasoning advanced by [Justice] O'Connor to support it. O'Connor joined with the majority invalidating the ordinance but then turned around and suggested that fixing the problem she has just helped create would not be difficult Unfortunately, the drafting suggestion is all but useless, even assuming that the Chicago City Counsel wants or needs O'Connor's help in doing the job it, not the Court, was elected to perform Here's a thought that arises quite naturally from the Supreme Court's recent work: If the Justices weren't so anxious to usurp the legislative function, they just might be more able to focus on writing soundly reasoned judicial opinions.").

⁸¹ Dan Kahan & Tracey Meares, *Public-Order Policing Can Pass Constitutional Muster*, WALL ST. J., June 15, 1999, at A18.

⁸² Editorial, *The End of An Anti-Gang Law*, *supra* note 80 (quoting Prof. Stephen Schulhofer).

Professor Schulhofer argued, "I wish they had done that seven years ago."⁸³

After the initial excitement of *Morales* had worn off, the concept of reenactment laid dormant for more than six months. Then in early January of this year, Chicago Mayor Richard Daley announced that he would introduce a new gang-loitering ordinance mirrored after the O'Connor concurrence.⁸⁴ Although admitting that the revised law might still be deemed unconstitutional, Daley promised that "if this ordinance fails, we will be right back with another plan."⁸⁵ The proposed law received the necessary committee support in early February⁸⁶ and was passed by the Chicago City Council two weeks later by an overwhelming margin.⁸⁷

As drafted, the new gang-loitering ordinance followed most (but not all⁸⁸) of Justice O'Connor's road map.⁸⁹ Per the *Morales* concurrence, gang loitering is defined as "remaining in any one place under circumstances that would warrant a reasonable person to believe that the purpose or effect of that behavior is to enable a criminal street gang to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities."⁹⁰ Likewise, the statute places limits on

⁸³ *Chicago v. Chicago*, U. CHI. L. S. REC., Fall 1999, at 11 (quoting Prof. Stephen Schulhofer).

⁸⁴ Gary Washburn, *Daley Will Propose New Gang Loitering Law*, CHI. TRIB., Jan. 7, 2000, at A1.

⁸⁵ Gary Washburn, *Daley Pursuing Anti-Gang Law Despite Challenges*, CHI. TRIB., Jan. 12, 2000, at A1.

⁸⁶ Gary Washburn, *Anti-Gang Loitering Law on Way to City Council*, CHI. TRIB., Feb. 4, 2000, at A1.

⁸⁷ Gary Washburn, *City OK's Gang Law*, CHI. TRIB., Feb. 17, 2000, at A1.

⁸⁸ Specifically, the new ordinance maintained criminal liability for non-gang members who congregate with gang members. See Appendix B, *infra* (providing text of new ordinance). But see *Morales*, 527 U.S. at 67-68 (O'Connor, J., concurring) (suggesting limits on non-gang member liability).

⁸⁹ CHICAGO, ILL., MUN. CODE § 8-4-015 (added Feb. 16, 2000). Like the original law, the new gang-loitering ordinance contained a number of findings in its preamble. See Appendix B for the preamble and text of the ordinance. The Chicago City Counsel also included a new provision using a similar procedural mechanism as the gang-loitering ordinance but specifically geared toward narcotics-related loitering. *Id.* § 8-4-017. That provision, however, does not require that the affected individual be a gang member.

⁹⁰ *Id.* § 8-4-015(d)(1). Compare this language to O'Connor's proposed definition in *Morales*, 527 U.S. at 68 (O'Connor, J., concurring).

the area and manner of enforcement,⁹¹ requiring the Police Superintendent to designate areas of Chicago subject to the ordinance and only after consulting with law enforcement agents, elected or appointed officials, and community-based organizations.⁹² In addition, suspects must be warned as to the distance they must travel—out of “sight and hearing of the place at which the order was issued”—and the period of time in which the order is in effect—“during the next three hours.”⁹³

Officials faced heavy pressure to begin enforcement immediately⁹⁴ but nonetheless held back out of concern for litigation.⁹⁵ “These are very complicated issues that have to be done right,” argued Police Superintendent Terry Hilliard, “because we know that as soon as we designate the first hot spot, the ACLU and every other organization that fought us at the City Council and the Supreme Court are going to come after us.”⁹⁶ With months of preparation—training police officers,⁹⁷ designating areas of enforcement,⁹⁸ educating the public,⁹⁹ and so on—the Chicago Police Department began implementing the new gang-loitering law on August 17, 2000.¹⁰⁰ In the first month

⁹¹ See *Morales*, 527 U.S. at 67 (O'Connor, J., concurring) (contrasting ordinance with “laws that incorporate limits on the area and manner in which the laws may be enforced”).

⁹² CHICAGO, ILL., MUN. CODE § 8-4-015(b) (added Feb. 16, 2000).

⁹³ *Id.* § 8-4-015(a) (iii).

⁹⁴ See, e.g., Gary Washburn, *Loitering Law Not Yet Enforced*, CHI. TRIB., Aug. 10, 2000, at 1; Editorial, *City Must Not Let Violence Continue*, CHI. SUN-TIMES, July 24, 2000, at 27; Editorial, *Tolerate No More of Gangs' Violence*, CHI. SUN-TIMES, July 21, 2000, at 39; Fran Spielman et al., *City's Hands Tied on Gangs*, CHI. SUN-TIMES, July 21, 2000, at 1.

⁹⁵ See Washburn, *Loitering Law Not Yet Enforced*, *supra* note 94 (“Certainly we expect a challenge to the ordinance,” said city Corporation Counsel Mara Georges. “I think we will be successful on the challenge, but the more care the Police Department can take, the easier any defeat of a challenge is going to be. I certainly appreciate their efforts in taking it carefully, making sure [officers] are ready and being very judicious about selection of hot spots.”).

⁹⁶ Fran Spielman, *Hilliard to Review Gang 'Hot Spot' Suggestions*, CHI. SUN-TIMES, Aug. 10, 2000, at 10.

⁹⁷ See Spielman et al., *City's Hands Tied*, *supra* note 94.

⁹⁸ See Fran Spielman, *Police Districts Choose 'Hot Spots' for Gang Law*, CHI. SUN-TIMES, Aug. 9, 2000, at 3.

⁹⁹ See Terry Wilson, *Students Get Lowdown on Loitering*, CHI. TRIB., June 7, 2000, at 3.

¹⁰⁰ See Rick Hepp, *Police Enforcing New Anti-Loitering Law*, CHI. TRIB., Aug. 22, 2000, at 1; Frank Main, *Police: Arrest Sends Message*, CHI. SUN-TIMES, Aug. 22, 2000, at 8.

and a half of enforcement, nearly 400 people had been "moved" from the designated areas.¹⁰¹

D. ROUND 4—FUTURE ADJUDICATION

Despite the ACLU's concession that Chicago officials "did a good job" of incorporating the O'Connor concurrence,¹⁰² a number of issues remain and will likely result in court challenges. The new law applies not only to gang members but to those found in their presence,¹⁰³ leading Professor Schulhofer to quip that it is "badly misnamed" and should be called a "gang and anyone else" ordinance.¹⁰⁴ Far be it from me to suggest that those who congregate around gang members are naive cherubs; many are violent predators. But there is something distinctly un-American about dragnet-style policing pursuant to a presumption of guilt by association.¹⁰⁵ While the broad reach of the

¹⁰¹ See Raoul V. Mowatt, *Daley Stands by Anti-Gang Loitering Law During Conference on Community Policing*, CHI. TRIB., Oct. 1, 2000, at 3. However, officers have made only 12 arrests since implementation began. "When we first came up with this, we stated that it was not about arrests," Chicago Police Superintendent Terry Hillard says. "This is about getting [gang members] to move and disperse. I am elated that we have only arrested 12." Gary Washburn, *Police Effort to Promote Blacks is Hit by Alderman*, CHI. TRIB., Oct. 22, 2000, at 3.

¹⁰² Washburn, *Daley Pursuing Anti-Gang Law*, *supra* note 85 (quoting Illinois ACLU spokesman Ed Yohnka).

¹⁰³ But see *Morales*, 527 U.S. at 68 (O'Connor, J., concurring) (suggesting "limitations that restricted the ordinance's criminal penalties to gang members or that more carefully delineated the circumstances in which those penalties would apply to non-gang members").

¹⁰⁴ Stephen Schulhofer, *Sweeping Kids Off the Streets*, CHI. TRIB., Feb. 8, 2000, at A13.

¹⁰⁵ See, e.g., *United States v. Lane*, 474 U.S. 438, 462 (1986) (Brennan, J., concurring in part and dissenting in part) ("Rules respecting joinder are based on recognition that the multiplication of charges or defendants may confuse the jury and lead to inferences of habitual criminality or guilt by association."); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 925 (1982) ("liability . . . imposed on a 'guilt for association' theory" is impermissible under the First Amendment); *Healy v. James*, 408 U.S. 169, 186-87 (1972) ("the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization"); *United States v. Robel*, 389 U.S. 258, 265 (1967) (invalidating statute that "literally establishes guilt by association alone"); *NAACP v. Overstreet*, 384 U.S. 118, 122 (1966) ("[r]ecognizing that guilt by association is a philosophy alien to the traditions of a free society"); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) (invalidating statute that "rests on the doctrine of 'guilt by association' which has no place here"); *Bridges v. Wixon*, 326 U.S. 135, 163 (1945) (Murphy, J., concurring) (arguing that a deportation statute "completely ignores the traditional American doctrine requiring personal guilt rather than guilt by association"). Cf. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (reversing conviction for being a "gang-

ordinance will certainly catch many thugs who would otherwise slip through the net, it will snare more than a few innocent people to boot.¹⁰⁶ And that is the precise problem: In a constitutional democracy dedicated to the presumption of innocence and a belief that it is more important to exonerate the blameless than punish the guilty,¹⁰⁷ it is unacceptable to sacrifice the fundamental rights of the few for the good of the many. An individual right that may be defeated this way is, in fact, no right at all.¹⁰⁸

Opponents also note the disparate impact on racial minorities, suggesting that the law "legalizes racial profiling."¹⁰⁹ Although neutral on its face, the ordinance will be applied almost exclusively in poor communities of color.¹¹⁰ "It seems there are

ster"); *Davis v. Mississippi*, 394 U.S. 721 (1969) (invalidating police round-up of twenty-four Black youths based on victim's description of rapist as a young Black male); *Korematsu v. United States*, 323 U.S. 214, 242-42 (1944) (Jackson, J., dissenting) (criticizing the internment of Japanese-Americans during World War II as violating the "fundamental assumption under[lying] our system . . . that guilt is personal and not inheritable").

¹⁰⁶ See, e.g., Washburn, *Anti-Gang Loitering Law on Way*, *supra* note 86 ("Rev. Jeffrey Haynes, an African-American pastor, predicted that some 'innocent kids are going to be harassed and arrested' along with gang members and dope dealers. But he contended the ordinance is necessary nonetheless."); Gary Washburn, *City OK's Gang Law, Expects Challenges*, CHI. TRIB., Feb. 17, 2000, at 1 ("Alderwoman Freddrenna Lyle said it will allow officers 'to sweep up the innocent along with the guilty.'"); Fran Spielman, *New Anti-Gang Law Passes*, CHI. SUN-TIMES, Feb. 17, 2000, at 3 ("The ACLU released a statement saying it was 'disheartening' that the Council had passed the ordinance. 'This ensures that thousands of innocent persons of color will be arrested for no good reason.'").

¹⁰⁷ Cf. *Furman v. Georgia*, 408 U.S. 238, 367 n.158 (1972) (Marshall, J., concurring) (quoting William O. Douglas) ("We believe that it is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned."); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 358 (15th ed. 1809) ("[I]t is better that ten guilty persons escape, than that one innocent suffer.").

¹⁰⁸ See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1978) ("Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.").

¹⁰⁹ Spielman, *New Anti-Gang Law Passes*, *supra* note 106 (quoting Alderwoman Leslie Hairston).

¹¹⁰ *Id.* See also Dorothy Roberts, *It's All About Race*, CHI. TRIB., Jun 18, 1999, at 31 ("Racism is a motivating concern underlying the constitutional objections to vague loitering laws like the Chicago ordinance. Broadly worded statutes permit police to haul off the streets people who look suspicious even though they have committed no criminal conduct. Without clear guidelines, police have a tendency to enforce the law against groups they disfavor and this often means members of minority groups.").

two laws,”¹¹¹ argued a young Latino. “There’s one for this kind of area, and there’s another for everyone else.”¹¹² Given the Court’s exacting legal standard,¹¹³ however, litigants will have difficulty mounting a selective prosecution claim. Still, racially disproportionate enforcement tends to decrease community trust and cooperation with law enforcement,¹¹⁴ as “large segments of the population [will] believe they are suspects simply because of their age, race and location.”¹¹⁵

The new ordinance may suffer a variety of other defects as well, including problems related to evidentiary proof,¹¹⁶ in-

¹¹¹ Gary Washburn & Eric Ferkenhoff, *City Targets 86 Hot Spots for Gangs, Keeps List Secret*, CHI. TRIB., Aug. 23, 2000, at A1.

¹¹² *Id.*

¹¹³ See *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (“The claimant must demonstrate the federal prosecutorial policy ‘had a discriminatory effect and it was motivated by a discriminatory purpose.’”). See also Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998) (critiquing the Court’s selective prosecution standard).

¹¹⁴ See Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1154-63 (2000).

¹¹⁵ Washburn & Ferkenhoff, *supra* note 111 (quoting Illinois ACLU spokesman Ed Yohnka).

¹¹⁶ Government is generally required to prove all elements of a crime beyond a reasonable doubt, see *Apprendi v. New Jersey*, 120 S. Ct. 2348, 2355-56 (2000); *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *In re Winship*, 397 U.S. 358, 364 (1970); and cannot shift that burden of proof to the defendant. See *Mullaney v. Wilbur*, 421 U.S. 684, 702-704 (1975). But see *Martin v. Ohio*, 480 U.S. 228, 236 (1987) (“We are no more convinced that the Ohio practice of requiring self-defense to be proved by the defendant is unconstitutional than we are that the Constitution requires the prosecution to prove the sanity of a defendant who pleads not guilty by reason of insanity.”); *Patterson v. New York*, 432 U.S. 197, 210 (1977) (“We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused.”). Gang membership or physical proximity to a gang member is integral to the crime itself and apparently constitutes an element of the offense. The ordinance provides an elaborate definition of “criminal street gang,” CHICAGO, ILL., MUN. CODE § 8-4-015(d)(2) (added Feb. 16, 2000), but leaves some doubt as to whether a prosecutor must prove the defendant or his associate was, in fact, a gang member. Without establishing actual gang membership, the due process requirements of *Winship* and its progeny would seem to have been circumvented. See Wilson, *Students Get Lowdown*, *supra* note 99 (noting that police claims of being able to distinguish “gang members from anyone else” “drew raucous laughter from 300 students”). In addition to proof problems, the ordinance may suffer from a variety of definitional ambiguities. For example, how far must individuals “remove themselves” in order to be out of “sight or hearing of the place at which the order was issued”? CHICAGO, ILL., MUN. CODE § 8-4-015(a) (added Feb. 16, 2000). Is it sufficient to go around the block and quietly carry on the conversation?

fringement on protected liberty,¹¹⁷ the prohibition on status crimes,¹¹⁸ and the secrecy of enforcement areas.¹¹⁹ Challengers

¹¹⁷ The ordinance arguably threatens, for example, associational liberty emanating from the First Amendment. See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (invalidating compelled disclosure law); *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (similar); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 558 (1963) (similar). "An individual's freedom to speak," the Court has noted, "could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). See also *City of Chicago v. Morales*, 687 N.E.2d 53, 65 (1997) (arguing that Chicago's ordinance impinges upon, *inter alia*, "the general right to associate with others"). But see *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) ("we do not think the Constitution recognizes a generalized right of 'social association' that includes chance encounters in dance halls").

¹¹⁸ The ordinance has an uncomfortable resemblance to those status crimes violating either due process or the Eighth Amendment's ban on excessive punishment. In *Lanzetta v. New Jersey*, the Court invalidated a law making it a crime to be a "gangster," 306 U.S. 451, 458 (1939), while in *Robinson v. California* it struck down a statute punishing individuals for their drug addiction. 370 U.S. 660, 667 (1962). If "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold," *id.*, it is at least arguable that six-months imprisonment for public congregation is equally excessive. But see *Powell v. Texas*, 392 U.S. 514, 532 (1968) (upholding an alcoholic's conviction for public drunkenness). Moreover, the dispersal order, in itself, is a form of non-adjudicated punishment; affected individuals are essentially banished from certain public places for a period of time. Admittedly, the penalty is not banishment in the historical sense—being cast out into the wilderness without hope of repatriation. Yet this is a difference in degree rather than in kind: People are still being ordered to leave an area, backed by threat of coercive force.

¹¹⁹ It is troublesome that Chicago will not announce those areas subject to the ordinance. Gary Washburn, *Loitering Proposal Raising Concern*, CHI. TRIB., Feb. 3, 2000, at A1 ("The ordinance does not require the [hot spot] designations be made public, and I think the Police Department . . . general practice would be not to publicize the precise boundaries of designated areas," Deputy Corporation Counsel Lawrence Rosenthal said at a hearing on the new ordinance."). See also Washburn & Ferkenhoff, *supra* note 111 ("That disturbs me," said Alderwoman Freddrenna Lyle, who said she learned of the start of enforcement of the new ordinance only after it was announced Tuesday by police Superintendent Terry Hilliard at a press conference. "I don't even know what the criteria are" for designation, Lyle said.); Editorial, *Chicago's Guessing Game on Gangs*, CHI. TRIB., Sep. 3, 2000, at 20 (criticizing failure to announce enforcement areas). This type of intentional opaqueness is hard to square with the basic tenets of an open democracy. See Luna, *Transparent Policing*, *supra* note 114, at 1130-31.

Nonetheless, I admit that the inherently suspicious practice of hiding the ball from the citizenry does not rise to the level of a constitutional violation. Proponents are likely to forward at least three arguments in support of enforcement secrecy: (1) announcement of designated areas would reduce property values or result in insurance redlining in those neighborhoods; (2) law enforcement would lose a tactical advantage if gang members were aware of the geographic boundaries; and (3) public disclosure of the designated areas would result in the displacement of gang bangers

can also point to parts of the majority/plurality opinion, arguing that the City's approach to gang congregation remains unconstitutionally vague and without meaningful standards for police while indiscriminately netting hoodlums and innocents alike. But despite lingering flaws, Chicago's new gang-loitering ordinance will almost certainly pass muster in the lower courts. The drafters followed the basic outlines of Justice O'Connor's road map, literally lifting words from the *Morales* concurrence.¹²⁰ Trial judges are usually not inclined to second-guess statutes that formally square with higher court prescriptions, and appellate courts can do the math of hypothetical adjudication¹²¹—the

to previously unaffected neighborhoods. Although the first claim would be deemed irrelevant if a liberty interest were being infringed, *cf.* *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985) (rejecting "negative attitude of the majority of property owners" as a legitimate basis for discriminatory zoning against mentally handicapped residents); *Moore v. City of East Cleveland*, 431 U.S. 494, 499-500 (1977) ("preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on [the] school system" were insufficient to justify zoning limits on family composition); there is no constitutional right to know where police plan to enforce a given law. (This is a descriptive rather than normative claim. For arguments favoring greater visibility of police choices and justifications, see Luna, *Transparent Policing*, *supra* note 114.) Likewise, the second argument is probably not fishy enough to be struck down under rationality review—but it is still inconsistent with the alleged purpose of the ordinance itself. If the goal is to prevent gang members from gathering in particular neighborhoods, it seems that you would want members to know the designated areas as a means of self-enforcement. But if the real aim is to inflict retribution rather than prevent gang congregation, secrecy provides an effective (and illegitimate) vehicle for punishment. *See, e.g., id.* at 1144-54 (discussing the concept of "secret law" in policing). The third claim—that full disclosure will result in gang migration to non-designated areas—will also provide a sufficient justification under deferential judicial review. The jury is still out, however, on the nature and predictability of crime displacement. *Cf.* Robert Barr & Ken Pease, *Crime Placement, Displacement, and Deflection*, 12 *CRIME & JUSTICE: A REVIEW OF RESEARCH* 277 (Tonry & Morris eds., 1990). More importantly, one would think that academic proponents of Chicago's gang-loitering ordinance would actively *encourage* displacement of gang activity. The lynchpin of their argument is that policing strategies are less objectionable if the coercive burden is shared by the general community. *See, e.g.,* Kahan & Meares, *The Coming Crisis*, *supra* note 38, at 1172-76. While it is true that the burdens of private versus public action are incommensurate, *see* Cole, *supra* note 32, at 1089-90, what better way to share the *total* burden of gang violence and official policing than to force previously unaffected neighborhoods to bear some gang-related costs?

¹²⁰ *See* note 90, *supra*.

¹²¹ *Cf. Uzzell v. Friday*, 592 F. Supp. 1502, 1516 (D.N.C. 1984) (interpreting *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)):

In his opinion announcing the judgment of the Court, Justice Powell held that the special admissions program was invalid—a ruling supported by four other Justices whose views

ordinance would receive the support of the three *Morales* dissenters and, absent a change of heart, the two votes behind the O'Connor concurrence. This does not mean, of course, that the Chicago Police Department will wield its renewed discretion in a constitutional manner. Given CPD's record of misconduct,¹²² "as applied" challenges will undoubtedly be made and possibly sustained in future litigation.¹²³ Claims against the face of the statute, however, would seem to have little chance of success.

II. CUSTODIAL INTERROGATION, 18 U.S.C. § 3501, AND *DICKERSON*

Like the gang-loitering dilemma, the issue of custodial interrogation is painted against a backdrop of police misconduct and invidious discrimination. During the nineteenth and early twentieth centuries, law enforcement frequently resorted to ruthless techniques and physical brutality in eliciting confessions.¹²⁴ Minorities and the marginalized members of society were particularly susceptible to violence under color of law.¹²⁵

were expressed in an opinion by Justice Stevens—but that, at the same time, the school could take race into account in its admissions decisions—a ruling supported by four other Justices whose views were expressed in a joint opinion and three separate opinions. As the Fourth Circuit has indicated, of the several opinions filed in *Bakke*, the opinion of Justice Powell is the one which governs this case.

¹²² See, e.g., William Neikirk & Jeff Meredith, *Contingent Asks Federal Help in Brutality Cases*, CHI. TRIB., Apr. 5, 2000, at N3.

¹²³ See Washburn & Ferkenhoff, *supra* note 111 (quoting Illinois ACLU spokesman Ed Yohnka) ("there will be a challenge to this ordinance, even if it may be on a case-by-case basis").

¹²⁴ See, e.g., FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 20, at 361-63.

Suspects were beaten all over the body, but especially on parts that would not be immediately visible when the individual was taken before a judge. Thus, some suspects were beaten with clenched fists or with brass knuckles under the kneecaps, across the abdomen, or above the kidneys, or were whipped across the torso or the soles of the feet. Kicks to the groin were not uncommon. Other times, the beatings were more obvious, as some suspects were clubbed with nightsticks, or hit with pistol butts or a baseball bat. Other documented examples of torture included hanging a handcuffed suspect over the top of an open door and using him as a "human punching bag."

JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 362 (2d ed. 1997).

¹²⁵ See FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 20, at 362 (noting that "the police enjoyed an enormous amount of discretion as far as the lower levels of society were concerned" and that "Southern blacks were always fair game"); *id.* at 463 (noting that "[p]olice brutality has been a recurrent issue" and that minorities "have historically suffered more from the 'bad cop'"). See also *Brown v. Mississippi*, 297 U.S. 278 (1936) (detailing brutal beatings of black suspects).

But while police misconduct surfaced in various government reports¹²⁶ and judicial decisions,¹²⁷ the necessity and nature of remedial action remained controversial. Historically, the Supreme Court had scrutinized confessions under a general constitutional test for *voluntariness*. Statements obtained through physical or psychological coercion—denying a suspect the “free choice to admit, to deny, or to refuse to answer”¹²⁸—violated either the Fifth Amendment right against self-incrimination¹²⁹ or the due process guarantees in the Fifth and Fourteenth Amendments.¹³⁰ Under the “totality of the circumstances,”¹³¹ the judiciary would examine whether “the defendant’s will was overborne at the time he confessed.”¹³² Despite the “amphibian”¹³³ character of voluntariness, case law plotted a list of factors and rules to guide the inquiry.¹³⁴

Frustration eventually surfaced with *de facto* case-by-case analysis, and the Court looked for other mechanisms to protect against undue coercion in custodial interrogation. The first move was to prevent federal agents from delaying appearances

¹²⁶ See, e.g., NAT’L COMM. ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931).

¹²⁷ See, e.g., *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963); *Leyra v. Denno*, 347 U.S. 556 (1954); *Malinski v. New York*, 324 U.S. 401 (1945); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Ward v. Texas*, 316 U.S. 547 (1942); *Vernon v. Alabama*, 313 U.S. 547 (1941); *White v. Texas*, 310 U.S. 530 (1940); *Canty v. Alabama*, 309 U.S. 629 (1940); *Chambers v. Florida*, 309 U.S. 227 (1940); *Brown v. Mississippi*, 297 U.S. 278 (1936).

¹²⁸ *Lisenba v. California*, 314 U.S. 219, 241 (1941).

¹²⁹ See *Bram v. United States*, 168 U.S. 532 (1897) (holding confession inadmissible under the Self-Incrimination Clause of the Fifth Amendment).

¹³⁰ See *Brown v. Mississippi*, 297 U.S. 278 (1936) (holding confessions inadmissible under the Due Process Clause of the Fourteenth Amendment).

¹³¹ See, e.g., *Haynes v. Washington*, 373 U.S. 503, 514 (1963).

¹³² *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963).

¹³³ *Columbe v. Connecticut*, 367 U.S. 568, 605 (1961).

¹³⁴ *Id.* at 601-02 (relevant factors include “extensive cross-questioning,” “undue delay in arraignment,” “failure to caution a prisoner,” “refusal to permit communication with friends and legal counsel,” “the duration and conditions of detention,” “the manifest attitude of the police toward [the suspect], his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control”). See *White v. Texas*, 310 U.S. 530, 532 (1940) (physical beatings); *Ashcraft v. Tennessee*, 322 U.S. 143, 147 (1944) (“fear of violence at the hands of a mob”); *Leyra v. Denno*, 347 U.S. 556 (1954) (abuse of physician-patient relationship to extract confession); *Lynumn v. Illinois*, 372 U.S. 528 (1963) (threatening to take away suspect’s children). See also DRESSLER, *supra* note 124, at 383-86 (discussing factors in voluntariness test).

before a magistrate in order to question an arrestee.¹³⁵ Pursuant to its supervisory powers over the lower federal judiciary, the Supreme Court held that confessions obtained during such a delay were inadmissible at trial regardless of their voluntariness. A second and more important development was the application of the Sixth Amendment right to counsel in police questioning. Within a five-week span in 1964, the Court held that: (1) law enforcement could not deliberately elicit incriminating statements from an individual outside the presence of counsel after criminal proceedings have been instituted,¹³⁶ and (2) the Sixth Amendment applies to pre-indictment interrogation and is violated when, *inter alia*, the police deny a suspect's request for counsel.¹³⁷

A. ROUND 1—MIRANDA

These initial steps set the stage for "the centerpiece of the Warren Court's revolution in American criminal procedure"¹³⁸—*Miranda v. Arizona*.¹³⁹ In a consolidated appeal, the *Miranda* Court considered four separate cases with common fact-patterns: Each defendant had given incriminating statements during custodial interrogation in a police-dominated environment without first being advised of their constitutional rights. Writing for a five-member majority, Chief Justice Earl Warren meandered through a history of the privilege against self-incrimination, a critique of law enforcement prerogatives and techniques, and an analysis of the intrinsic pressures in-

¹³⁵ This is the famous *McNabb-Mallory* rule, derived from *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957). *But see* *United States v. Alvarez-Sanchez*, 511 U.S. 350 (1994) (holding that Congress had abrogated the Court's *McNabb-Mallory* rule).

¹³⁶ *Massiah v. United States*, 377 U.S. 201 (1964).

¹³⁷ *Escobedo v. Illinois*, 378 U.S. 478 (1964). Specifically, the *Escobedo* Court held that "where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment . . ." *Id.* at 490-91.

¹³⁸ Yale Kamisar, *The Miranda Warning Takes a Body Blow*, L.A. TIMES, Feb. 17, 1999, at B7.

¹³⁹ 384 U.S. 436 (1966).

volved in police questioning.¹⁴⁰ The opinion's punch-line was a list of admonitions that police must provide before custodial interrogation on pains of evidentiary exclusion in a subsequent prosecution. Specifically, a suspect "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."¹⁴¹

These so-called *Miranda* warnings "may be the most famous words the Court has ever written,"¹⁴² more recognizable to "school children . . . than the Gettysburg Address."¹⁴³ The decision itself actually involved more than the now-legendary police mantra. As Professor Schulhofer has argued, "*Miranda* contains not one holding but a complex series of holdings."¹⁴⁴ The final step, however, provided *Miranda* its muscles—the exclusion of unwarned but possibly voluntary confessions. The decision thereby offered police a strong incentive to follow its dictates:

¹⁴⁰ Professors Richard Leo and George Thomas suggest that *Miranda* was "in many ways a unique Supreme Court decision." *THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING* 249 (Leo & Thomas eds., 1999).

To begin with, *Miranda* did not follow the pattern of the typical appellate court opinion—i.e., the application of legal principles and precedents to a set of facts. Instead, the Court first reviewed the history of the privilege against self-incrimination, then criticized contemporary police interrogation training manuals, and finally announced a set of code-like warnings and waiver requirements—all before reviewing the specific facts of the cases at hand and applying the relevant law. Perhaps more significant than its "legislative quality" is that *Miranda* broke with earlier doctrine and created a new set of rights based on the Fifth Amendment privilege against self-incrimination.

Id.

¹⁴¹ *Miranda*, 384 U.S. at 479.

¹⁴² *THE MIRANDA DEBATE*, *supra* note 140, at 249.

¹⁴³ *Id.* at xv.

¹⁴⁴ Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 436 (1987). Professor Schulhofer isolated "three conceptually distinct steps" in the majority opinion: (1) "informal pressure to speak—that is, pressure not backed by legal process or any formal sanction—can constitute 'compulsion' within the meaning of the Fifth Amendment"; (2) "this element of compulsion is present in any questioning of a suspect in custody, no matter how short the period of questioning may be"; and (3) "precisely specified warnings are required to dispel the compelling pressure of custodial interrogation." *Id.*

Either read suspects their rights or lose any subsequent statements.¹⁴⁵

The entire opinion was controversial,¹⁴⁶ but *Miranda's* exclusionary rule elicited particularly sharp responses from the dissenting justices. "In some unknown number of cases," argued Justice Byron White, "the Court's rule will return a killer, a rapist or other criminal to the streets to the environment which produced him, to repeat his crime whenever he pleases."¹⁴⁷ Justice Tom Clark agreed, suggesting that the Court's "strict constitutional specific inserted at the nerve center of crime detection may well kill the patient."¹⁴⁸ In turn, Justice John Harlan claimed that "the social costs of crime are too great to call the new rules anything but a hazardous experimentation."¹⁴⁹ *Miranda's* "new confession rules" also suffered from "ironic untimeliness," given the "massive reexamination" of police practices taking place in private organizations and government entities.¹⁵⁰

Although rebuffed by Justice Harlan as a mere "disclaimer,"¹⁵¹ the majority opinion did suggest that legislative alternatives were not foreclosed. Instead of "a constitutional straitjacket which will handicap sound efforts at reform," the opinion encouraged "Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws."¹⁵² But this invitation was not unconditional, as made clear in the very next sentence: "[U]nless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring

¹⁴⁵ But see notes 197-99, *infra* (citing exceptions to *Miranda*-based evidentiary exclusion).

¹⁴⁶ For instance, Justice Clark criticized the majority's factual basis for concluding that custodial interrogation is inherently coercive. *Miranda*, 384 U.S. at 499-501 (Clark, J., dissenting).

¹⁴⁷ *Id.* at 542 (White, J., dissenting).

¹⁴⁸ *Id.* at 500 (Clark, J., dissenting).

¹⁴⁹ *Id.* at 517 (Harlan, J., dissenting).

¹⁵⁰ *Id.* at 523.

¹⁵¹ *Id.* at 524.

¹⁵² *Miranda*, 384 U.S. at 467 (Warren, C.J., for the Court).

a continuous opportunity to exercise, the [*Miranda* warnings] must be observed.”¹⁵³

B. ROUND 2—18 U.S.C. § 3501

Miranda faced immediate derision from law enforcement and anti-crime politicians, triggering calls for the impeachment of Chief Justice Warren, proposals for a constitutional amendment, and a good deal of saber-rattling during subsequent election campaigns.¹⁵⁴ The most notable response was bundled in a massive piece of congressional legislation—the Omnibus Crime Control and Safe Streets Act of 1968. Though generically intended to “reduc[e] the incidence of crime [and] to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems,”¹⁵⁵ the Act surgically abrogated a number of the Supreme Court’s leading criminal procedure decisions.¹⁵⁶

In particular, subsections (a) and (b) of 18 U.S.C. § 3501 (“3501”) created a statutory replacement for *Miranda*. The “new” standard was virtually identical to the voluntariness test eschewed by the Court only two years earlier. Subsection (b) required federal judges to consider “all the circumstances surrounding the giving of the confession” and then provided a non-exhaustive list of factors relevant to the inquiry, including whether a defendant had been advised of his constitutional rights.¹⁵⁷ But unlike *Miranda*, the statute made clear that the

¹⁵³ *Id.* See also *id.* at 490 (“We have already pointed out that the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.”).

¹⁵⁴ See, e.g., LIVA BAKER, *MIRANDA: CRIME, LAW, AND POLITICS* (1983); ADAM CARLYLE BRECKENRIDGE, *CONGRESS AGAINST THE COURTS* (1970); FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* (1970); Patrick A. Malone, “*You have the Right to Remain Silent*”: *Miranda after Twenty Years*, 55 AM. SCHOLAR 367 (1987); George C. Thomas III, *The End of the Road for Miranda v. Arizona?: On the History and Future of Rules for Police Interrogation*, 37 AM. CRIM. L. REV. 1, 10-12 (2000).

¹⁵⁵ S. REP. NO. 90-1097 (1968), available at 1968 U.S.C.C.A.N. 2112, and on Westlaw at 1968 WL 4956.

¹⁵⁶ See *id.* (abrogating *McNabb v. United States*, 318 U.S. 332 (1943), *Mallory v. United States*, 354 U.S. 449 (1957), *Miranda v. Arizona*, 378 U.S. 478 (1964), *United States v. Wade*, 388 U.S. 218 (1967)), codified as 18 U.S.C. §§ 3501, 3502 (1968)).

¹⁵⁷ 18 U.S.C. § 3501(b) (1968).

presence or absence of such warnings "need not be conclusive" on the admissibility of a confession.¹⁵⁸

What seems less clear is the intent of congressional legislators in enacting 3501. Some have claimed that Congress was merely responding to *Miranda's* invitation for legislators "to develop their own safeguards for the privilege"¹⁵⁹ against self-incrimination.¹⁶⁰ This argument is hard to sustain, however, given the evidence before Congress that *Miranda* could not be undone by legislative fiat alone.¹⁶¹ "It is one thing to devise alternative safeguards," Charles Alan Wright scoffed, "and quite another thing to provide, as the 1968 legislation does, that no safeguards are needed."¹⁶² Yale Kamisar agreed, noting that "Congress did not walk in the door" left open by the Supreme Court and instead failed "to replace *Miranda* with a credible substitute."¹⁶³

Others contend that 3501 resulted from Congress' superior fact-finding capacity and therefore trumps the empirical conclusions underlying *Miranda*.¹⁶⁴ In particular, federal lawmakers repudiated the factual basis for inherent coercion in custodial interrogation and the continuing presence of police brutality in

¹⁵⁸ *Id.* For the text of the statute, see Appendix C, *infra*.

¹⁵⁹ *Miranda*, 378 U.S. at 490.

¹⁶⁰ See, e.g., *United States v. Dickerson*, 166 F.3d 667, 691 (4th Cir. 1999) ("Congress . . . acted in response to the Court's invitation"); 145 CONG. REC. S7024-01 (daily ed. June 15, 1999) (statement of Sen. Thurmond) (omnibus crime bill was "[i]n response to the Court's invitation"); *Hearings on S. 674, S. 917, S. 675 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong. 181 (1967) (statement of Sen. Ervin) ("the way I interpret the majority opinion in the *Miranda* case, the majority did give Congress permission to legislate in this field"); Brief of U.S. Senators as Amici Curiae in Support of Affirmance at 8-9, *Dickerson v. United States*, 2000 WL 272002 (U.S. Mar. 9, 2000) (No. 99-5525) (group of U.S. Senators detailing *Miranda's* invitation for legislative action).

¹⁶¹ See Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 CORNELL L. REV. 883, 910 (2000) (listing statements demonstrating congressional awareness of *Miranda's* constitutional status).

¹⁶² CHARLES ALAN WRIGHT, *FEDERAL PRACTICE AND PROCEDURE: CRIMINAL* § 76 at 185 (3d ed. 1999).

¹⁶³ Kamisar, *Can (Did) Congress "Overrule" Miranda?*, *supra* note 161, at 951.

¹⁶⁴ See *United States v. Dickerson*, 166 F.3d 667, 691 n.22 (4th Cir. 1999); Brief of Bipartisan Legal Advisory Group of the U.S. House of Representatives as Amicus Curiae in Support of Affirmance at 17-22, *Dickerson v. United States*, 2000 WL 271995 (U.S. Mar. 9, 2000) (No. 99-5525); Brief of Maricopa County Attorney's Office as Amicus Curiae in Support of Affirmance at 5-8, *Dickerson v. United States*, 2000 WL 272015 (U.S. Mar. 9, 2000) (No. 99-5525).

extracting confessions.¹⁶⁵ Because *Miranda* was grounded on faulty empirics and not merely an unpopular theory, proponents argued, "it is constitutionally permissible for Congress to formulate a test of admissibility different from that adopted by the Court."¹⁶⁶ But scholars have questioned the alleged accuracy of the congressional record, noting a calculated selectivity of witnesses and documents as well as the redaction of testimony that tended to undermine the constitutionality of 3501.¹⁶⁷ "On this occasion at least," Professor Kamisar argues, "the much-vaunted superior fact-finding capacity of Congress was little in evidence."¹⁶⁸

A third interpretation suggests that "Congress enacted 3501 largely for symbolic purposes, to make an election-year statement about law and order, not to mount a challenge to *Miranda*."¹⁶⁹ Specifically, 3501 resulted from a political compromise—campaigning politicians could proclaim their toughness on crime through hardnosed legislation, but federal agents would continue to admonish suspects and the Justice Department would simply ignore the anti-*Miranda* provisions. As such,

¹⁶⁵ S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, at 2134 ("[T]he so-called third-degree methods deplored by the Supreme Court and cited as a basis for their opinion in *Miranda* is not a correct portrayal of what actually goes on in police stations across the country. While there are isolated cases of police using coercive tactics, this is the exception rather than the rule."); *id.* at 2142 ("[e]xamples of presumed police practice and data supporting the [Court's] conclusion of inherent coercion in custodial interrogation were drawn solely from police manuals and texts which may or may not have been followed"); *id.* at 2134 ("while coercive practices might have been approved 30 years ago, they have no place in modern police techniques"); *id.* ("the Court overreacted to defense claims that police brutality is widespread").

¹⁶⁶ *Id.* at 2147. See also *Hearings on the Supreme Court Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong. 25 (1968) (statement of Sen. Ervin) ("A decision of the Supreme Court, if it is based on a factual assumption which is incorrect, may be subject to Congress' power to legislate. The Supreme Court has no right to make . . . determinations based on unsound factual assumptions.")

¹⁶⁷ See Kamisar, *Can (Did) Congress "Overrule" Miranda?*, *supra* note 161, at 901-06.

¹⁶⁸ *Id.* at 906. See also Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 126 ("As a general matter, it can be said that the entire congressional debate on all sides of Title II was notably devoid of anything but the most speculative assertion of facts.")

¹⁶⁹ Brief of House Democratic Leadership as Amicus Curiae in Support of Petitioner at 8, *Dickerson v. United States*, 2000 WL 126192 (U.S. Jan. 23, 2000) (No. 99-5525).

Congress made a "gesture of defiance"¹⁷⁰ against the Warren Court that "only required that 3501 go on the books, not that it force an actual court case."¹⁷¹ At least one key advocate of the 1968 crime bill, however, rejects the historical validity of this argument. "We did not enact the law to make some vague statement about crime," Senator Strom Thurmond snapped. "We passed it to be enforced."¹⁷²

The final and most accepted explanation is that Congress intended to overturn *Miranda*, plain and simple. This rationale is supported by the accompanying Senate Report,¹⁷³ the statements of individual legislators,¹⁷⁴ subsequent court decisions,¹⁷⁵ and a consensus of opinion among legal commentators.¹⁷⁶ Certainly,

¹⁷⁰ Burt, *supra* note 168, at 127. See also Terry Carter, *The Man Who Would Undo Miranda*, 86 A.B.A. J. 44, 47 (Mar. 2000) ("It was an act of defiance by the Congress, ridiculing the Court, an unbelievable hostility to the Court," says [Professor] Kamisar. "The country was going to hell with riots in the streets, and they blamed it all on the Supreme Court.").

¹⁷¹ Brief of House Democratic Leadership, *supra* note 169, at 16.

¹⁷² 146 CONG. REC. S760-02 (daily ed. Feb. 24, 2000) (statement of Sen. Thurmond).

¹⁷³ S. REP. NO. 90-1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, at 2141 ("the intent of [3501] is to reverse the holding of *Miranda v. Arizona*").

¹⁷⁴ See, e.g., 114 CONG. REC. 11,206 (1968) (statement of Sen. McClellan); *id.* at 11,594 (statement of Sen. Morse); *id.* at 11,612 (statement of Sen. Thurmond); *id.* at 13,202 (statement of Sen. Scott); *id.* at 14,136 (statement of Sen. Fong); *id.* at 14,158 (statement of Sen. Hart); *id.* at 14,167 (statement of Sen. McIntyre); *id.* at 14,176 (statement of Sen. Ervin); *id.* at 16,066 (statement of Rep. Celler); *id.* at 16,074 (statement of Rep. Corman); *id.* at 16,075 (statement of Rep. Rogers); *id.* at 16,278 (statement of Rep. Poff); *id.* at 16,278 (statement of Rep. Whitten); *id.* at 16,279 (statement of Rep. Taylor); *id.* at 16,295 (statement of Rep. Reid); *id.* at 16,296 (statement of Rep. Randall); *id.* at 16,297-98 (statement of Rep. Pollock); 113 CONG. REC. 1583, 1584 (1967) (statement of Sen. McClellan).

¹⁷⁵ See, e.g., *Dickerson v. United States*, 120 S. Ct. 2326, 2332 (2000) ("we agree . . . that Congress intended by its enactment [of 3501] to overrule *Miranda*"); *United States v. Dickerson*, 166 F.3d 667, 671 (4th Cir. 1999) ("Based upon the statutory language, it is perfectly clear that Congress enacted 3501 with the express purpose of legislatively overruling *Miranda* and restoring voluntariness as the test for admitting confessions in federal court.").

¹⁷⁶ See, e.g., STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 545 (5th ed. 1996) ("the intent of Congress was to 'overrule' *Miranda* in favor of a return to the 'voluntariness' standard"); Stephen J. Schulhofer, *Miranda* Now on the Endangered Species List, NAT'L L.J., Mar. 1, 1999, at A22 ("Congress sought, in a word, to overrule the Court on the precise point of constitutional law that *Miranda* had just settled."); GRAHAM, *supra* note 154, at 319-20 (Title II "was essentially an attempt to use a statute to reverse a string of Supreme Court decisions, most of which had been interpretations of the Constitution"); Kamisar, *Can (Did) Congress "Overrule" Miranda?*, *supra* note 161, at 906 (intent of 3501 was "to bury *Miranda*").

other goals could be sustained by the congressional record; conversely, determining the exact legislative intent of 3501 presents an exercise in futility. Yet it seems pretty clear that abrogating *Miranda* was high on Congress' list.

C. ROUND 3—STASIS: 1968-1997

The ensuing federal enforcement of 3501 is also subject to varying interpretations. A number of judges,¹⁷⁷ legislators,¹⁷⁸ litigants,¹⁷⁹ and commentators¹⁸⁰ contend that the anti-*Miranda* provisions have gone largely unenforced over the past three decades. Beginning with President Johnson's cautious signing of the 1968 crime bill,¹⁸¹ seven successive administrations have allegedly "treated 3501 as an unenforceable dead letter."¹⁸² But an equally impressive group rejects this claim,¹⁸³ including three former Attorneys General who insist that 3501 was in play dur-

¹⁷⁷ See, e.g., *Davis v. United States*, 512 U.S. 452, 463-64 (1994) (Scalia, J., concurring); *United States v. Dickerson*, 166 F.3d 667, 671 (4th Cir. 1999); *id.* at 695 (Michael, J., dissenting in part and concurring in part).

¹⁷⁸ See, e.g., Brief of House Democratic Leadership, *supra* note 169, at 19-25.

¹⁷⁹ See, e.g., Brief of Petitioner at 9-10, *Dickerson v. United States*, 2000 WL 142076 (U.S. Jan. 28, 2000) (No. 99-5525); Reply Brief for the United States at 19-20, *Dickerson v. United States*, 2000 WL 374574 (U.S. Apr. 10, 2000) (No. 99-5525).

¹⁸⁰ See, e.g., Kamisar, *Body Blow*, *supra* note 138; Schulhofer, *Endangered Species*, *supra* note 176; Laurence Tribe, *Miranda Warning Is the Law of the Land*, BOSTON GLOBE, Feb. 15, 1999, at A99; CONG. TESTIMONY (May 13, 1999) (statement of Prof. Daniel C. Richman), available at 1999 WL 16947866.

¹⁸¹ See Lyndon B. Johnson, Statement by the President Upon Signing the Omnibus Crime Control and Safe Streets Act of 1968, 4 PUB. PAPERS 981, 983 (June 19, 1968) ("Under long-standing policies, for example, the Federal Bureau of Investigation and other Federal law enforcement agencies have consistently given suspects full and fair warning of their constitutional rights. I have asked the Attorney General and the Director of the Federal Bureau of Investigation to assure that these policies will continue.").

¹⁸² Schulhofer, *Endangered Species*, *supra* note 176.

¹⁸³ See, e.g., Brief of Former Attorneys General of the United States as Amici Curiae in Support of Affirmance at 8-9, *Dickerson v. United States*, 2000 WL 271993 (U.S. Mar. 9, 2000) (No. 99-5525) (William P. Barr, Edwin Meese III, and Dick Thornburgh); 145 CONG. REC. S7024-01 (Strom Thurmond and Stephen Markman); CONG. TESTIMONY (May 13, 1999) (statement of Edwin Meese), available at 1999 WL 390429; Brief of U.S. Senators, *supra* note 160, at 1-2 (Senators Orrin G. Hatch, Trent Lott, Don Nickles, Strom Thurmond, Bob Smith, Larry E. Craig, Paul Coverdell, Fred Thompson, Jon Kyl, and Jeff Sessions); Paul G. Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 IOWA L. REV. 175, 197-203 (1999).

ing their tenures.¹⁸⁴ Paul Cassell has likewise argued that, except for the past eight years under the Clinton Administration, the U.S. Department of Justice ("DOJ") has consistently supported the constitutionality of 3501 and its use in appropriate litigation.¹⁸⁵ Professor Cassell compares, for example, the DOJ's successful invocation of 3501 in a 1975 lower court case¹⁸⁶ with the current Administration's recurring failure to defend the statute in any forum.¹⁸⁷

What cannot be debated, however, is the lack of a definitive Supreme Court statement on the validity of 3501 in the three decades following its enactment. Although a few cases had danced around the issue,¹⁸⁸ the anti-*Miranda* provisions remained in limbo—at least as a matter of judicial precedent. The Supreme Court eventually took note of the DOJ's "repeated failure to invoke 3501."¹⁸⁹ Justice Scalia even ridiculed the DOJ for "caus[ing] the federal judiciary to confront a host of *Miranda* issues that might be entirely irrelevant under federal law," facilitating "the acquittal and the nonprosecution of many dangerous felons, [and thereby] enabling them to continue their depredations upon our citizens."¹⁹⁰ To Scalia, there was "no excuse for this."¹⁹¹

Miranda doctrine and scholarship, of course, did not wait in abeyance for an authoritative ruling on 3501. Instead, the Supreme Court and legal commentators were occupied with a variety of difficult (and possibly unforeseen¹⁹²) questions stemming from *Miranda*. At the most basic level, the Court was

¹⁸⁴ See Brief of Former Attorneys General, *supra* note 183, at 8-9; 146 CONG. REC. S760-2 (daily ed. Feb. 24, 2000) (statement of Sen. Thurmond).

¹⁸⁵ See Cassell, *The Statute That Time Forgot*, *supra* note 183, at 203-19; CONG. TESTIMONY (May 13, 1999) (statement of Prof. Paul G. Cassell).

¹⁸⁶ *United States v. Crocker*, 510 F.2d 1129 (10th Cir. 1975).

¹⁸⁷ See Cassell, *The Statute That Time Forgot*, *supra* note 183, at 203-219.

¹⁸⁸ See *Davis v. United States*, 512 U.S. 452, 457 n.* (1994) (declining to rule on 3501 because "the issue is one of first impression involving the interpretation of a federal statute on which the Department of Justice expressly declines to take a position"); *United States v. Alvarez-Sanchez*, 511 U.S. 350 (1994) (holding that 18 U.S.C. § 3501(c) replaced the Court's *McNabb-Mallory* rule).

¹⁸⁹ *Davis*, 512 U.S. at 465 (Scalia, J., concurring).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² But see *Dickerson v. United States*, 120 S. Ct. 2326, 2347 (2000) (Scalia, J., dissenting) (noting that "most of [the difficulties were] predicted with remarkable prescience by Justice White in his *Miranda* dissent.").

forced to define "custody"¹⁹³ and "interrogation,"¹⁹⁴ the efficacy of incomplete or altered *Miranda* warnings,¹⁹⁵ and the adequacy of rights waivers.¹⁹⁶ A different set of cases carved out exceptions to *Miranda*'s exclusionary rule. Beginning in 1971, the Court held that un-*Mirandized* statements could be used for purposes of impeachment,¹⁹⁷ that evidence derived from *Miranda* violations was not suppressible as "fruit of the poisonous tree,"¹⁹⁸ and that *Miranda* warnings need not precede questioning "prompted by a concern for public safety."¹⁹⁹ At the same time, the Supreme Court continued to apply *Miranda* in

¹⁹³ See, e.g., *Berkemer v. McCarty*, 468 U.S. 420, 437-42 (1984) (holding that ordinary traffic stops do not constitute "custody" for purposes of *Miranda* and that a "policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation"); *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (holding that police station questioning does not inherently constitute "custody" for purposes of *Miranda* and that "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest"); *Oregon v. Mathiason*, 429 U.S. 492 (1977) (similar); *Orozco v. Texas*, 394 U.S. 324 (1969) (holding that "custody" may attach even when the suspect is questioned in a seemingly non-coercive environment).

¹⁹⁴ See, e.g., *Illinois v. Perkins*, 496 U.S. 292 (1990) (holding that voluntary statements made to an undercover police officer did not constitute "interrogation" within the meaning of *Miranda*); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (holding that routine booking questions do not constitute "interrogation" within the meaning of *Miranda*); *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (holding that "'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect").

¹⁹⁵ See, e.g., *Duckworth v. Eagan*, 492 U.S. 195 (1989) (holding that warnings need not be given in any exact form as long as they reasonably convey *Miranda*'s requirements); *California v. Prysock*, 453 U.S. 355 (1981) (similar).

¹⁹⁶ See, e.g., *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (holding that "[o]nly if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived"); *North Carolina v. Butler*, 441 U.S. 369, 373 (1979) (holding that "in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated").

¹⁹⁷ See *Harris v. New York*, 401 U.S. 222 (1971).

¹⁹⁸ See *Oregon v. Elstad*, 470 U.S. 298 (1985); *Michigan v. Tucker*, 417 U.S. 433 (1974).

¹⁹⁹ See *New York v. Quarles*, 467 U.S. 649 (1984).

state prosecutions²⁰⁰ and extended its protections to habeas proceedings.²⁰¹

These last two groups of precedents—the various exceptions to the exclusionary rule and *Miranda*'s application to both state and habeas decisions—were hard to reconcile and would eventually create a “conundrum”²⁰² for the Court. If *Miranda* warnings were truly demanded by the Fifth Amendment, the introduction of unwarned statements or their fruits at any point in a criminal prosecution would be blatantly unconstitutional. If instead *Miranda* lacked a constitutional basis, the federal judiciary had no business interfering with state judgments or creating a new cause of action for habeas petitioners. But in the first three decades, the Supreme Court seemed content to ignore the puzzle and continued to sketch out custodial interrogation law regardless of confusion or incoherence.

As might be expected, the Court faced considerable heat from legal scholars of all political bents.²⁰³ Joseph Grano, for

²⁰⁰ See, e.g., *Stansbury v. California*, 511 U.S. 318 (1994); *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Arizona v. Roberson*, 486 U.S. 675 (1988); *Edwards v. Arizona*, 451 U.S. 477 (1981).

²⁰¹ See *Thompson v. Keohane*, 516 U.S. 99 (1995) (holding that state-court determination as to whether suspect was “in custody” at time of interrogation for purposes of *Miranda* is mixed question of law and fact warranting independent review by federal habeas court); *Withrow v. Williams*, 507 U.S. 680, 683 (1993) (holding that “restriction on the exercise of federal habeas jurisdiction does not extend to a state prisoner’s claim that his conviction rests on statements obtained in violation of the safeguards mandated by *Miranda*”). See also *Dickerson v. United States*, 120 S. Ct. 2326, 2335 (2000) (noting cases in which the Court “broadened the application of the *Miranda* doctrine”).

²⁰² Transcript of Oral Argument, *Dickerson v. United States*, 120 S. Ct. 2326 (No. 99-5525) available at 2000 WL 486733, at *19 (Apr. 19, 2000) (statement of Chief Justice Rehnquist). See also Brief of Criminal Justice Legal Foundation as Amici Curiae in Support of Affirmance at 25, *Dickerson v. United States*, 2000 WL 271991 (U.S. Mar. 9, 2000) (No. 99-5525) (“[S]tare decisis blocks both paths. If the Court is really forced to the choice the government asserts is necessary, then it will have to overrule some precedent—either *Miranda* itself with all its progeny or the many cases holding that the Constitution does not require the *Miranda* rule.”).

²⁰³ See, e.g., JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* 173-98 (1993) (pointing to *Miranda* exceptions as demonstrating that the original decision was “illegitimate”); Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 188 (describing exception as “an outright rejection of the core premise of *Miranda*”). See also Donald Dripps, *Miranda Caselaw: Really Inconsistent? A Proposed Fifth Amendment Synthesis*, 17 CONST. COMMENT. 19, 20 n.9 (2000) (“When [scholars] cite Stone and Grano for the proposition that *Tucker* and like cases are inconsistent with *Miranda*, there can be no doubt that thoughtful commentators across a wide spectrum of ideological persuasions suspect the Court of inconsistency.”).

one, criticized *Miranda* as an ultimate form of judicial activism without constitutional mandate,²⁰⁴ while Professor Schulhofer defended the Court's original decision as a legitimate exercise of judicial interpretation in a modern context.²⁰⁵ Over the past decade or so, the academic focus shifted away from Congress' power to abrogate *Miranda* and toward a public policy debate on the social costs and benefits of different approaches to custodial interrogation.²⁰⁶ In a series of articles, Professor Cassell collected data suggesting that *Miranda* impedes law enforcement, leads to fewer confessions, and thereby decreases the clearance rate for crime.²⁰⁷ But a number of scholars—including Stephen Schulhofer,²⁰⁸ John Donohue,²⁰⁹ and George Thomas²¹⁰—reject Cassell's conclusions as empirically incorrect, methodologically flawed, and grounded on false premises. This statistical standoff proves ironic in a debate that may well be impossible²¹¹ or irrelevant.²¹²

²⁰⁴ See GRANO, CONFESSIONS, *supra* note 203; Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985).

²⁰⁵ See Schulhofer, *Reconsidering Miranda*, *supra* note 144.

²⁰⁶ See *United States v. Dickerson*, 166 F.3d 667, 687 (4th Cir. 1999) ("Interestingly, much of the scholarly literature on *Miranda* deals not with whether Congress has the legislative authority to overrule the presumption created by *Miranda*, but whether it should.").

²⁰⁷ Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998); Paul G. Cassell & Richard Fowles, *Falling Clearance Rates After Miranda: Coincidence or Consequence?*, 50 STAN. L. REV. 1181 (1998); Paul G. Cassell & Bret S. Hayman, *Police Interrogation: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839 (1996); Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996); Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084 (1996).

²⁰⁸ Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996); Stephen J. Schulhofer, *Miranda and Clearance Rates*, 91 NW. U. L. REV. 278 (1996).

²⁰⁹ John J. Donohue, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998).

²¹⁰ George C. Thomas III, *Is Miranda a Real-World Failure? A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. REV. 821 (1996); George C. Thomas III, *Plain Talk About the Miranda Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933 (1996).

²¹¹ See Brief of National Legal Aid and Defender Association as Amicus Curiae in Support of Petitioner at 17-18, *Dickerson v. United States*, 2000 WL 122089 (U.S. Jan. 28, 2000) (No. 99-5525) (Prof. Charles Weisselberg, counsel of record):

There is no single empirical method to establish the ordering of Fifth Amendment values and the "costs" of *Miranda*. These values and costs are incommensurate; they cannot be

D. ROUND 4—DICKERSON

The “indefatigable”²¹³ Professor Cassell did not limit himself to number-crunching alone. Cassell testified before Congress on numerous occasions, criticizing *Miranda*, the exclusionary rule, and DOJ policy.²¹⁴ His greatest influence, however, has been as an advocate before the federal judiciary.²¹⁵ In conjunction with a conservative public interest group, Professor Cassell participated as *amicus curiae* in a number of federal prosecutions, prodding the courts to rule on the constitutionality of 3501.²¹⁶ Yet through happenstance²¹⁷ or DOJ maneuvering,²¹⁸ he

measured along the same scale. We may describe Fifth Amendment values, such as respect for individual autonomy and retention of the predominantly adversarial character of our system, but we cannot quantify them. Thus, even if it were possible to estimate the cases that *Miranda* renders “lost” or not subject to prosecution, there is no single metric that can capture *Miranda*’s “costs” and “benefits.”

²¹² Thomas, *Plain Talk*, *supra* note 210, at 935 (“It is not clear to me why a constitutional interpretation that will soon be thirty years old must justify itself with empirical evidence.”).

²¹³ YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE* 506 (9th ed. 1999). *See also* Carter, *supra* note 170, at 47 (“Compared to Cassell, the Energizer Bunny suffers chronic fatigue syndrome.”); Laurie Magid, *The Miranda Debate: Questions Past, Present, and Future*, 36 HOUS. L. REV. 1251, 1276-77 (1999) (noting that Cassell “has been unrelenting in his efforts to see *Miranda* overturned”).

²¹⁴ *See* CONG. TESTIMONY (May 13, 1999), *available at* 1999 WL 16947869 (Prof. Cassell’s testimony on 18 U.S.C. § 3501); CONG. TESTIMONY (Nov. 14, 1995), *available at* 1995 WL 674878 (Prof. Cassell’s testimony on the Office of the Solicitor General); CONG. TESTIMONY (Mar. 14, 1995), *available at* 1995 WL 105412 (Prof. Cassell’s testimony on reforming *Miranda* rules).

²¹⁵ Cassell was first introduced to 3501 as a member of the Reagan DOJ:

Miranda and Cassell found each other in 1986, soon after he finished his clerkship with Chief Justice Burger and moved into the Justice Department as an associate deputy attorney general. A high-flying Reagan appointee, Stephen Markman, assistant attorney general in the Office of Legal Policy, had just written a report circulating in the department that called for using 3501 to lessen the damaging impact of *Miranda*. Cassell read it, he says, and “latched onto it.” Soon, he was tapped by Attorney General Edwin Meese to find appropriate cases to use 3501 in challenging *Miranda*. Some possibilities came along, but he never got the big one.

Carter, *supra* note 170, at 108.

²¹⁶ For example, Cassell has raised 3501 in *Davis v. United States*, 512 U.S. 452, 457 n.* (1994) (acknowledging argument but “declin[ing] the invitation of some amici to consider [3501]”); *United States v. Sullivan*, 138 F.3d 126 (4th Cir. 1998); *United States v. Nafkha*, 1998 WL 45492 (10th Cir. Feb. 5, 1998); *United States v. Leong*, 116 F.3d 1474 (4th Cir. 1997); and *United States v. Rivas-Lopez*, 988 F. Supp. 1424 (D. Utah 1997).

²¹⁷ *See* Cassell, *The Statute That Time Forgot*, *supra* note 183, at 219 (3501 argument mooted when defendant skipped bail).

²¹⁸ *See id.* at 203-219 (detailing efforts by Clinton DOJ to avoid a ruling on 3501).

lacked a viable test-case to press 3501 before the Supreme Court.

1. Background

In 1999, Professor Cassell finally “hit paydirt”²¹⁹ in a Virginia case. Defendant Charles Dickerson had been arrested for bank robbery and allegedly admitted his guilt to federal agents. When a conflict arose over whether *Miranda* warnings had been given prior to questioning, the trial court found “that Dickerson’s in-court testimony was more credible than that of [the FBI agent]”²²⁰ and suppressed the defendant’s confession. On appeal, the Fourth Circuit accepted Cassell’s invitation to consider the relevance of 3501 for federal confession law. A divided appellate panel held that: (1) the DOJ’s failure to defend 3501 did not prevent a court from raising it *sua sponte*;²²¹ (2) 3501 was intended to supplant *Miranda*;²²² and (3) Congress had the constitutional authority to replace the irrebuttable presumption and exclusionary rule created by *Miranda*.²²³ Because Dickerson’s confession had been voluntary despite the lack of *Miranda* warnings, the court held it admissible at trial.²²⁴

Dickerson then sought review in the Supreme Court, which was granted in late 1999.²²⁵ There was a problem, however, as the Attorney General made clear earlier that year: “In this administration and in other administrations preceding it, both parties have reached the same conclusion [that 3501 is unconstitutional].”²²⁶ With both defendant Dickerson and the DOJ standing against 3501, the Court had no other option but to appoint counsel to defend the statute. The obvious choice, and that of the Supreme Court, was to “invite[] Professor Paul Cas-

²¹⁹ Carter, *supra* note 170, at 108 (quoting Prof. Yale Kamisar).

²²⁰ United States v. Dickerson, 971 F. Supp. 1023, 1023 (E.D. Va. 1997).

²²¹ United States v. Dickerson, 166 F.3d 667, 672, 680-683 (4th Cir. 1999). Prior case law had held that 3501 must be raised in the trial court to be considered on appeal. See Cassell, *The Statute That Time Forgot*, *supra* note 183, at 215. Dickerson avoided this procedural bar, however, as “the prosecution had presented 3501 to the trial court.” *Id.* at 216, 219-20.

²²² Dickerson, 166 F.3d at 684-87.

²²³ *Id.* at 687-92.

²²⁴ *Id.* at 692-93.

²²⁵ 120 S. Ct. 578 (1999) (mem.).

²²⁶ Attorney General Janet Reno, Press Conference (Feb. 11, 1999), available at <<http://www.usdoj.gov/ag/speeches/1999/feb1199.htm>>.

sell to assist our deliberations by arguing in support of the judgment below."²²⁷

2. *Rehnquist's Opinion*

Speaking for a seven-member majority, Chief Justice William Rehnquist struck down 3501 and reaffirmed the basic holding of *Miranda*. After reviewing the history of confession law, the *Miranda* decision, and the enactment of 3501, the Chief Justice charged that the case "turns on whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction."²²⁸ He then offered a handful of reasons for accepting the former and rejecting the latter. "[F]irst and foremost," Rehnquist opined, "*Miranda* and two of its companion cases applied the rule to proceedings in state courts" and "[s]ince that time, we have consistently applied *Miranda*'s rule to prosecutions arising out of state courts."²²⁹ Unless *Miranda* is constitutionally based, the opinion reasoned, the Court would lack the authority to review such cases.

The majority also rejected the argument that various exceptions to *Miranda*'s exclusionary rule demonstrated its non-constitutional character. "These decisions illustrate the principle—not that *Miranda* is not a constitutional rule—but that no

²²⁷ *United States v. Dickerson*, 120 S. Ct. 2326, 2335 n.7 (2000).

²²⁸ *Id.* at 2333. Apparently, the Chief Justice's reading of his *Dickerson* opinion, "[i]n a hushed courtroom crowded with spectators, . . . provided high drama to a case already among the most anxiously awaited of the Court's term. Announcing he would explain *Miranda*'s fate, he began by reciting the familiar warnings, pausing after each one . . ., his strong voice filling the marble courtroom." Jan Crawford Greenburg, *High Court Upholds Miranda Warnings*, CHI. TRIB., June 27, 2000, at 1. See also Joan Biskupic, *Rehnquist shifts on Miranda with little warning*, USA TODAY, June 27, 2000, at A4 ("The Chief Justice's reading of the *Miranda* warnings was one of the most dramatic moments I've seen in the courtroom," says former Clinton administration solicitor general Walter Dellinger.).

²²⁹ *Dickerson*, 120 S. Ct. at 2333. The Court also suggested that its

conclusion regarding *Miranda*'s constitutional basis is further buttressed by the fact that we have allowed prisoners to bring alleged *Miranda* violations before the federal courts in habeas corpus proceedings. Habeas corpus proceedings are available only for claims that a person "is in custody in violation of the Constitution or laws or treaties of the United States." Since the *Miranda* rule is clearly not based on federal laws or treaties, our decision allowing habeas review for *Miranda* claims obviously assumes that *Miranda* is of constitutional origin.

Id. at 2333 n.3.

constitutional rule is immutable.”²³⁰ Advocates in post-*Miranda* litigation were bound to seek extensions or contractions of that precedent, “and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision.”²³¹ The Chief Justice likewise rebuffed the idea that new procedures, such as *Bivens* actions,²³² coupled with 3501 created an alternative as effective as *Miranda* at protecting the privilege against self-incrimination. Though conceding “that there are more remedies available for abusive police conduct than there were at the time *Miranda* was decided,” the Court could “not agree that these additional measures supplement 3501’s protections sufficiently to meet the constitutional minimum.”²³³ Of particular concern was police discretion under 3501 to dispense with pre-interrogation warnings altogether.²³⁴

Finally, the Court suggested that “the principles of stare decisis weigh heavily against overruling [*Miranda*] now.”²³⁵ There was no “special justification”²³⁶ for uprooting three decades of case law, particularly since “*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our natural culture.”²³⁷ Subsequent decisions have tempered the impact of its exclusionary rule, the Chief Justice argued, while the bright-line nature of the *Miranda* warnings continued to provide a degree of certainty unattainable in a balancing test for voluntariness.²³⁸

3. *Scalia’s Dissent*

Joined only by Justice Clarence Thomas, dissenting Justice Scalia lashed out at the majority for its “radical revision”²³⁹ of *Miranda*. Although not stated in so many words, the Court’s opinion reaffirmed that custodial interrogation in the absence of *Miranda* warnings is unconstitutional—despite the fact that

²³⁰ *Id.* at 2335.

²³¹ *Id.*

²³² *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (creating a civil cause of action against federal officials for constitutional violations).

²³³ *Dickerson*, 120 S. Ct. at 2335.

²³⁴ *Id.*

²³⁵ *Id.* at 2336.

²³⁶ *Id.* (citations omitted).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 2337 (Scalia, J., dissenting).

three "Justices whose votes are needed to compose today's majority are on record as believing that a violation of *Miranda* is not a violation of the Constitution."²⁴⁰ After a scathing critique of the original *Miranda* decision,²⁴¹ Justice Scalia turned to the Court's use of prophylactic rules not mandated by the Constitution itself. He deemed the majority's various descriptions of *Miranda* as "word games,"²⁴² arguing that "what makes a decision 'constitutional' . . . is the determination that the Constitution requires the result."²⁴³ But because the majority "refuses to abandon" those cases holding that *Miranda* is not required by the Constitution, "what today's decision will stand for, whether the Justices can bring themselves to say it or not, is the power of the Supreme Court to write a prophylactic, extraconstitutional Constitution, binding on Congress and the States."²⁴⁴ To Scalia, this is "an immense and frightening antidemocratic power, and it does not exist."²⁴⁵

In the final section of his dissent, Justice Scalia assailed the majority's reliance on *stare decisis* as a basis for affirming *Miranda*. Having been whittled away by subsequent decisions, the core of *Miranda* now lacked constitutional legitimacy and instead supplied the "special justification" needed for its jettison.²⁴⁶ Nor was Scalia convinced that the "totality of the circumstances" test under 3501 would be more difficult to apply than the Court's *Miranda* doctrine. The "nearly 60 cases involving a host of *Miranda* issues" in the ensuing decades had demonstrated that the Court's interrogation rules were less than bright.²⁴⁷ What is more, the judiciary is still required in many cases to scrutinize confessions under both *Miranda* doctrine and

²⁴⁰ *Id.* (citing *Davis v. United States*, 512 U.S. 452, 457-458 (1994) (opinion of the Court, in which Kennedy, J., joined); *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (opinion of the Court, in which Kennedy, J., joined); *Oregon v. Elstad*, 470 U.S. 298 (1985) (opinion of the Court by O'Connor, J.); *New York v. Quarles*, 467 U.S. 649 (1984) (opinion of the Court by Rehnquist, J.)).

²⁴¹ *Id.* at 2338-40.

²⁴² *Id.* at 2342 ("The Court today insists that the decision in *Miranda* is a 'constitutional' one, that it has 'constitutional underpinnings,' a 'constitutional basis' and a 'constitutional origin,' that it was 'constitutionally based,' and that it announced a 'constitutional rule.'").

²⁴³ *Id.*

²⁴⁴ *Id.* at 2346.

²⁴⁵ *Id.* at 2337.

²⁴⁶ *Id.* at 2346.

²⁴⁷ *Id.* at 2346-47.

the voluntariness test.²⁴⁸ Scalia also rejected the claim that *Miranda* should be saved because it “occupies a special place in the ‘public’s consciousness.”²⁴⁹ The “public is not under the illusion that we are infallible,” Scalia noted, and there was “little harm in admitting that we made a mistake” and “much to be gained by reaffirming for the people the wonderful reality that they govern themselves.”²⁵⁰

As in his *Morales* dissent, Scalia peppered the majority with harsh rhetoric, suggesting that the Court may have become “some sort of nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy.”²⁵¹ In closing, Justice Scalia argued that the decision “converts *Miranda* from a milestone of judicial overreaching into the very Cheops’ Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance.”²⁵² His parting shot then offered a (mild) threat: “[U]ntil 3501 is repealed, [I] will continue to apply it in all cases where there has been a sustainable finding that the defendant’s confession was voluntary.”²⁵³

E. ROUND 5—FUTURE LEGISLATION?

“Civil libertarians breathed a sigh of relief” when *Dickerson* was issued.²⁵⁴ Like many others, I was pleased with the decision’s bottom line: A musty, largely unenforced statute could not supplant three decades of case law by simply reverting to the pre-*Miranda* status quo. The Court’s means to this end, however, were substantially less gratifying. In large part, *Miranda* will continue to rule the world of custodial interrogation as *cause celebre*, with the original decision taking on a life of its own, transcending its pages in the U.S. Reports. The “new” *Miranda*

²⁴⁸ *Id.* at 2347.

²⁴⁹ *Id.* (quoting Petitioner’s Brief).

²⁵⁰ *Id.*

²⁵¹ *Id.* at 2342.

²⁵² *Id.* at 2348.

²⁵³ *Id.*

²⁵⁴ Yale Kamisar, *Miranda: A rule surrounded by silence*, DET. NEWS, July 5, 2000, at 11.

is concerned not only with the conditions of police questioning, but also its position within "our national culture."²⁵⁵

This seems pretty thin cover for maintaining judge-mandated rules of police behavior, particularly given the Court's unsatisfying response to an undeniable doctrinal conflict: Apparently, a third type of constitutional rule exists, less exacting than the dictates of the Constitution (allowing a host of exceptions to evidentiary exclusion), but more powerful than the Court's supervisory authority over federal courts (permitting the application of these rules to state prosecutions). For reasons previously articulated by noted scholars,²⁵⁶ I have little doubt that the Court has the power to create such devices. But it would have been nice if *Dickerson* had offered a general justification for prophylactic constitutional rules and a rationale for application to custodial interrogation.

Equally troublesome is the lack of guidance for legislators seeking to "develop their own safeguards for the privilege [against self-incrimination]."²⁵⁷ It seems unlikely that *Miranda* is the end-all of custodial interrogation law, that a century from now police will still be admonishing suspects out of fear of the exclusionary rule. Law-and-order conservatives, of course, are concerned with the future of police questioning—but so are liberals and libertarians. Professor Kamisar notes that "[t]here is good reason to believe that in a substantial number of police stations, police interrogators are getting suspects to waive their rights—by persuading them it is in their 'best interest' to do so—before they ever advise them of their rights."²⁵⁸ Likewise,

²⁵⁵ *Dickerson*, 120 S. Ct. at 2336. See also *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-69 (1992) (making similar argument in support of upholding *Roe v. Wade*).

²⁵⁶ See, e.g., David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988); Stephen J. Schulhofer, *Reconsidering Miranda*, *supra* note 144, at 448-53; Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

²⁵⁷ *Miranda*, 384 U.S. at 490.

²⁵⁸ Kamisar, *A rule surrounded by silence*, *supra* note 254. For instance, consider the following excerpts from a 1999 taped interrogation conducted by New Orleans police officers:

Officer 1: But . . . when you want f— with me I will f— you in the end! Now we could sit here and go through these lies some more. The more you lie, the more I'mma dig you deeper and deeper because ink pens are a m—a f—a! I could send you way, way down that road with just some ink pen. I ain't gotta put a hand on you. So, you willing to talk to us, tell us the f— truth. Tell us your part of this crime. We get this f— ball rolling.

Albert Alschuler suggested more than a decade ago that the Court's *Miranda* jurisprudence had created a virtual "bad man's"²⁵⁹ guide to custodial interrogation, offering an inventory of police strategies that would avoid suppression of incriminating statements.²⁶⁰

Officer 2: Alright as much as I wanna cut you a deal I can't cut you a deal along these lines, you follow what I'm saying? You gotta talk to me.

Officer 1: Even if you walked out here today, if you walk out here today, you gon' be a dead man not long from now, watch! Cause I'm sure just like you heard everything, you heard your name implicated, right?

Suspect: I never hear people talking my name.

Officer 2: I'm offering you the whole pie. Man when you can go down from first-degree murder! I ain't even going down to second-degree or manslaughter! I'm talking about a burglary! You follow what I'm saying? I'm talking about a burglary but I gotta have you work with me man!

Suspect: I'm working . . .

Michael Perlstein, *Tape Captures Hardball Cop Tactics*, NEW ORLEANS TIMES-PICAYUNE, July 7, 2000, at A1. Although the officers "took turns badgering, cajoling, and railing against [the suspect] as they tried to extract a confession," in the end the suspect did not confess. *Id.* "Uncomfortable with the bullying methods used by police interrogators, Orleans Parish District Attorney Harry Connick [eventually] dropped plans to use [the] taped interrogation as evidence . . ." Susan Finch, *Connick to Ditch Tape of Interview, Lawyer May Asks Feds for Civil Rights Probe*, NEW ORLEANS TIMES-PICAYUNE, July 8, 2000, at B1.

²⁵⁹ See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.").

²⁶⁰ Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1442 (1987):

Upon arresting a suspect, do not give him the *Miranda* warnings. When the public safety requires it, you may question this suspect without advising him of his rights, and his answers will be admissible. In the absence of a special public need, however, you should not question an arrested, unwarned suspect. If the suspect does make a statement, it will be a 'volunteered' statement of the sort that *Miranda* makes admissible. Moreover, if the suspect remains silent, his silence may be used to impeach any defense that he offers at trial. After an hour or two (during which your suspect will have provided either a statement or a potentially useful period of silence), you should advise him of his rights. If the suspect waives these rights, his statement will be admissible. If he indicates that he wishes to remain silent or to consult a lawyer, however, continue to interrogate him without a lawyer. Although the prosecutor will be unable to introduce as part of the state's case-in-chief any statement that the suspect makes, the suspect's statement will become admissible to impeach his testimony if he later takes the witness stand to say something different from what he told you. Indeed, if the suspect's testimony on direct examination fails to contradict his earlier

A variety of alternatives might be preferable to *Miranda* and its exclusionary rule, with videotaping confessions being high on most lists.²⁶¹ Others propose judicially supervised questioning in lieu of interrogation on the streets or in police cruisers.²⁶² Unfortunately, a post-*Dickerson* lawmaker is left to wonder whether *Miranda* is immutable and without substitute—or whether some yet unlegislated solution might be “at least as effective”²⁶³ at informing suspects of their privilege against self-incrimination and providing a continuous opportunity to invoke it. Chief Justice Rehnquist did mention *Miranda*’s invitation for reform efforts but only as “[a]dditional support for our conclusion that *Miranda* is constitutionally based.”²⁶⁴ Moreover, his *Dickerson* opinion ended on a blunt, discouraging note for creative lawmakers: “*Miranda* announced a constitutional rule that Congress may not supersede legislatively.”²⁶⁵

statement, the prosecutor may cross-examine him about facts reported in the earlier statement and may introduce the statement if the suspect fails to confirm what he said to you.

Id. at 1442-43. “Do not place too much pressure on the suspect, however,” Professor Alschuler quips. “If a court holds his confession involuntary under pre-*Miranda* standards, it will be inadmissible for any purpose. The Supreme Court has said that pre-*Miranda* voluntariness standards are part of the ‘real’ Constitution. *Miranda* is part of the Court’s ‘just pretend’ Constitution.” *Id.* at 1443. I would only add that the Holmesian “bad man” cop may also freely use an un-*Mirandized* statement to uncover evidence without concern for the “fruit of the poisonous tree” doctrine. See *Oregon v. Elstad*, 470 U.S. 298 (1985); *Michigan v. Tucker*, 417 U.S. 433 (1974). See also Charles Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 132-136, 189-192 (1998) (noting that “Alschuler’s writings proved prescient” and then providing excerpts from a “training bulletin, which the California District Attorneys Association published, . . . encouraging officers to continue questioning a suspect who has invoked his or her rights”). But see note 265, *infra* (noting change in custodial interrogation policy pursuant to *Dickerson* and a Ninth Circuit case that rejected civil immunity for police who intentionally violate *Miranda*).

²⁶¹ See Luna, *Transparent Policing*, *supra* note 114, at 1170 n.243 (listing supporters of videotaping confessions); Kamisar, *A rule surrounded by silence*, *supra* note 254 (“For a long time, virtually all of the nation’s leading criminal procedure professors—critics and defenders of *Miranda* alike—have favored the idea [of videotaping confessions].”).

²⁶² See, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 46-88 (1997); Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995).

²⁶³ *Miranda*, 384 U.S. at 467.

²⁶⁴ *Dickerson*, 120 S. Ct. at 2334.

²⁶⁵ *Id.* at 2336 (emphasis added). On the same day it delivered *Dickerson*, the Supreme Court denied certiorari in a case concerning government liability for failure to provide *Miranda* warnings to criminal defendants. *Butts v. McNally*, 120 S. Ct. 2717 (2000). In the decision below, the Ninth Circuit had rejected a claim of qualified

So is the *Miranda*'s invitation still open? Could Congress enact a valid confession statute—incorporating, for instance, videotaping requirements—if it provided evidence that such a provision was “at least as effective” as *Miranda* at protecting a suspect's right of silence? The answers remain uncertain 32 years later. What seems clear, however, is that *Dickerson* failed to advance these questions any closer to a final resolution.

III. JUDICIAL STRATEGIES FOR INTERBRANCH DIALOGUE

In *Morales* and *Dickerson*, the Supreme Court presented different visions of judicial review and its role in interbranch dialogue on criminal procedure issues. The *Morales* decision struck down Chicago's ordinance but simultaneously presented, through Justice O'Connor's concurrence, a “road map” for enacting a valid statutory scheme. The local government then adopted a new gang-loitering law that roughly mirrored O'Connor's suggestions and will likely pass judicial muster precisely for its obedience. In contrast, *Dickerson* nullified 3501 but offered no advice (or even encouragement) to federal and state lawmakers interested in passing a valid confession statute. The result has been near legislative silence, broken only by a congressional bill to formally take the anti-*Miranda* sections off the books and thereby preclude Justice Scalia from applying 3501 in future cases.²⁶⁶ Aside from this partisan effort, there has been

immunity, holding that “[o]fficers who intentionally violate the rights protected by *Miranda* must expect to have to defend themselves in civil actions.” California Attorneys for Justice v. Butts, 195 F.3d 1039, 1050 (9th Cir. 1999). As a consequence of both *Dickerson* and *Butts*, “police across [California] are being warned to obey the U.S. Supreme Court's famous *Miranda* ruling and stop interrogating citizens who invoke their rights to remain silent or obtain legal help.” Seth Rosenfeld, *Warning to respect Miranda*, S.F. EXAMINER, Aug. 27, 2000, at A1. “The bottom line now must be: Do not intentionally violate *Miranda*,” [the California Department of Justice] says. “This is because an intentional violation will virtually guarantee a civil rights suit against you and your department.” *Id.*

²⁶⁶ See S. 2830, 106th Cong. § 2 (2000) (“A bill to preclude the admissibility of certain confessions in criminal cases.”). The bill would strike subsections (a) and (b) from 18 U.S.C. § 3501 and then redesignate subsections (c), (d), and (e). In introducing “the *Miranda* Reaffirmation Act of 2000,” Senator Patrick Leahy stated:

This week's resounding reaffirmation of the *Miranda* rule should put to rest the issue of *Miranda*'s continuing vitality. Most law enforcement officers made their peace with *Miranda* long ago: It is time for the rest to do the same. That is why I am so disturbed by Justice Scalia's parting shot in *Dickerson*. In a dissenting opinion joined by Justice Thomas, Justice Scalia vowed to continue to apply 3501 until such time as it is repealed. Mr. President, that time has come. I am introducing a bill today, together with my good friend, Senator Feingold, to repeal 3501.

no further political dialogue on reforming the law of custodial interrogation.

The divergent approaches and political consequences of *Morales* and *Dickerson* raise an important question: Are judge-made road maps an appropriate means of stimulating interbranch dialogue on issues of criminal procedure? As suggested earlier, the answer depends on the capacity of less aggressive judicial techniques to spur interbranch dialogue, the Court's past experience with constitutional road maps, and the balance of arguments both for and against judge-made road maps. This Part begins with an overview of the leading theories of interbranch dialogue and then examines the Court's experience with constitutional road maps.

A. THEORIES OF INTERBRANCH DIALOGUE

"[T]he Supreme Court is the Constitution," declared then-Professor Felix Frankfurter in 1930.²⁶⁷ Whether out of arrogance, paternalism, or self-preservation, the justices have occasionally espoused a Court-centric vision of American constitutionalism.²⁶⁸ Yet legal commentators of all political stripes have rejected unqualified judicial supremacy as untenable in theory and unworkable in practice;²⁶⁹ even Justice Frank-

146 CONG. REC. S6124-01, S6140, available in Westlaw at 2000 WL 868356.

²⁶⁷ Felix Frankfurter, *The United States Supreme Court Molding the Constitution*, 32 CURRENT HIST. 235, 240 (1930). See also CHARLES EVANS HUGHES, THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 144 (Danelski & Tuchin eds., 1973) ("We are under a Constitution, but the Constitution is what the judges say it is."); *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

²⁶⁸ See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("*Marbury v. Madison* . . . declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the country as a permanent and indispensable feature of our constitutional system."). See also *Baker v. Carr*, 369 U.S. 186, 211 (1962) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."); *Powell v. McCormack*, 395 U.S. 486, 549 (1969) ("it is the responsibility of this Court to act as the ultimate interpreter of the Constitution").

²⁶⁹ See, e.g., DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 108, at 211 ("Sometimes, even after a contrary Supreme Court decision, an individual may still reasonably believe that the law is on his side We cannot assume . . . that the Constitution is always what the Supreme Court says it is."); *id.* at 214-15 ("A citizen's allegiance is to the law, not to any particular person's view of what the law is [I]f the issue is one

further would later admit that "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."²⁷⁰ Instead of commanding from on high, the Supreme Court is only one actor in an ongoing dialogue on the meaning and application of the Constitution, sharing interpretive duties with other courts, legislators, executives, and the citizenry.²⁷¹ Sometimes the Court has the final say,²⁷² sometimes it does not.²⁷³ But in reality, most constitutional interpretation occurs

touching fundamental or political rights, and it is arguable that the Supreme Court has made a mistake, a man is within his social rights in refusing to accept that decision as conclusive."); 3 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 470-71 (1923) ("However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court."); Edwin Meese III, *The Law of the Constitution*, 61 *TULANE L. REV.* 979, (1987) ("[A Supreme Court] decision does not establish a supreme law of the land that is binding on all persons and parts of government henceforth and forevermore. . . . Once we understand the distinction between constitutional law and the Constitution, once we see that constitutional decisions need not be seen as the last words in constitutional construction, once we comprehend that these decisions do not necessarily determine future public policy, once we see all of this, we can grasp a correlative point: constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government."); *Review and Outlook: The Irrepressible Mr. Meese*, *WALL ST. J.*, Oct. 29, 1986, at 28 (noting a "distinction between the Constitution and judicial enforcement of its commands" and that "we must distinguish the dancer from the dance") (quoting Prof. Laurence Tribe). Which branch reigns supreme is a question that has dogged legal scholars for decades and will likely do so for many more. It is possible, of course, to construct a moral theory that sides with President Lincoln rather than Chief Justice Taney on the issue of slavery, *see generally* 2 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* (Basler ed., 1953), but supports the Warren Court's stand in *Cooper v. Aaron* against a recalcitrant and segregationist Arkansas state government. But articulating a structural or procedural theory that would justify oscillating supremacy between the legal and political branches is an entirely different matter.

²⁷⁰ *Graves v. New York*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring).

²⁷¹ *See, e.g.*, BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 5 (1991) ("[The Constitution] is the subject of an ongoing dialogue amongst scholars, professionals, and the people at large."); PHILIP BOBBITT, *CONSTITUTIONAL FATE* 185 (1982) ("All constitutional actors participate in creating constitutional decisions of principally expressive significance."); LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* 3-8 (1988).

²⁷² *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down congressional attempt to abrogate the Court's free exercise decision in *Employment Division v. Smith*, 494 U.S. 872 (1990)); *United States v. Eichman*, 496 U.S. 310 (1990) (striking down Congressional attempt to abrogate the Court's flag burning decision in *Texas v. Johnson*, 491 U.S. 397 (1989)).

²⁷³ Consider, for example, the repeated enactment of child labor laws in spite of Supreme Court rulings. *See Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 44 (1922); *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918). Congress eventually won this battle.

outside the walls of the Supreme Court Building—in the well of the Senate, in the White House, in the chambers of lower federal courts, in the offices of administrative agencies, and in analogous institutions of state government. Constitutional issues confront various governmental actors on a daily basis and often contain the dialogic characteristics of “ordinary” politics.²⁷⁴

The question for legal commentators, then, is determining the appropriate amount of constitutional dialogue between the Court and other officials, as well as a suitable medium for this discourse. Toward these ends, a number of suggestions have been forwarded by scholars and jurists with varying degrees of success.

1. *Cardozo's Ministry Of Justice*

In 1921, then-Professor Benjamin Cardozo lamented the poverty of interaction between the branches of government, concluding that the “[l]egislature and courts move on in proud and silent isolation.”²⁷⁵ The barrier between lawmakers and judges had very real costs, both in terms of efficiency and quality of outcomes:

On the one side, the judges, left to fight against anachronism and injustice by methods of judge-made law, are distracted by the conflicting promptings of justice and logic, of consistency and mercy, and the output of their labors bears the tokens of the strain. On the other side, the legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend.²⁷⁶

The solution, Cardozo argued, was to create an agency with the express responsibility of mediation between the courts and

See *United States v. Darby*, 312 U.S. 100, 121 (1941). See generally LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 62-67 (3d ed. 2001) (detailing child labor dispute between Congress and the Supreme Court). See also *Helvering v. Griffiths*, 318 U.S. 371, 400-01 (1943) (“There is no reason to doubt that this Court may fall into error as may other branches of the Government. Nothing in the history or attitude of this Court should give rise to legislative embarrassment if in the performance of its duty a legislative body feels impelled to enact laws which may require the Court to re-examine its previous judgments or doctrine.”).

²⁷⁴ Cf. Paul Brest, *Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175, 184 (1986) (“[C]onstitutional issues are not radically discontinuous from other political issues.”).

²⁷⁵ Benjamin Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 114 (1921).

²⁷⁶ *Id.* at 113-14.

legislatures. Borrowing from the writings of Roscoe Pound,²⁷⁷ the future member of the Supreme Court articulated the concept of a “ministry of justice” specifically empowered to debate the interstices between law enactment and law adjudication and to suggest recommendations for reform. The ministry would be composed of judges, legislators, academics, and practitioners, charged with opening up the lines of communication between the branches of government.²⁷⁸ “The spaces between the plants,” Cardozo suggested, “would at last be bridged.”²⁷⁹

Following this blueprint, New York created a law revision commission in 1934 to pinpoint deficiencies in the law and propose necessary legal modifications.²⁸⁰ A number of states would follow its lead, adopting similar commissions to expose flaws that resulted from limited dialogue between judicial and political bodies.²⁸¹ In addition, a non-governmental entity, the American Law Institute (“ALI”), has promulgated code reforms in numerous legal disciplines that have been subsequently adopted in whole or in part by state governments.²⁸² The ALI’s Model Penal Code (“MPC”), for example, has been particularly influential on systematic revisions of substantive criminal law.²⁸³

Unfortunately, the MPC provides only marginal assistance to legislators interested in fighting gang congregation and no help to Chicago *after* it enacted the loitering ordinance at issue in *Morales*. The MPC does have provisions concerning “failure to disperse,” “disorderly conduct,” “harassment,” “loitering or prowling,” and “obstructing public passages.”²⁸⁴ But none of

²⁷⁷ *Id.* at 114 (citing Roscoe Pound, *Anachronisms in Law*, 3 J. AM. JUDICATURE SOC. 142, 146 (1920); Roscoe Pound, *Juristic Problems of National Progress*, 22 AM. J. OF SOCIOLOGY 721, 729, 731 (1917)). See also Roscoe Pound, *A Ministry of Justice: A New Role for the Law School*, 38 A.B.A. J. 637 (1952).

²⁷⁸ Cardozo, *A Ministry of Justice*, *supra* note 275, at 124-25.

²⁷⁹ *Id.* at 125.

²⁸⁰ See, e.g., Bernard L. Shientag, *A Ministry of Justice in Action: The Work of the New York State Law Revision Commission*, 22 CORNELL L.Q. 183 (1937).

²⁸¹ See, e.g., CAL. GOV’T CODE §§ 8280-8297 (West 2000) (establishing the California Law Revision Commission).

²⁸² See <www.ali.org/ali/thisali.htm> (describing ALI’s creation, operation, and projects).

²⁸³ See, e.g., Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. (forthcoming 2000) (discussing the influence of the Model Penal Code).

²⁸⁴ MODEL PENAL CODE § 250.1 (riot; failure to disperse); *id.* § 250.2 (disorderly conduct); *id.* § 250.4 (harassment); *id.* § 250.6 (loitering or prowling); *id.* § 250.7 (obstructing highways and other public passages).

these offenses incorporates an individual's status or identity into their definitions and, conversely, all apparently require suspicious overt action prior to arrest.²⁸⁵ By contrast, Chicago's original loitering law expressly targets individuals by their status (gang membership) and their otherwise innocuous conduct (congregating in public).

As for the problem of custodial interrogation raised by *Miranda* and *Dickerson*, there has been no successful analog to the MPC in the realm of criminal procedure. The National Conference of Commissioners of Uniform State Laws adopted the Uniform Rules of Criminal Procedure in 1974²⁸⁶ and the ALI promulgated a Model Code of Pre-Arrest Procedure a year later.²⁸⁷ Yet neither effort has encouraged state reform nor significantly affected the American criminal process. Wayne LaFave noted that the Uniform Rules "dropped out of sight like a lead balloon" after publication without a single state adopting any of its provisions,²⁸⁸ while Jerold Israel suggested that criminal procedure is "an unlikely candidate for state law uniformity" as it is "hardly touched by those interests that typically have led

²⁸⁵ For example, the MPC's loitering provisions suggest that "alarm for the safety of persons or property" can be justified by "the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object." *Id.* § 250.6

²⁸⁶ UNIFORM RULES OF CRIMINAL PROCEDURE (1974). Rule 212 of the Uniform Rules lists specific information that must be provided an individual upon detention. Although roughly mirroring the warnings required by *Miranda*, the rule also demands an admonition "[t]hat if at any time during any questioning [the detainee] desires to consult with a lawyer or desires it to stop, questioning will stop." *Id.* rule 212(b)(5).

²⁸⁷ A MODEL CODE OF PRE-ARREST PROCEDURE (1975). The Model Code requires *Miranda*-type warnings when "a law enforcement officer stops any person who he suspects or has reasonable cause to suspect may have committed a crime," *id.* § 110.2(5), as well as when the officer makes an arrest. *Id.* § 120.8. But the stop-and-frisk warnings also require, among other things, that a suspect be informed "that within twenty minutes he will be released unless he is arrested" and "that if he is arrested he will be taken to a police station where he may promptly communicate by telephone with counsel, relatives, or friends." *Id.* § 110.2(5)(i)(ii). Likewise, the post-arrest warnings require, *inter alia*, that a suspect be informed "that he will promptly be taken to a police station where he may promptly communicate with counsel, relatives or friends." *Id.* § 120.8(1)(d)(ii).

²⁸⁸ Wayne F. LaFave, *Random Thoughts by a Distant Collaborator*, 94 MICH. L. REV. 2431, 2434 n.7 (1996). See also Yale Kamisar, *Bouquets for Jerry Israel*, 94 MICH. L. REV. 2455 (1996) ("I would like to believe that the Uniform Rules of Criminal Procedure have significantly affected the thinking of judges and law professors, but as LaFave notes, it appears that no state has adopted any of the Uniform Rules' provisions.").

states to adopt uniform laws.”²⁸⁹ It is also possible that the Warren Court’s constitutionalization of criminal procedure dampened reform efforts by transferring primary responsibility for the criminal process from the political branches to the judiciary.²⁹⁰

2. *Bickel’s Passive Virtues*

In contrast to Cardozo’s extrajudicial proposal, Alexander Bickel seemed to recognize that interbranch dialogue between the Court and the political branches was, for the most part, driven by case-based disputes. According to Bickel, the Supreme Court “wields a threefold power”: it may strike down political action as unconstitutional, it may uphold the action as constitutionally valid, “[o]r it may do neither.”²⁹¹ This latter category comprises the “passive virtues,” a loose grouping of judicial strategies that can dodge difficult constitutional issues.²⁹² By employing avoidance doctrines such as standing and ripeness,²⁹³ the Court can abstain from adjudicating politically sensitive issues and erroneously casting its imprimatur in undeveloped controversies.

Ironically, Professor Bickel believed that judicial silence through the employment of passive virtues does not prevent but instead allows a broad debate on the propriety of certain state actions.²⁹⁴ The comparative finality of constitutional decision-making has the potential to stifle discourse by precluding a political resolution outside of the Article V amendment process.²⁹⁵

²⁸⁹ Jerold Israel, *Federal Criminal Procedure as a Model for the States*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 133-34 (1996).

²⁹⁰ See *Miranda v. Arizona*, 384 U.S. 436, 523 (Harlan, J., dissenting) (noting the “ironic untimeliness” of *Miranda*’s new exclusionary rule given the ongoing “massive re-examination of criminal law enforcement procedures on a scale never before witnessed”).

²⁹¹ BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 2, at 69.

²⁹² See *id.* at 115-198; see also Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

²⁹³ Cf. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-54 (1936) (Brandeis, J., concurring) (listing seven avoidance doctrines employed by the Court).

²⁹⁴ BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 2, at 70-71.

²⁹⁵ See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 224 (1991) (O’Connor, J., dissenting) (“This Court acts at the limits of its power when it invalidates a law on constitutional grounds. In recognition of our place in the constitutional scheme, we must act with ‘great gravity and delicacy’ when telling a coordinate branch that its actions are absolutely prohibited absent constitutional amendment.”).

Conversely, avoidance doctrines “engage the Court in a Socratic colloquy with the other institutions of government and with society as a whole concerning the necessity for this or that measure, for this or that compromise.”²⁹⁶

Bickel connects the passive virtues to criminal procedure through the void-for-vagueness doctrine, arguing that its operation avoids thorny constitutional or political issues. “[W]hen the Court finds a statute unduly vague, it withholds adjudication of the substantive issue in order to set in motion the process of legislative decision.”²⁹⁷ But equating this doctrine with jurisdictional limits such as standing is, at best, a stretch in cases like *Morales*. There is a world of difference between using the vagueness doctrine against shoddy draftsmanship and its application, for instance, to Chicago’s gang-loitering ordinance. In the former case, the Court is arguably employing a passive virtue-esque device that “does not hold that the legislature may not *do* whatever it is that is complained of” but instead asks that lawmakers be more precise in their terms.²⁹⁸ In the latter case, however, the Court is making a substantive value judgment that law enforcement cannot be vested with undue discretion in areas of personal liberty.²⁹⁹ This is not avoidance; it is a frontal confrontation between judges and politicians. Once the Court granted certiorari, then, the passive virtues became an unlikely tool for resolving *Morales*.

Although Professor Bickel does not address *Miranda*,³⁰⁰ it seems hard to argue that the passive virtues would inspire inter-

²⁹⁶ BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 2, at 70-71. See also ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 111 (1975) (arguing that the Court “interacts with other institutions, with whom it is engaged in an endlessly renewed educational conversation” even when jurisdiction is “declined”).

²⁹⁷ BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 2, at 152.

²⁹⁸ *Id.*

²⁹⁹ Bickel does, in fact, recognize this distinction. “[A] statute may deter conduct that should on principle be altogether free from governmental regulation. When a court finds this to be the case and holds the statute void for vagueness, it renders a substantive adjudication based on constitutional principle.” *Id.* at 149.

³⁰⁰ In testimony unrelated to his passive-virtues theory, Bickel argued that Congress could not abrogate *Miranda* based solely on its superior fact-finding capacity:

[I]t is not quite enough to refer to the factual bases of Supreme Court decisions and be willing to let Congress override those, because the realm of fact probably covers most of what there is. . . . [I]n *Miranda* there are facts more at large to which the Supreme Court could retreat. The answer could be no, we don't think every policeman tries to administer the third degree to every prisoner. We believe that in the station house situation, there is a natural unintended effect of overbearing the prisoner. That is a factual premise, but I sup-

branch dialogue on custodial interrogation between the Supreme Court and the political branches. It is true, of course, that staying constitutional judgment—by denying certiorari in *Dickerson*, for example—allows debate to continue among legislators, executives, and their constituents without the background limitation of Supreme Court precedent. Yet it is difficult to discern the Court's contribution to the dialogue. Absent an annotation of potential unconstitutionality,³⁰¹ the passive virtues merely deflect the issue back to the lower judiciary or the political branches without providing input from the Justices themselves. Unless the Court addressed the merits of *Dickerson*, lawmakers and law enforcers would be guided solely by lower court rulings on 3501 and their own estimation of constitutionality. To many, this would be tantamount to deferential silence not interbranch dialogue.

3. Sunstein's Judicial Minimalism

Bickel's intellectual heir, Cass Sunstein, has revived the idea of passive virtues under the title "judicial minimalism."³⁰² Like Bickel, Sunstein supports the use of avoidance doctrines and the prudent exercise of certiorari jurisdiction as a means of limiting unnecessary strife between the Court and the political branches.³⁰³ Moreover, "constructive use of silence" is conducive to political discourse "because it allows democratic processes room to maneuver" and "ensures that certain important decisions are made by democratically accountable actors."³⁰⁴

But Professor Sunstein goes beyond the passive virtues of judicial avoidance and suggests a minimalist approach to opin-

pose it is too near to the core of the constitutional proposition that if you allow that to be overruled, what is left of the function of judicial review?

Senate Hearings on Separation of Powers, *supra* note 166, at 26 (statement of Prof. Bickel).

³⁰¹ Cf. *Bethley v. Louisiana*, 520 U.S. 1259 (1997) (statement of Stevens, J., respecting the denial of certiorari) ("It is well settled that our decision to deny a petition for writ of certiorari does not in any sense constitute a ruling on the merits of the case in which the writ is sought. That is certainly true of our decision to deny certiorari in this case.").

³⁰² See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

³⁰³ See Sunstein, *Foreword*, *supra* note 302, at 8; see also *id.* at 7, 51-53, 99 (discussing justiciability and denials of certiorari as minimalist techniques).

³⁰⁴ *Id.* at 7, 14, 19-20.

ion writing as well. Rather than announcing broad principles that transcend the particular case at hand, the Court generally should address constitutional questions on limited grounds and employ analogical rather than deductive reasoning in its justifications.³⁰⁵ By narrowly deciding a case without settling related issues, the Court instigates dialogue with the political branches on those unresolved questions, solicits input from the academy on the case and its potential consequences, prods the lower courts into testing the implications of its decision in other legal contexts, and leaves the door open for future cases that extend or limit the original decision.³⁰⁶

Sunstein largely omits analysis of criminal procedure issues as they relate to his theory of judicial review, focusing instead on constitutional law *proper*—freedom of speech, equal protection, substantive due process, and so on. Yet like Bickel, he does suggest that the void-for-vagueness doctrine offers a minimalist approach to unduly ambiguous laws: “When the Court strikes down a statute as void, it leaves open the possibility that a more specific version of the legislative judgment—regulating speech or conduct—may be valid. A void-for-vagueness holding leaves that question undecided; it demands a focused legislative determination.”³⁰⁷ As such, Professor Sunstein would likely endorse the judgment of *Morales* but not the maximalist rhetoric of Justice Steven’s plurality opinion. The Court did “ensure legislative rather than executive lawmaking”³⁰⁸ in its application of the vagueness doctrine’s second prong, striking down the gang-loitering ordinance for Chicago’s failure to “establish minimal guidelines to govern law enforcement.”³⁰⁹ But the plurality opinion’s broad and superfluous theorizing—that, for example, “the freedom to loiter for innocent purposes is part of the ‘liberty’ protected by the Due Process Clause”³¹⁰—seems inconsistent with Sunstein’s charge for democracy-enhancing minimalist decisions that promote rather than foreclose political solutions.

³⁰⁵ *Id.* at 15-20.

³⁰⁶ *See, e.g., id.* at 51 (noting that minimalism is appropriate when “the Court thinks that additional discussion, in lower courts and nonjudicial arenas, is likely to be productive”).

³⁰⁷ SUNSTEIN, ONE CASE AT A TIME, *supra* note 302, at 110-11.

³⁰⁸ *Id.* at 31.

³⁰⁹ *Morales*, 527 U.S. at 60 (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

³¹⁰ *Id.* at 53 (Stevens, J., joined by Souter and Ginsburg, JJ.).

Instead, the existence of a fundamental right to loiter should be left for another day.³¹¹

In contrast, Professor Sunstein points to *Miranda* as an example of a maximalist decision that might nonetheless be justified. Although it created "a virtual code of police behavior,"³¹² "perhaps *Miranda v. Arizona* made sense in light of the extreme difficulty of proceeding case by case to see whether confessions were actually involuntary."³¹³ Of course, one could imagine a minimalist opinion on custodial interrogation, where the Court would suppress Ernesto Miranda's confession as lacking sufficient indicia of voluntariness under prevailing legal standards. Or the Court might have moderately increased the state's burden through a rebuttable presumption of coercion. But readers are generally left to wonder what a minimalist *Miranda* might look like under Sunstein's theory.

It is difficult, however, to describe *Dickerson* as either strictly maximalist or minimalist in nature. Chief Justice Rehnquist's opinion eluded issues not before the Court, such as a videotaping substitute for *Miranda*, and avoided a deeply theorized explanation for prophylactic constitutional rules. Conversely, the Chief Justice seemed to close the door on political debate and alternatives, concluding that *Miranda* announced a constitutional rule that may not be superseded by statute.³¹⁴ *Dickerson* was thus "minimalist" in the issues it addressed but "maximalist" in its foreclosure of further democratic deliberation and legislation. Under Professor Sunstein's theory, this latter aspect of the Court's opinion could only be justified if *Miranda* represents an irreducible minimum for custodial interrogation consistent with the Fifth Amendment. In other words, the maximalist preclusion of democratic options assumes that pre-interrogation warnings are demanded by the Constitution forever (or at least for the foreseeable future).

³¹¹ In fact, that is precisely what happened: Justice Stevens was able to garner only two additional votes on his explication of the fundamental right to loiter. *Id.* at 53-54 (Stevens, J., joined by Souter and Ginsburg, JJ.).

³¹² SUNSTEIN, ONE CASE AT A TIME, *supra* note 302, at 262.

³¹³ *Id.* at 30. See also *id.* at 55.

³¹⁴ *Dickerson*, 120 S. Ct. at 2336.

4. Calabresi's Second-Look Doctrine

In his scholarly work as a Yale law professor and dean,³¹⁵ Guido Calabresi contends that tempered activism rather than avoidance often provides the best means of encouraging dialogue between courts and legislators.³¹⁶ The passive virtues require deference to otherwise suspicious or stagnant statutes and therefore provide insufficient motivation for legislative reform, while full-blown judicial activism leaves little room for political debate and compromise. Calabresi suggests a middle-ground to spur reform without foreclosing legislative alternatives: "[W]hen the legislature has acted with haste or hiding in a way that arguably infringes even upon the penumbra of fundamental rights, courts should invalidate the possibly offending law and force the legislature to take a 'second look' with the eyes of the people on it."³¹⁷

This second-look doctrine is nevertheless consistent with Sunstein's judicial minimalism. Under Calabresi's quasi-common law approach, courts would strike down constitutionally dubious statutes on narrow grounds and expressly cabin their opinions to the context of particular cases. Without the presence of sweeping constitutional principles looming in the background, lawmakers would be relatively free to experiment with other statutory schemes. Calabresi's theory takes only one option off the table—the statutory status quo.

After being appointed to the Second Circuit, Judge Calabresi has further refined his second-look doctrine, this time in live cases rather than scholarly publications. In *Quill v. Vacco*, for instance, he concurred in the invalidation of New York's criminal suicide laws as violating equal protection.³¹⁸ But unlike his colleagues, Calabresi limited his opinion to the statutes' nineteenth-century legislative record and took no position on whether such prohibitions would survive judicial scrutiny if re-

³¹⁵ GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); Guido Calabresi, *The Supreme Court, 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80 (1991). Somewhat ironically, Calabresi relies on an article co-authored by Professor Bickel as the basis for his second-look doctrine. See Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957) (detailing the Court's "remanding" function).

³¹⁶ CALABRESI, *COMMON LAW*, *supra* note 315, at 141-77.

³¹⁷ Calabresi, *Foreword*, *supra* note 315, at 104.

³¹⁸ *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996).

enacted with contemporary justifications.³¹⁹ When lawmakers "wish to regulate conduct that, if not protected by our Constitution, is very close to being protected, they must do so clearly and openly. They must, in other words, face the consequences of their decisions before the people."³²⁰

Criminal procedure doctrine, however, illustrates the inherent limitations of Judge Calabresi's theory. For the most part, constitutional precedents rather than statutes regulate the crucial elements of the criminal process, diminishing the import of Calabresi's second-look doctrine for contemporary criminal procedure. If the boundaries of the Fourth Amendment's exclusionary rule are either too constraining or not constraining enough, for instance, it is the Court rather than the political branches that must take a second look. Nonetheless, there are a few statute-driven aspects of constitutional criminal procedure. Calabresi cites the Supreme Court's death penalty jurisprudence as an example of the second-look doctrine at work.³²¹ The Court essentially struck down every death penalty statute in 1972 as inconsistent with the Eighth Amendment's ban on cruel and unusual punishment,³²² but then approved a new set of capital punishment schemes four years later.³²³ *Furman* remanded "to the states, in effect, the issue of the constitutionality of the death penalty," while *Gregg* accepted the state legislatures' second-look and "reaffirmation of capital punishment."³²⁴

Assuming the Court continued to abide by *Miranda*'s invitation for political alternatives,³²⁵ *Dickerson* might have presented an ideal case for employing the second-look doctrine. As suggested earlier, 3501 was enacted in an atmosphere of hostility toward the Warren Court and its constitutionalization of crimi-

³¹⁹ *Id.* at 743 (Calabresi, J., concurring).

³²⁰ *Id.* at 742. See also *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) (arguing that, although the defendant's drug conviction must be affirmed, the sentencing disparity between crack and rock cocaine might be "heading toward unconstitutionality" in light of "changed circumstances").

³²¹ See Calabresi, *Foreword*, *supra* note 315, at 120.

³²² *Furman v. Georgia*, 408 U.S. 238 (1972).

³²³ *Gregg v. Georgia*, 428 U.S. 153 (1976).

³²⁴ Calabresi, *Foreword*, *supra* note 315, at 120 n.127. See also *id.* at n.126 (citing *Thompson v. Oklahoma*, 487 U.S. 815, 857 (1988), as "raising the possibility that state legislatures did not realize children could be executed under their own statutes").

³²⁵ But see *Dickerson*, 120 S. Ct. at 2336 (concluding "that *Miranda* announced a constitutional rule that Congress may not supersede legislatively").

nal procedure. Yet the statute's exact intent seems hard to pin down and the legislative record was purposely manicured rather than inclusive in coverage. By the time it finally reached the Court, 3501 was more than three decades old and without any significant track-record of enforcement or judicial consideration. Per the Calabresian second-look doctrine, the *Dickerson* Court might have (carefully) struck down the statute, thereby sending 3501 back to Congress for further reflection "with the eyes of the people on it."³²⁶

But Calabresi's theory would seem to have little effect on other criminal justice statutes. Chicago's gang-loitering ordinance, for example, neither suffered from desuetude (it was passed in 1992 and was actively enforced) nor was enacted in haste (it was subject to prolonged and vigorous debate).³²⁷ In *Morales*, then, the issue was not whether the City had openly considered the means and ends of its ordinance, but whether the loitering law was unconstitutional *despite* lengthy political deliberation and public participation in the legislative process. In such circumstances, Judge Calabresi's second-look doctrine may be out of place. "The true justification for imposing a second look," Calabresi argues, is the Court's assurance that, "to the extent that the law clashes with the legal topography in a fundamental way, the clash is the result of the genuine and *considered* wishes of majoritarian bodies."³²⁸ By contrast, the *Morales* Court faced a conflict between publicly aired legislation and the rights of individuals—a clash animated by concerns for personal liberty and countermajoritarian adjudication rather than popular ignorance of the underlying legislative process.

B. THE COURT AS CARTOGRAPHER

These legal scholars have attempted to strike a balance in judicial review—inspiring interbranch dialogue and democratic deliberation while avoiding interbranch conflict and appearances of illegitimacy. Bickel believed that gentle nudges from the passive virtues could encourage dialogue on important so-

³²⁶ Calabresi, *Foreword*, *supra* note 315, at 104.

³²⁷ See Robert Davis, *New Police Arrest Power Lights City Council Fuse*, CHI. TRIB., June 18, 1992, at A1. Cf. Meares & Kahan, *Antiquated Procedural Thinking*, *supra* note 38; Alschuler & Schulhofer, *supra* note 32; Meares & Kahan, *Black, White and Gray*, *supra* note 38.

³²⁸ CALABRESI, *COMMON LAW*, *supra* note 315, at 136.

cial issues without discouraging reasonable solutions or inspiring societal strife. Sunstein supplemented Bickel's theory with the concept of judicial minimalism, advocating narrow decisions that permit further consideration by the political branches. Calabresi went even further by suggesting that statutes of dubious constitutionality be remanded for a second look by the legislature. Cardozo, in contrast, sought an external mechanism for interbranch dialogue that was not bound by jurisdictional requirements or the pragmatic constraints of American politics.

Each theory, however, adopts a distinct perspective on the meaning of *dialogue*. Cardozo envisions interbranch dialogue as a somewhat colloquial collaboration among judges, legislators, and executives, where each party can directly and immediately interact with other government institutions outside of formal proceedings. In turn, Bickel privileges the discourse among politicians and between the political branches and the citizenry, suggesting that the judiciary enhances this type of dialogue through its silence. Sunstein and Calabresi advocate slightly more aggressive approaches and recognize a limited role for judicial voice in interbranch dialogue. Yet despite disagreement on the active participants in a normatively superior discourse, the scholars seem to agree that judicial opinions are, at most, a catalyst for conversation.

Unfortunately, the ability of these theories to inspire interbranch dialogue has not been tested and, in fact, might not be amenable to empirical analysis at all. But assume for present purposes that the theories fall short of optimal dialogue, defined as a judicial strategy that leads to an appropriate political response. In certain cases, techniques such as minimalist opinions and the second-look doctrine might produce confusion rather than clarity for the political branches, informing legislators what they cannot enact but offering no other guidance. The use of these strategies in *Morales*, for instance, might have inadvertently squelched the reenactment of Chicago's gang-loitering ordinance. As such, it might be argued that heightened conversation requires a more intrusive form of judicial review that prods, more or less, a response from the political branches. This approach would not merely invalidate official acts but would propose alternatives consistent with the Constitution. After striking down a statute, in other words, the Court would offer lawmakers a road map toward constitutional legislation.

The idea is fairly novel for criminal procedure but not to constitutional scholarship. Frederick Schauer described this judicial strategy as "lawmaking by specific rules."³²⁹ According to Schauer, the approach "most closely resembles lawmaking by a legislative body in the 'normal' manner."³³⁰ Under this model, the judiciary provides detailed rules for official actors, whether they be legislators, police officers, lower court judges or juries. Neil Katyal has noted a similar phenomenon that he labels "ex-emplification," where the Supreme Court "uses judicial review to strike down an act for its unconstitutionality, but then provides the legislature with a constitutional method to achieve the same end."³³¹ In essence, the Court tells lawmakers that they missed the mark and then hands out a map for the legislature to follow.

1. Federalism

The Supreme Court has occasionally issued constitutional road maps when striking down federal law as beyond the enumerated powers of Article I. It is not an altogether surprising technique in this context given the judicial reticence toward flat bans on congressional legislation.³³² *New York v. United States*, for example, struck down a federal provision requiring states to "take title" of undisposed radioactive waste produced within their borders.³³³ According to the Court, the dual boundaries of the Commerce Clause and the Tenth Amendment barred Congress from commandeering state government, demanding local enactment and enforcement of a national regulatory scheme.³³⁴ But Justice O'Connor's majority opinion "identified a variety of methods, short of outright coercion, by which Congress may urge a state to adopt a legislative program consistent with fed-

³²⁹ Frederick Schauer, *Refining the Lawmaking Function of the Supreme Court*, 17 U. MICH. J.L. REFORM 1, 19 (1983).

³³⁰ *Id.*

³³¹ Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1718 (1998).

³³² See, e.g., *Printz v. United States*, 521 U.S. 898, 956-57 (1997) (Stevens, J., dissenting) ("the presumption of validity that supports all congressional enactments has added force with respect to policy judgments concerning the impact of a federal statute upon the respective States").

³³³ *New York v. United States*, 505 U.S. 144 (1992) (striking down a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b-j).

³³⁴ *Id.* at 159-66.

eral interests.”³³⁵ Congress might condition the receipt of federal funds on state adoption of a waste disposal program, for instance, or it might give state government the option of managing radioactive waste consistent with national standards or having its law pre-empted by federal regulation.³³⁶

Justice O'Connor issued a similar road map a few years later, this time in a concurrence in *Printz v. United States*.³³⁷ In that case, the Court struck down provisions of the Brady Handgun Violence Prevention Act requiring local law enforcement to conduct background checks on prospective gun purchasers.³³⁸ In her separate opinion, O'Connor argued that this “does not spell the end of the objectives of the Brady Act,”³³⁹ as Congress might condition federal largesse on state oversight of handgun transactions.

2. Abortion

Probably the most (in)famous constitutional road maps are found in the Supreme Court's abortion jurisprudence. In *Roe v. Wade*,³⁴⁰ the Court invalidated most criminal abortion statutes as they then existed in 1972, arguing that these laws impermissibly encroached on a woman's rights to privacy and reproductive freedom. Justice Harry Blackmun's majority opinion then sketched out a three-part scheme consistent with substantive due process: (1) the states cannot limit access to abortion in the first trimester; (2) the states may regulate abortion after the first trimester “in ways that are reasonably related to maternal health”; and (3) the states may prohibit abortion after viability “except where it is necessary . . . for the preservation of the life or health of the mother.”³⁴¹

³³⁵ *Id.* at 166.

³³⁶ *See id.* at 167-68.

³³⁷ 521 U.S. 898 (1997).

³³⁸ *Id.* at 933.

³³⁹ *Id.* at 936 (O'Connor, J., concurring).

³⁴⁰ 410 U.S. 113 (1972).

³⁴¹ *Id.* at 164-65. For a statutory example adopting the language of *Roe*, see 22 ME. REV. STAT. ANN. tit. 22, § 1598 (West 1999) (“After viability an abortion may be performed only when it is necessary to preserve the life or health of the mother.”). *But see* *Planned Parenthood v. Casey*, 505 U.S. 833, 872-79 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) (affirming the “essential holding of *Roe v. Wade*” but rejecting its “rigid trimester framework” in favor of an “undue burden” test).

Seven years later, the Court struck down a statute prohibiting an unmarried minor from receiving an abortion without the consent or notification of her parents. The plurality opinion in *Bellotti v. Baird*³⁴² held that a state must provide an alternative legal procedure that bypasses parental consent.³⁴³ In particular, a pregnant minor is constitutionally entitled to a proceeding where she can demonstrate: (1) sufficient maturity and knowledge to make an independent decision or (2) an abortion serves her best interests.³⁴⁴

3. Pornography

After years of unprincipled, ad-hoc adjudication of pornography cases,³⁴⁵ the Supreme Court issued a road map in 1973 specifically detailing what types of sexually explicit materials can and cannot be banned consistent with the First Amendment. In that case, *Miller v. California*,³⁴⁶ the Court essentially crafted a patterned jury instruction for obscenity prosecutions.³⁴⁷ It then gave examples of what a legislature might prohibit: (1) “[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated,” and (2) “[p]atently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.”³⁴⁸

³⁴² 443 U.S. 622 (1979).

³⁴³ *Id.* at 643.

³⁴⁴ *Id.* at 643-44. For statutory examples adopting the *Belotti* formulation, see ALA. CODE § 26-21-4 (2000); GA. CODE ANN. § 15-11-114 (2000).

³⁴⁵ See text and notes 421-31, *infra* (describing pre-*Miller* approach to sexually explicit materials).

³⁴⁶ 413 U.S. 15 (1973).

³⁴⁷ The Court stated:

The basic guidelines for the trier of fact must be: (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (internal citations omitted).

³⁴⁸ *Id.* at 25. See Part IV.D.1, *infra* (analyzing *Miller* road map); note 460, *infra* (listing statutes adopting *Miller* formulation).

4. *Syndicalism*

For a half-century, the Supreme Court had struggled with the First Amendment's implications for subversive speech and advocacy of unlawful conduct, analyzing syndicalism-type statutes under varying constitutional tests.³⁴⁹ In 1969, the Court finally settled on a workable standard in *Brandenburg v. Ohio*.³⁵⁰ That case involved the prosecution of a Ku Klux Klan leader under a broad state syndicalism statute.³⁵¹ In a *per curiam* opinion, the Court struck down the Ohio law but also laid out the

³⁴⁹ See, e.g., *Schenk v. United States*, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."); *Gitlow v. New York*, 268 U.S. 652, 668, 670 (1925) (holding that "a State in the exercise of its police power may punish those who abuse [expressive] freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace," and "when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration"); *Dennis v. United States*, 341 U.S. 494, 510 (1951) (plurality opinion) (adopting Judge Learned Hand's interpretation of the clear-and-present-danger test as "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger"); *Yates v. United States*, 354 U.S. 298, 321-22 (1957) (holding that "indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence as 'a rule or principle of action,' and employing 'language of incitement,' is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur," but "that mere doctrinal justification of forcible overthrow, . . . even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action" unprotected by the First Amendment); *Scales v. United States*, 367 U.S. 203, 234 (1961) (indicating "at least two patterns of evidence sufficient to show illegal advocacy: (a) the teaching of forceful overthrow, accompanied by directions as to the type of illegal action which must be taken when the time for the revolution is reached; and (b) the teaching of forceful overthrow, accompanied by a contemporary, though legal, course of conduct clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated").

³⁵⁰ 395 U.S. 444 (1969).

³⁵¹ The Ohio Criminal Syndicalism statute prohibited "'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.'" *Id.* at 444-45 (quoting OHIO REV. CODE ANN. § 2923.13).

boundaries of permissible legislation: "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation *except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.*"³⁵² It then dropped a footnote suggesting that the federal Smith Act had been upheld in prior cases precisely because of the distinction between "mere advocacy" and the incitement of imminent lawlessness.³⁵³ Not surprisingly, subsequent syndicalism-type statutes have obeyed the Court's formulation.³⁵⁴

IV. CONSTITUTIONAL ROAD MAPS: A PRELIMINARY ASSESSMENT

The Supreme Court has created constitutional road maps in other contexts as well, from voting rights to involuntary servitude.³⁵⁵ Seminal decisions such as *New York Times v. Sullivan*³⁵⁶ and *Regents of the University of California v. Bakke*³⁵⁷ offered variations on the road mapping strategy—for libel laws and affirmative action statutes, respectively.³⁵⁸ But the Court's criminal

³⁵² *Id.* at 447 (emphasis added).

³⁵³ *Id.* at 447 n.2 (discussing *Dennis v. United States*, 341 U.S. 494 (1951), and *Yates v. United States*, 354 U.S. 298 (1957)).

³⁵⁴ See, e.g., ALA. CODE § 13A-11-4 (2000); CAL. PENAL CODE § 151 (Deering 2000); COLO. REV. STAT. ANN. § 18-9-121 (1999); MD. CODE ANN. art. 27, § 83 (1999); MONT. CODE ANN. § 45-8-105 (1999); 21 OKLA. STAT. § 850 (1999).

³⁵⁵ See *Nixon v. Condon*, 286 U.S. 73, 84 (1932) (participation in political parties); *Bailey v. Alabama*, 219 U.S. 219, 237, 239, 245 (1911) (criminal penalties for breach of contract). See also *Hill v. Wallace*, 259 U.S. 44, 68-69 (1922) (congressional regulation of futures markets); *Howard v. Illinois Cent. R.R. Co.*, 207 U.S. 463, 498 (1908) (congressional regulation of common carriers); *United States v. Steffens*, 100 U.S. 82, 96-97 (1879) (congressional regulation of trade-marks).

³⁵⁶ 376 U.S. 254 (1964).

³⁵⁷ 438 U.S. 265 (1978).

³⁵⁸ It must be noted that neither *New York Times* nor *Bakke* involved legislation, strictly speaking. Instead, the former case concerned a civil action "that is common law only, though supplemented by statute," *New York Times*, 376 U.S. at 265, while the latter decision focused on the rules promulgated by "a corporation administering a university." *Bakke*, 438 U.S. at 366 n.42 (Brennan, J., concurring in the judgment in part and dissenting). Nonetheless, both cases placed boundaries on the lawmaking function by suggesting a line between permissible and unconstitutional legislation. For a statutory example using the *New York Times* formulation, see UTAH CODE ANN. § 45-2-3 (2000) (requiring evidence of malice for defamation claims against the press). For an example applying the *Bakke* formulation, see CAL. CONST. art. 9, § 9(d) (2000) ("Regents shall be able persons broadly reflective of the economic, cultural, and social diversity of the state, including ethnic minorities and women. However, it is not intended that formulas or specific ratios be applied in the selection of regents.").

procedure jurisprudence has largely³⁵⁹ eschewed this approach, possibly for lack of statutes governing the conduct of law enforcement or out of sensitivity for the exigencies of criminal justice.

Reticence was lacking in *Morales*, however, with Justice O'Connor explicitly suggesting legislative alternatives to Chicago's original gang-loitering ordinance. As such, it might have foreshadowed further use of the road mapping strategy in other areas of criminal procedure. *Dickerson* seemed to present just such an opportunity: The *Miranda* opinion had invited "sound efforts at reform,"³⁶⁰ yet Congress responded with a constitutionally dubious statute. If the Court felt compelled to invalidate 3501 but remained faithful to the *Miranda* invitation—and if it wanted to promote (or at least not discourage) political dialogue on confession law—then a constitutional road map in *Dickerson* might have instigated a fresh round of debates on the appropriate limits of custodial interrogation. In the end, the Supreme Court chose a more standard path: invalidation without legislative guidance.

Which brings us back to the basic issue—the propriety of judge-made road maps for enacting valid legislation. The answer depends, I believe, on three questions:

- (1) Are constitutional road maps *ever* permissible?
- (2) If so, *when* should constitutional road maps be used?
- (3) Assuming an appropriate case, *how* should constitutional road maps be used?

³⁵⁹ As I have defined it, a constitutional road map accompanies the Court's invalidation of *legislation*. Because of, *inter alia*, the relative dearth of statutory schemes governing criminal procedure, there are few road mapping examples in this area. But if the definition was expanded to include detailed, legislative-like guidelines for *lower courts* and *law enforcers*, a number of Supreme Court cases would be consistent with the road mapping strategy. See, e.g., *Anders v. California*, 386 U.S. 738, 744 (1967) (articulating detailed procedures before court-appointed appellate counsel can withdraw because the case is "wholly frivolous"); *Smith v. Robbins*, 120 S. Ct. 746, 759 (2000) (holding "that the *Anders* procedure is merely one method of satisfying the requirements of the Constitution for indigent criminal appeals" and that the "States may—and, we are confident, will—craft procedures that, in terms of policy, are superior to, or at least as good as, that in *Anders*").

³⁶⁰ *Miranda*, 384 U.S. at 467.

This Part will examine each of these questions in turn. It will then consider the road mapping strategy in distinct cases and, in particular, the decisions in *Morales* and *Dickerson*.

A. WHETHER TO USE

Constitutional road maps present a fairly narrow concern within a much larger debate on interaction between the courts and the political branches. The overarching problem has been variously described by commentators,³⁶¹ but for the most part, judge-made road maps merely iterate the challenges posed by nonessential opinion writing and creative uses of dicta. With this in mind, here are some of the leading arguments both for and against the road mapping strategy:

Interbranch Dialogue and Judicial Efficiency. Advocates would likely begin with the dialogic value of road maps, their ability to promote discourse between the judiciary and the other branches of government. Rather than locking out political solutions, this approach leaves the door ajar and tacitly invites legislative reenactment consistent with the Court's opinion. Road maps openly share constitutional concerns with those institutions charged with making and enforcing law, refracting issues with judicial insight rather than merely reflecting them back to the political branches. This strategy thereby allows legislation that can survive constitutional challenges rather than leaving lawmakers in the lurch.

Legal commentators can disagree, however, on whether a given road map has heightened dialogue or merely increased hostilities. Barry Friedman has suggested that *Roe v. Wade*³⁶² "generated a highly interactive process of legislative enactment-federal court response, tailoring the areas in which states could regulate the abortion process."³⁶³ But according to then-Judge

³⁶¹ See, e.g., Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 S. CAL. L. REV. 995, 995 (1987) (describing problem as "the failure of Congress to review and revise statutes that slip from the judges' grasp"); Schauer, *Refining the Lawmaking Function*, *supra* note 329, at 24 (1983) (describing problem as the need for "more guidance and more attention to the needs of those who must follow [the Court's] lead"); Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1056 (1991) (describing problem as whether "the courts [should] use their opinions as a vehicle to draw legislative attention to statutory deficiencies").

³⁶² 410 U.S. 113 (1973).

³⁶³ Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 663 (1993).

Ruth Bader Ginsburg, *Roe* “invited no dialogue with legislators” and instead “remove[d] the ball from the legislators’ court.”³⁶⁴ The problem, then, is not only uncertainty about the seemliness of constitutional road maps as a judicial strategy but also the appropriate definition and scope of dialogic deliberation in government.

If dialogue means ensuring legislative responses compatible with a judicial vision of permissible statutes, then judge-made road maps clearly fit the bill. Lawmakers are given advice *ex ante* instead of largely unconstructive disapproval *ex post*. It is possible to imagine a succession of statutes on a given issue, each struck down without guidance on what the Constitution would allow—a type of “close but no cigar” method of judicial review. At best this approach would be frustrating; at worst, debilitating to the legislative function. In contrast, constitutional road maps focus dialogue on the possible rather than the impermissible. Suggested legislative strategies, however, are just that—suggestions. *Obiter dictum* lacks the binding quality of a judgment or its constituent parts and may be discarded by legislators.³⁶⁵ Nor is *dictum stare decisis* in subsequent cases and may be reevaluated or flatly rejected by future Courts.³⁶⁶

If instead interbranch dialogue means spurring discussion between the political branches and the citizenry about the various options available to lawmakers and the fitness of each alternative, road maps seem far from dialogic. Conversation is not guaranteed, only judicial instructions and legislative acceptance. In this sense, road maps amount to commands, not conversations, akin to parent-child interaction rather than dialogue between co-equal partners.

Separation of Powers and Advisory Opinions. Opponents of constitutional road maps would probably appeal to the textual, structural, and practical limitations of the judiciary. Article III of the Constitution has been interpreted as restricting federal court jurisdiction to live “cases or controversies” and conversely

³⁶⁴ Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1205 (1992).

³⁶⁵ See *United States Nat’l Bank v. Independent Ins. Agents of Am.*, 508 U.S. 439, 463 n. 11 (1993) (emphasizing “the need to distinguish an opinion’s holding from its dicta”).

³⁶⁶ See *United States v. Dixon*, 509 U.S. 688, 714 (1993) (Rehnquist, C.J., concurring in part and dissenting in part) (“Those statements are dicta, to be sure, and thus not binding on us as *stare decisis*.”).

precluding advisory opinions on issues not properly before the Court.³⁶⁷ In other words, federal judges are empowered to issue judgments (i.e., “affirmed,” “reversed,” “remanded,” etc.) and the necessary justifications but have no authority to speculate on how they might decide a hypothetical controversy.³⁶⁸ A constitutional road map presents precisely that vice by suggesting the Court’s predisposition toward statutes that have not been raised by the litigants nor even enacted by the legislature.³⁶⁹

The structure of the Constitution suggests a related impediment in the separation of powers doctrine. Article I explicitly vests “all legislative powers”³⁷⁰ in Congress while the balance of the original document makes no mention of sharing the lawmaking function with any other institution. Instead, the constitutional scheme was intended to prevent the “accumulation of all powers, legislative, executive, and judiciary, in the same hands”³⁷¹ and, “by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”³⁷² Constitutional road maps would seem to violate the separation of powers by usurping the legislative function: The Court is, for all intents and purposes, constructing a statute rather than rendering judgment.³⁷³

³⁶⁷ See *Rescue Army v. Municipal Court*, 331 U.S. 549, 568 (1947) (noting “the Court’s refusal to render advisory opinions”); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (“The Court has frequently called attention to the ‘great gravity and delicacy’ of its function in passing upon the validity of an act of Congress; and has restricted exercise of this function by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions.”).

³⁶⁸ See PAUL M. BATOR ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 65-67 (3d ed. 1988) (detailing the Supreme Court’s refusal in 1793 to issue an advisory opinion on an American treaty with France).

³⁶⁹ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6 (1959):

The duty [of the Court] is not that of policing or advising legislatures or executives, nor even, as the uninstructed think, of standing as an ever-open forum for the ventilation of all grievances that draw upon the Constitution for support. It is the duty to decide the litigated case and to decide it in accordance with the law, with all that that implies as to rigorous insistence on the satisfaction of procedural and jurisdictional requirements

³⁷⁰ U.S. CONST. art. I, § 1.

³⁷¹ THE FEDERALIST NO. 47, at 301 (James Madison) (Rossiter ed., 1961).

³⁷² *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

³⁷³ See LEARNED HAND, *THE SPIRIT OF LIBERTY* 109 (1953):

Advocates of constitutional road maps can muster decent arguments in rebuttal. Judicial advice to elected officials has not only been allowed but encouraged throughout American history, and the separation of powers was never intended to hermetically seal the courts from the political branches.³⁷⁴ Functionalism has defeated formalism in the partition of government institutions, proponents might argue,³⁷⁵ ensuring "that practice will integrate the dispersed powers into a workable government."³⁷⁶ Moreover, judges make law every day—in the lacunae of statutes, for example, or in the interpretation of open-ended constitutional provisions.³⁷⁷

Institutional Competence, Responsibility, and Legitimacy. Constitutional road maps raise a more pragmatic question of institutional competence—whether the judiciary has the tools and materials to properly craft a statute.³⁷⁸ After all, legislatures can conduct hearings and take expert testimony; can openly consult

[T]he judge must always remember that he should go no further than he is sure the government would have gone, had it been faced with the case before him. If he is in doubt, he must stop, for he cannot tell that the conflicting interests of society for which he speaks would have come to a just result, even though he is sure that he knows what the just result should be. He is not to substitute even his juster will for theirs; otherwise it would not be the common will which prevails, and to that extent the people would not govern.

³⁷⁴ See THE FEDERALIST NO. 47, at 302-03 (James Madison) (Rossiter ed., 1961) (arguing that Montesquieu's concept of the separation of powers "did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other," but only that "the whole power of one department [cannot be] exercised by the same hands which possess the whole power of another department"); THE FEDERALIST NO. 48, at 1 (James Madison) (Rossiter ed., 1961) ("It was shown in the last paper that the political apothegm there examined does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other."). See generally Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996).

³⁷⁵ See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

³⁷⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

³⁷⁷ See BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10-11 (1921) ("I take judge-made law as one of the existing realities of life. There, before us, is the brew. Not a judge on the bench has not had a hand in the making."). See also Schauer, *Refining the Lawmaking Function*, *supra* note 329, at 1 (noting that in "the legal academy, denial of the Court's lawmaking activity is considered conclusive evidence of professional incompetence").

³⁷⁸ See generally Abner J. Mikva, *Why Judges Should Not Be Advicegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825 (1998) (detailing the differences in institutional competence between judges and legislators).

with constituents and interested parties; can interact with executive officials and administrators regarding enforceability; and can leave the particulars to professional draftsmen. In contrast, most judges lack legislative experience; are limited in their deliberations to admissible materials or the trial record; cannot freely confer with experts, political officials, or even the parties to the litigation; are supported only by law clerks and court administrators; and must draft any work product by themselves.³⁷⁹

It is also possible that this judicial strategy can decrease political accountability and responsibility.³⁸⁰ Constitutional road maps might allow legislators to shirk their duties to fully investigate the relevant social problem, to craft a workable solution based on the totality of evidence, and to independently scrutinize a legislative proposal for constitutional defects. Likewise, lawmakers could pass blame to the courts for programmatic failures that they in good conscience should bear. It's not our fault, legislators might cry; the courts gave us no other choice.

The ghost of *Lochner*³⁸¹ looms large as well, with a counter-majoritarian fear that judges will use the road-map approach to thwart otherwise valid legislation in support of spurious rights.³⁸² "Courts are not representative bodies," Justice Frankfurter warned. "They are not designed to be a good reflex of a democratic society."³⁸³ Instead, the members of the Supreme Court are appointed not elected, hold life tenure rather than a term of years, and can heed or ignore popular sentiment as they please. As a general matter, the Court recognizes the anti-democratic nature of judicial review and seeks to avoid (or at least limit) those decisions that could undermine its legitimacy. Consistent with this institutional constraint, judge-made road

³⁷⁹ Or, more likely, have their clerks (typically recent law school graduates) draft the opinions for them. See, e.g., Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 628 (2000) ("there is little doubt that law clerks have great influence in the way opinions are actually drafted, since law clerks do most of the opinion writing for most of the Justices").

³⁸⁰ See Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1006-07 (1924).

³⁸¹ *Lochner v. New York*, 198 U.S. 45 (1905).

³⁸² Cf. BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 2, at 16-23 (defining the "counter-majoritarian difficulty").

³⁸³ *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

maps might seem the treacherous product of "a third legislative chamber" "ruled by a bevy of Platonic Guardians."³⁸⁴

Weighing the Pros and Cons. The arguments for and against constitutional road maps are neither theoretically compelling nor facially ridiculous. One could envision a lively public discourse spurred by this approach, with legislators, executives, and their constituents discussing various regulatory schemes consistent with the Court's road map. Instead of stifling the debate, the map might guide lawmakers through the strictures of the Constitution and encourage creative solutions that avoid areas of personal liberty. Yet it is also possible to imagine the judiciary hijacking the legislative process, becoming an imperial super-lawmaker that can both strike down and redraft statutes at will.³⁸⁵ Legislators may follow a road map in this scenario, not from belief of constitutionality, but out of obedience to the Court's commands.

A recurring problem is the appropriate definition of dialogue and whether the road mapping strategy furthers or impedes the interaction between government institutions. Even assuming a basic definition of dialogue in this context—encouraging action by the other branches of government, for instance—I remain agnostic³⁸⁶ toward the Supreme Court's role in this conversation. I like discourse just as much as the next person; it is, after all, how individuals of varying interests attain mutually beneficial outcomes. But there are always limits to a good thing,³⁸⁷ and so it is with interbranch dialogue: A healthy tripartite scheme of government requires a conversation among the

³⁸⁴ LEARNED HAND, *THE BILL OF RIGHTS* 42, 73 (1958).

³⁸⁵ See, e.g., *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (the Court does "not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare"); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.").

³⁸⁶ Cf. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 27-53 (1988) (drawing a parallel between the Catholic-Protestant divide over religious authority and the debate over Supreme Court supremacy in constitutional interpretation).

³⁸⁷ Baseball slugger Reggie Jackson might have put it best in his analysis of flame-throwing pitcher Nolan Ryan: "Every hitter likes fastballs like everybody likes ice cream. But you don't like it when somebody's stuffing it into you by the gallon." Tim Sullivan, *Ryan Induction Adds Heat to the Moment; Fiery Fastball Scorched Hitters*, CINCINNATI INQUIRER, July 25, 1999, at D1.

judiciary, the legislature, and the executive—yet too much debate can lead to acrimonious friction or an unintelligible din.

Sometimes the Court should be Scalia's "nine-headed Caesar, giving thumbs up or thumbs down"³⁸⁸ on a particular issue—providing judgment and little else—only to chariot away from the (political) forum.³⁸⁹ Although the other branches have become accustomed to, if not dependent on, the give-and-take among lawmakers and law enforcers, courts are strangers to this partisan process of debate and compromise.³⁹⁰ For any number of prudential reasons, sometimes it is best that judges stay on the sidelines rather than venturing into the political rumble.³⁹¹

In the abstract, then, it is well near impossible to discern whether this approach is a helpful jurisprudential tool or a harmful distortion of the constitutional design. At a minimum, road maps are theoretically problematic for the strict constructionist and potentially dangerous in practice from institutional incompetence or the specter of illegitimacy.³⁹² But the question is not whether road maps are *usually* inappropriate—which may well be true—but whether they are *always* inappropriate. And given the rough balance of arguments, reasonable minds could differ.³⁹³

³⁸⁸ *Dickerson*, 120 S. Ct. at 2342 (Scalia, J., dissenting).

³⁸⁹ The Court's desegregation decisions presented just such an occasion. *Brown v. Board of Education (Brown I)*, 347 U.S. 483 (1954); *Brown v. Board of Education (Brown II)*, 349 U.S. 294 (1955). See section IV.D.2, *infra* (discussing *Brown I & II*).

³⁹⁰ See *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring) ("History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.").

³⁹¹ Cf. Bickel, *The Passive Virtues*, *supra* note 292 (arguing for passive virtues of avoidance); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-54 (1936) (Brandeis, J., concurring) (listing avoidance doctrines). But see Gerald Gunther, *The Subtle Vices of the Passive Virtues*, 64 COLUM. L. REV. 1 (1964) (arguing against passive virtues).

³⁹² Cf. LON L. FULLER, *THE MORALITY OF LAW* 82 (1964) ("All of the influences that can produce a lack of congruence between judicial action and statutory law can, when the court itself makes law, produce equally damaging departures from other principles of legality: a failure to articulate reasonably clear general rules and an inconstancy in decision manifesting itself in contradictory rulings, frequent changes of direction, and retrospective changes in the law.").

³⁹³ As an aside, constitutional road maps seem substantially less intrusive on legislatures than judicial decisionmaking in other nations. For example, the West German Constitutional Court held in 1975 that the legislature could not *repeal* its criminal abortion law. See MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS*

B. WHEN TO USE

Assuming *in arguendo* that constitutional road maps might be an acceptable judicial tool, at least in certain circumstances, the question becomes one of discretion: When might the Court properly employ the road mapping strategy? "Rarely" offers a true but not altogether helpful response, as it seems clear that road maps should be the exception and not the norm. In addition to concerns of judicial aptitude and legitimacy, frequent reliance on the mapping approach might well agitate the political branches or become the unheeded cry of wolf. With that said, however, the problem might be informed with factors or patterns indicating that a given constitutional road map will attain the advantages of interbranch dialogue while minimizing potential danger.

Judicial Competence. A suitable starting point for analysis is the relative competence of the Court vis-à-vis lawmakers on a particular issue. As just suggested, the judicial and legislative branches diverge sharply in training, experience, and information. Legislators must stay in tune with popular sentiment in setting agendas and seeking reelection, for example, while courts enjoy political insularity in the largely closed universe of "cases or controversies." In turn, judges are constantly challenged by questions of litigation procedure that rarely (if ever) face lawmakers.

The problem, then, is how to disaggregate the comparative fitness of these institutions at a given task. On the most basic level, courts seem skilled at dichotomous yes-no/either-or questions—guilty or not guilty, for instance—as well as issues of amount, such as the damages to be awarded in a particular case. By contrast, they are ill-suited for assessing the merits of various social policies and allocating government largesse among competing interests. These "polycentric"³⁹⁴ issues are best left to political institutions with extensive fact-finding capacity and a knack for the art of the horse trade. Consider also those decisions that require flexibility, expediency, and definitiveness, in-

86-106 (1985) (reprinting decision). Consider also a section of the Swiss Civil Code explicitly stating that if a rule cannot be discerned from either statutory or customary law, the judge may act "according to the rule which he would establish as legislator." *Id.* at 221.

³⁹⁴ Cf. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). But see Geoffrey C. Hazard, Jr., *Rising Above Principle*, 135 U. PA. L. REV. 153, 184-85 (1986) (critiquing Fuller's distinction between polycentric and bipolar issues).

cluding foreign affairs and the use of military force. Out of prudence, these matters have been denominated "political questions" reserved to the political branches.³⁹⁵

Individual rights provide another area of actual or alleged competence. As a practical matter, federal judges are called upon to construe and apply certain constitutional provisions in their regular course of business. Occasional opportunities to interpret the Fourth Amendment, for example, offer the judiciary a level of familiarity with search-and-seizure principles not available in legislative halls. And as a matter of theory, the Court has maintained a decisive power to protect certain basic freedoms. "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."³⁹⁶ The Court may also have a special obligation to protect "discrete and insular minorities" and remedy defects in the legislative process that obstruct political change.³⁹⁷

Definitive Guidance. A second group of factors concerns the need for convincing and conclusive leadership from the Supreme Court. The judiciary generally operates at a cautious pace, methodical in case management and painstaking in deliberations. But some issues naturally raise the stakes of litigation and call for prompt action. For instance, Professor Schauer suggests that the Court should avoid "a state of uncertainty" in judgments on school financing, given the large consequences for millions of Americans.³⁹⁸ A similar argument can be made on important issues of criminal justice. With untold lives in the

³⁹⁵ See, e.g., *Goldwater v. Carter*, 444 U.S. 996 (1979) (ordering the dismissal of suit against the President challenging his power to terminate treaties).

³⁹⁶ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). See Schauer, *Incentives*, *supra* note 379, at 627 ("Although the Supreme Court deals with a host of questions about separation of powers, federalism, and statutory interpretation, . . . the bulk of the Supreme Court's business, and an even higher proportion of its most publicly visible business, deals with claims of individual rights under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. . . . [T]he Supreme Court . . . exists as an institution of rights protection and with a consequent internal culture of rights protection.").

³⁹⁷ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980). See also Erik Luna, *The Models of Criminal Procedure*, 2 BUFF. CRIM. L. REV. 389, 442-47 (1999) (describing political process theory); Erik Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 804-09 (1999) (same).

³⁹⁸ See Schauer, *Refining the Lawmaking Function*, *supra* note 329, at 23.

balance—suspects, defendants, past and future victims, and so on—the criminal process seems to require a greater level of attentiveness than its civil counterpart. Admittedly, civil litigation often concerns major social policy issues affecting countless individuals. Yet the Microsoft anti-trust case,³⁹⁹ for example, can be conducted at a substantially slower gait than a death penalty appeal with only days before execution.⁴⁰⁰ Criminal prosecutions also face a double-jeopardy bar precluding appellate review after an acquittal;⁴⁰¹ unlike civil litigation, there is no second chance once the jury says “not guilty.”⁴⁰²

Frequently confronted issues require definitive guidance as well. “[T]o the extent that the situation is extremely common,” Professor Schauer notes, “then the possibility of continuing judicial supervision, refinement and reevaluation is nonexistent.”⁴⁰³ Fourth Amendment litigation often presents such problems, with the Justices reviewing only a small fraction of search and seizure challenges despite their ubiquity in the lower judiciary.⁴⁰⁴ The realities of law enforcement also favor clear directions from the Court, as “[a] single, familiar standard is essential to guide police officers, who have only limited time and

³⁹⁹ See *Microsoft Corp. v. United States*, 121 S. Ct. 25 (2000) (mem.) (denying certiorari before judgment).

⁴⁰⁰ Cf. John T. Noonan, *Horses of the Night: Harris v. Vasquez*, 45 STAN. L. REV. 1011, 1017-20 (1993) (describing hurried litigation prior to the execution of Robert Alton Harris). See also *Breard v. Greene*, 523 U.S. 371, 381 (1998) (Breyer, J., dissenting) (“Virginia is now pursuing an execution schedule that leaves less time for argument and for Court consideration than the Court’s rules provide for ordinary cases.”); *Clark v. Collins*, 502 U.S. 1052, 1052 (1992) (Stevens, J., dissenting from denial of stay of execution) (“The compressed schedule has denied state and federal courts the opportunity to review filings with adequate time for reflection, much less to review the record, or even to receive a full response from the State.”).

⁴⁰¹ U.S. CONST. amend. VI (no person shall “be subject for the same offence to be twice put in jeopardy of life or limb”). See, e.g., *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (noting that the double jeopardy clause “protects against a second prosecution for the same offense after acquittal”).

⁴⁰² Another important category involves cases “capable of repetition, yet evading review,” such as abortion litigation. The Court, however, has made a jurisdictional exception in such circumstances, as “pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied.” *Roe v. Wade*, 410 U.S. 113, 125 (1973).

⁴⁰³ Schauer, *Refining the Lawmaking Function*, *supra* note 329, at 23.

⁴⁰⁴ *Id.*

expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."⁴⁰⁵

The Supreme Court may have a similar responsibility when the risks of litigation tend to suppress creative solutions by Congress or the States. "Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science," argued Justice Louis Brandeis in 1932.⁴⁰⁶ Just as it (initially) stifled New Deal legislation, the Court can silence reform efforts by summarily striking down laws without indicating those options left open. Conversely, it can encourage continued experimentation in the face of an unconstitutional statute by suggesting alternative means to the same end.⁴⁰⁷

Three additional factors support definitive guidance within an opinion. First, the Court can jettison case-by-case analysis of a thorny issue, preferring deference to trial courts without meticulous oversight from above. In such circumstances, the Supreme Court provides guidelines for other decisionmakers and then vacates the field out of concern for its own institutional competence and capital. Second, detailed advice can mollify legislators who took their cue from a previous case. When striking down legislation that had been inspired by a prior decision, the Court may feel obligated to highlight the deficiency and suggest other options consistent with the Constitution. Finally, the Supreme Court can feel more confident in crafting precise rules if the trial-court record is fully developed, the relevant is-

⁴⁰⁵ *New York v. Belton*, 453 U.S. 454, 458 (1981) (quoting *Dunaway v. New York*, 442 U.S. 200, 214 (1979)). But see Wayne R. LaFare, *The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith'*, 43 U. PITT. L. REV. 307 (1983) (critiquing the bright-line drawn by the *Belton* Court).

⁴⁰⁶ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁴⁰⁷ When the Court struck down a statute imposing a tax on futures contracts for grain, for instance, it simultaneously suggested that Congress' power over interstate commerce might encompass similar legislation if supported by the legislative record. *Hill v. Wallace*, 259 U.S. 44, 68-69 (1922). Federal lawmakers followed the constitutional road map and enacted a new statute that was subsequently upheld by the Court. *Board of Trade v. Olsen*, 262 U.S. 1 (1923). See E.F. Albertsworth, *Advisory Functions in Federal Supreme Court*, 23 GEO. L.J. 643, 651-52 (1935). But more recent examples have been less successful; Congress did not reenact the nuclear waste provision struck down in *New York v. United States*, 505 U.S. 144 (1992), and has yet to pass a background-check statute to replace the one invalidated in *Printz v. United States*, 521 U.S. 898 (1997).

sue has been explored at length by the lower courts, and the Justices can predict future controversies with a degree of certainty. Such circumstances reduce the risk of imperfect fit between a given rule and the problem it was intended to solve.⁴⁰⁸

Institutional Efficiency. Some of the factors just considered also have relevance in evaluating the relative costs and benefits of a given constitutional road map. To the extent that a particular strategy reduces either the number of court challenges or expedites judicial review of those challenges, the legal system will experience an efficiency gain. If the Supreme Court sets out a bright-line rule in automobile searches,⁴⁰⁹ for instance, it may reduce the amount of time spent by trial courts litigating that issue.⁴¹⁰ In turn, if the Court is solely concerned with its own economics—such as the number of decisions needed to resolve a point of law—detailed guidance in an initial opinion may lessen the load on future dockets.

Efficiency analysis can also be viewed from the legislative perspective. The road mapping approach seems particularly apt, for example, when the constitutional flaw is small or technical. While a terse opinion might leave legislators guessing as to the location and size of the defect, a road map points out the exact problem and suggests potential remedies. The legislature can then focus its energy on correcting rather than finding the defect. Likewise, the road mapping strategy may be invaluable if the only *apparent* alternative is tinkering with the Constitution. The Article V amendment process is deliberately stubborn, ensuring that changes to the original design attach only after protracted deliberation and concerted efforts.⁴¹¹ But if the Court believes that a regular statute could suffice despite appearances to the contrary, a constitutional road map can avoid perceptions of legislative impotence or unnecessary alterations to the Constitution.

The context of legislation and litigation can offer insight as well. When a statute is of recent vintage, passed with strong endorsements, the road mapping approach may catch that politi-

⁴⁰⁸ See Schauer, *Refining the Lawmaking Function*, *supra* note 329, at 8.

⁴⁰⁹ See *New York v. Belton*, 453 U.S. 454 (1981).

⁴¹⁰ If the rule turns out to be a poor one, however, the Court may create more work for itself and the lower judiciary in ferreting out the precise definition and application of the rule's terms.

⁴¹¹ See note 9, *supra*.

cal support before it has ebbed and thereby facilitate a legislative response. In contrast, an old, idle law is unlikely to be revived by lawmakers pursuant to a constitutional road map. As a general rule, legislators rarely correct statutory lapses and vagueness, preferring to make new laws rather than fix old ones.⁴¹²

Reenactment, with or without guidance from the judiciary, is more likely when the decision itself sparks attention and stimulates popular demands for a political response. "Legislative action will probably occur," one state supreme court justice suggests, "when the decision has received media attention, when one or more legislators or legislative committees become interested in the subject, when there is near unanimity that the court decision is wrong, when a powerful interest group or governmental agency is affected by the decision and seeks legislative relief, or when the decision arouses passionate response among various constituencies."⁴¹³ The difficult question for the Court, then, is whether a constitutional road map provides needed encouragement or will instead be ignored by lawmakers. If the latter proves true, this judicial strategy will carry all the baggage of creative dicta without any instrumental value to the political branches and the public.

Judicial Legitimacy. A final factor in assessing a constitutional road map—or, for that matter, any other judicial strategy—is its effect on the perceived legitimacy of the Court. Lacking democratic accountability, financial autonomy, and independent means of enforcement, the judiciary relies heavily on popular compliance through apparent authority of the institution and its commands. History demonstrates that the greatest challenges to the Supreme Court—such as President Roosevelt's Court-packing proposal⁴¹⁴—are frequently linked to appearances of illegitimacy.⁴¹⁵ Decisions on hot-button social issues

⁴¹² See, e.g., Arthur D. Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 NOTRE DAME L. REV. 947, 995 (1985).

⁴¹³ Abrahamson & Hughes, *supra* note 361, at 1055.

⁴¹⁴ See GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 183-85 (13th ed. 1997) (detailing the Court-packing plan); FISHER & DEVINS, *supra* note 273, at 67-75 (same).

⁴¹⁵ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 862 (1992) (noting that, because of *Lochner*, "the Court lost something by its misperception, or its lack of prescience, and the Court-packing crisis only magnified the loss"); *id.* at 960 (Scalia, J., dissenting) ("[*Lochner* was overruled] at a time when Congress was considering Presi-

have also provoked loud, sometimes violent responses by the public and political branches.⁴¹⁶ But given the moral virtue of some judgments,⁴¹⁷ the question of legitimacy suggests caution rather than categorical abstention.

Three points bear mentioning. First, prior court decisions and political acts often create reliance interests in the general population. To the extent that overruling a case or invalidating legislation threatens public dependence on the status quo, the Court will diminish citizen confidence and thereby undermine the legitimacy of judicial review. Second, the authority to craft detailed rules for the political branches seems intimately tied to the source of those rules. By staying close to the text of the Constitution and the core policies underlying a particular provision, the Supreme Court is more likely to be perceived as faithful interpreter rather than social engineer. Finally, just as the Constitution is no "suicide pact,"⁴¹⁸ the Court is not bound to any strategy that threatens its ability to "do justice" in future cases.

C. HOW TO USE

Assuming an appropriate case presents itself to the Court, the final question is how to employ the road mapping strategy. A preliminary issue is a road map's position within the decision itself. By my count, the strategy can be incorporated in at least five distinct locations:

- (1) the majority opinion;

dent Franklin Roosevelt's proposal to 'reorganize' this Court and enable him to name six additional Justices in the event that any Member of the Court over the age of 70 did not elect to retire. It is difficult to imagine a situation in which the Court would face more intense opposition to a prior ruling than it did at that time . . .").

⁴¹⁶ See, e.g., Note, *Safety Valve Closed: The Removal of Nonviolent Outlets for Dissent and the Onset of Anti-Abortion Violence*, 113 HARV. L. REV. 1210, 1211 (2000) ("[P]rior to *Roe*, [abortion opponents] relied almost exclusively on legislative action to effect change. *Roe* removed this principal nonviolent outlet, and the first wave of anti-abortion violence in American history ensued.").

⁴¹⁷ See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁴¹⁸ *Haig v. Agee*, 453 U.S. 280, 309-10 (1981) ("[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.") (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)).

- (2) a portion of the Court's opinion lacking majority support;
- (3) a concurrence supported by swing votes necessary for the judgment;
- (4) a concurrence supported only by votes unnecessary for the judgment; and
- (5) a dissent.⁴¹⁹

In choosing among these points of insertion, two competing interests are at stake—intrusiveness versus authoritativeness. A road map within the majority opinion, for instance, carries the Supreme Court's full authority.⁴²⁰ There is no legislative guesswork when five or more Justices advocate political alternatives consistent with the Constitution; simply adopt its suggestions and the Court will be inclined to defer. On the other hand, this approach maximizes the potential for interbranch conflict precisely because it carries the imprimatur of the Supreme Court rather than a single Justice or two. If such a road map is viewed as judicial legislation, it cannot be shaken off as the wayward opinion of a mistaken jurist and instead might become a symbol of illegitimate activism.

In contrast, road maps contained within dissenting opinions would seem to have limited instrumental value. The general power of road mapping comes from the Court's suggestion that, despite striking down the statute under consideration, a different alternative might survive constitutional scrutiny. But a dissenting opinion offers little encouragement to lawmakers, as it lacks the support of those votes necessary to uphold future legislation. In between the extremes are less authoritative but also less intrusive means of delivering a constitutional road map. A concurrence, for example, does not cast the Court's full weight

⁴¹⁹ It seems possible, of course, to have variations on the road mapping dissent, classified by the amount of support from other dissenting Justices. But given that such road maps generally lack instrumental value to political actors—i.e., legislators cannot merely adopt dissenting dicta and expect validation by the courts—I need not belabor the potential variations here.

⁴²⁰ See, e.g., Katyal, *supra* note 331, at 1795 ("The general power of advicegiving is . . . at its high when a majority of Justices sign on to it.").

behind a particular strategy but still offers a lightly veiled indicator of its leanings, particularly when supported by swing votes.

Packaging a judicial strategy presents another consideration. The language and tone of a road map are particularly important if the Court wants to inspire dialogue on the issue without prompting political animosity or limiting potential alternatives. An opinion might explicitly state that it does not foreclose legislative solutions, for instance, and then suggest possible options couched in accommodating terms (e.g., "examples of valid legislation might include . . ."). Real-world models, such as legislation in other jurisdictions, could demonstrate the road map's feasibility by pointing to successes in similar arenas. The overarching tenor of this strategy, then, should be one of comity and cooperation with the political branches, encouraging dialogue while tempering the sting of judicial review.

One last caveat: The Court should be extremely careful in its word choice and the potential pitfalls created by the phrasing of a given road map. The precise language used in describing an alternative may very well find its way into new law. This is, of course, a variation on the "garbage in-garbage out" phenomenon: A faulty road map will only breed equally flawed statutes.

D. APPLICATION

Using this framework, the advantages and disadvantages of the road mapping strategy can be roughly assessed in the circumstances of a specific case. What has just been described, however, is not an algorithm; it does not analyze with mathematical certainty or produce ultimate conclusions. Instead, it offers a non-exhaustive list of factors that should be weighed by the Court in considering a constitutional road map. With that in mind, this final section briefly examines two well-known cases outside of criminal procedure and then evaluates the road mapping strategy in the context of *Morales* and *Dickerson*.

1. *Miller v. California*

As noted earlier, the Supreme Court had consistently struggled with the issue of obscenity prior to its 1973 decision in *Miller v. California*.⁴²¹ The problem's intractability⁴²² had been

⁴²¹ 413 U.S. 15 (1973).

best illustrated some nine years earlier in an oft-quoted and much derided passage by Justice Potter Stewart: "I shall not today attempt further to define the kinds of material I understand to be embraced within [unprotected obscenity]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."⁴²³

In the years immediately preceding *Miller*, the Supreme Court used an ad hoc approach to obscenity cases, issuing *per curiam* reversals regardless of the underlying theory espoused by each individual Justice.⁴²⁴ Between 1967 and 1973, 31 cases were decided in this manner⁴²⁵ without acknowledging the actual methodology used by the Court's members.⁴²⁶ "Year after year, several of the Justices and most of the clerks went either into a basement storeroom or to one of the larger conference rooms to watch feature films that were exhibits in obscenity cases that had been appealed to the Court."⁴²⁷ Other materials—"boxes of magazines, books, an occasional set of glossy photos or playing cards"⁴²⁸—circulated among the chambers. The Justices (or their clerks) would then compare the alleged obscenity to their own personal standard and either uphold or invalidate the lower court conviction.⁴²⁹ As a consequence, the Supreme Court

⁴²² See *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting) (describing "the intractable obscenity problem").

⁴²³ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

⁴²⁴ See *Redrup v. New York*, 386 U.S. 767, 771 (1967) ("Whichever of [the Justices' individual] constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand.").

⁴²⁵ See *Miller v. California*, 413 U.S. 15, 22 n.3 (1973).

⁴²⁶ See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 83 (1973) (Brennan, J., dissenting) ("By disposing of cases through summary reversal or denial of certiorari we have deliberately and effectively obscured the rationale underlying the decisions.").

⁴²⁷ BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 234 (1979).

⁴²⁸ *Id.* at 226-27.

⁴²⁹ See *id.* at 227, 229:

In the pending cases, [Justice] White's clerk checked to see whether the material violated his boss's personal definition of hard-core pornography. It was a definition that White had never written into an opinion—no erect penises, no intercourse, no oral or anal sodomy. For White, no erections and no insertions equaled no pornography [Justice] Brennan, like White, had his own private definition of obscenity: no erections. He was willing to accept penetration as long as the pictures passed what his clerks referred to as the "limp dick" standard. Oral sex was tolerable if there was no erection In *Casablanca*, as watch officer for his ship [during World War II, Justice Stewart] had seen his men bring

"resolve[d] cases as between the parties, but offer[ed] only the most obscure guidance to legislation, adjudication by other courts, and primary conduct."⁴³⁰ This approach consumed precious time and frustrated even the Court's most patient members.⁴³¹

The *Miller* decision drastically altered not only the legal analysis of obscenity but also the Supreme Court's role in the ultimate conclusion. Acknowledging the legitimate interests on both sides of the debate⁴³² and the difficulty the Justices experienced in delineating obscenity,⁴³³ the Court set out "to formulate standards more concrete than those in the past,"⁴³⁴ "abandon[ing] the casual practice of" its prior approach and "attempt[ing] to provide positive guidance to federal and state courts alike."⁴³⁵ It crafted a *de facto* jury instruction for obscenity prosecutions based in large part on prior decisions.⁴³⁶ The *Miller* Court then employed a road mapping strategy by offering legislators "a few plain examples of what a state statute could define for regulation."⁴³⁷

The potential sting of this constitutional road map was moderated in three distinct ways. First, the Court "emphasize[d] that it is not our function to propose regulatory schemes for the

back locally produced pornography. He knew the difference between the hardest of hard core and much of what came to the Court. He called it his "Casablanca Test."

⁴³⁰ *Paris Adult Theatre*, 413 U.S. at 83 (Brennan, J., dissenting).

⁴³¹ As Justice Brennan allegedly lamented, "I'm sick and tired of seeing this god-damn shit." WOODWARD & ARMSTRONG, *supra* note 427, at 228.

⁴³² *Miller*, 413 U.S. at 18 (noting that "the States have a legitimate interest in prohibiting dissemination or exhibition of obscene materials"); *id.* at 24 (noting "the inherent dangers of undertaking to regulate any form of expression" and that "State statutes designed to regulate obscene materials must be carefully limited").

⁴³³ *Id.* at 22 ("Apart from the initial formulation in the *Roth* case, no majority of the Court has at any time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. We have seen 'a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.'").

⁴³⁴ *Id.* at 20.

⁴³⁵ *Id.* at 29.

⁴³⁶ *Id.* at 24. See CALIFORNIA JURY INSTRUCTIONS: CRIMINAL 435 (6th ed. 1996) (CALJIC No. 16.182) (duplicating language from *Miller* to define "obscene material" in jury-instruction form).

⁴³⁷ *Miller*, 413 U.S. at 25. See text accompanying note 348, *supra* (quoting the Court's examples).

States,” which “must await their concrete legislative efforts.”⁴³⁸ Second, it listed “examples of state laws directed at depiction of defined physical conduct, as opposed to expression,” that would seem to pass constitutional muster. The Court was careful, however, to note that “[o]ther state formulations could be equally valid in this respect” and that it did “not wish to be understood as approving of them in all other respects nor as establishing their limits as the extent of state power.”⁴³⁹ And finally, the decision made clear that the Supreme Court was abdicating primary responsibility to trial courts⁴⁴⁰ and that it would no longer exercise case-by-case review of obscenity prosecutions.⁴⁴¹

Neither the opinion⁴⁴² nor its road map⁴⁴³ was met with open-arms by all members of the Court.⁴⁴⁴ But from an institutional

⁴³⁸ *Miller*, 413 U.S. at 25.

⁴³⁹ *Id.* at 24 n.6.

⁴⁴⁰ *Id.* at 26 (noting that the Court must “rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide”); *id.* at 30-34 (arguing in favor of “community standards” to be applied by local juries).

⁴⁴¹ *See id.* at 28-29:

Mr. Justice Brennan also emphasizes ‘institutional stress’ in justification of his change of view. Noting that ‘[t]he number of obscenity cases on our docket gives ample testimony to the burden that has been placed upon this Court,’ he quite rightly remarks that the examination of contested materials ‘is hardly a source of edification to the members of this Court.’ He also notes, and we agree, that ‘uncertainty of the standards creates a continuing source of tension between state and federal courts’ ‘The problem is . . . that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so.’ It is certainly true that the absence, since *Roth*, of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts. But today, for the first time since *Roth* was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate ‘hard core’ pornography from expression protected by the First Amendment. Now we may abandon the casual practice of *Redrup v. New York*, and attempt to provide positive guidance to federal and state courts alike.

⁴⁴² *See id.* at 37 (Douglas, J., dissenting) (“Today we leave open the way for California to send a man to prison for distributing brochures that advertise books and a movie under freshly written standards defining obscenity which until today’s decision were never the part of any law.”); *Paris Adult Theatre I*, 413 U.S. at 73 (Brennan, J., dissenting).

⁴⁴³ *Miller*, 413 U.S. at 47 (Brennan, J., dissenting) (“I need not now decide whether a statute might be drawn to impose, within the requirements of the First Amendment, criminal penalties for the precise conduct at issue here. For it is clear that under my dissent in *Paris Adult Theatre I*, the statute under which the prosecution was brought is unconstitutionally overbroad, and therefore invalid on its face.”).

perspective (and with perfect hindsight), the road mapping strategy in *Miller* seems at least defensible. Justices on both sides of the obscenity issue expressed concern with the Court's ad hoc approach in prior cases.⁴⁴⁵ This methodology challenged the Justices' competence as arbiters of good taste and the legitimacy of the "Court's sitting as the Super Censor of all the obscenity purveyed throughout the Nation."⁴⁴⁶ Conversely, the Court faced little danger of political revolt by issuing guidelines in a constitutional road map, as there were no powerful lobbies behind pornography production nor an inherent legislative desire to protect such materials.⁴⁴⁷

There was a need, though, for definitive guidance to other government actors and the public at large. Obscenity was a frequently confronted problem in the Court, taxing its time and patience, but generating only vague standards and confusion in the lower judiciary.⁴⁴⁸ "We are back again before this Court," defense counsel argued in *Miller*, "to discuss . . . the continuing saga of life in the pits, or what goes on in the lower courts, because we don't know what, actually, this Court is saying with respect to the pornographer."⁴⁴⁹ What prior decisions had done, nonetheless, was set the stage for the *Miller* road map—demonstrating the inadequacy of case-by-case analysis, offering the raw

⁴⁴⁴ Journalists Bob Woodward and Scott Armstrong describe a deeply divided Court on the issue of obscenity, particularly in the machinations leading up to the *Miller* decision. WOODWARD & ARMSTRONG, *supra* note 427, at 236-41, 290-300.

⁴⁴⁵ See *Miller*, 413 U.S. at 29; *Paris Adult Theatre I*, 413 U.S. at 92-93 (Brennan, J., dissenting). See also WOODWARD & ARMSTRONG, *supra* note 427, at 228 (noting Justice White's distaste for case-by-case adjudication).

⁴⁴⁶ *Jacobellis v. Ohio*, 378 U.S. 184, 203 (1964) (Warren, C.J., dissenting). See also WOODWARD & ARMSTRONG, *supra* note 427, at 293 (quoting a political cartoon showing "two gentlemen in black robes strolling along, . . . and one of them is saying, 'If it turns me on it's smut'").

⁴⁴⁷ Or at least Chief Justice Burger thought as much. See WOODWARD & ARMSTRONG, *supra* note 427, at 239 ("I confess I do not see it as a threat to genuine First Amendment values to have commercial porno-peddlers feel some unease . . . [A] little 'chill' will do some of the ' pornos' no great harm and it might be good for the country.").

⁴⁴⁸ *Ginsberg v. New York*, 390 U.S. 676, 707 (1968) (Harlan, J., dissenting) ("The upshot of all this divergence in viewpoint is that anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment.").

⁴⁴⁹ WOODWARD & ARMSTRONG, *supra* note 427, at 292.

material for detailed rules,⁴⁵⁰ and reassuring the Court that the issue had been fully developed by its own case law and that of the lower courts. The road mapping strategy seemed particularly apropos in *Miller*, as the California law in question “approximately incorporate[d]” a prior standard that was now being abandoned by the Supreme Court.⁴⁵¹

The most important advantages of the *Miller* road map were efficiency gains for the Court and the political branches. By issuing a road map and then relinquishing primary responsibility for review to the trial courts, it substantially lightened “the burden that has been placed upon this Court” by “[t]he number of obscenity cases on our docket.”⁴⁵² Moreover, it was freed from “spend[ing] an inordinate amount of time in the absurd business of perusing and viewing the miserable stuff that pours into the Court.”⁴⁵³ The Justices would still have to refine the rough contours of *Miller*, such as the type of “sexual conduct” that might be deemed “patently offensive”⁴⁵⁴ and the limits of “community standards.”⁴⁵⁵ For the most part, however, the road map served its purpose: “As far as [Justice] White was concerned, the [*Miller* approach] worked perfectly. The Justices still had to review a few cases, but by and large, communities were enforcing their own standards.”⁴⁵⁶

⁴⁵⁰ See *Miller*, 413 U.S. at 24-25 (supporting its “jury instruction” with case cites).

⁴⁵¹ See *id.* at 23 (“The case we now review was tried on the theory that the California Penal Code § 311 approximately incorporates the three-stage *Memoirs* test. But now the *Memoirs* test has been abandoned as unworkable by its author, and no Member of the Court today supports the *Memoirs* formulation.”)

⁴⁵² *Paris Adult Theatre I*, 413 U.S. at 92 (Brennan, J., dissenting). To be clear, Justice Brennan was not advocating the *Miller* approach to obscenity but instead justifying his change of heart to absolute protection for most sexually explicit materials. *Id.* at 93 (“The severe problems arising from the lack of fair notice, from the chill on protected expression, and from the stress imposed on the state and federal judicial machinery persuade me that a significant change in direction is urgently required.”).

⁴⁵³ *Ginsberg v. New York*, 390 U.S. 676, 707 (1968) (Harlan, J., dissenting).

⁴⁵⁴ See, e.g., *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (explaining why the film “‘Carnal Knowledge’ could not be found under the *Miller* standards to depict sexual conduct in a patently offensive way”).

⁴⁵⁵ See, e.g., *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987) (describing the “proper inquiry” under *Miller*’s “community standards” prong).

⁴⁵⁶ WOODWARD & ARMSTRONG, *supra* note 427, at 332.

Efficiency gains accrued to the political branches in two ways. First, *Miller* gave prosecutors greater guidance in their case selection, providing rough outlines of protected speech where only scattered precedents and assorted tests existed before. And second, the road map offered concrete models of valid legislation as well as referencing statutory schemes adopted in other jurisdictions.⁴⁵⁷ The Court was nevertheless accommodating and deferential in language,⁴⁵⁸ presenting only "a few plain examples"⁴⁵⁹ rather than unchangeable schemes. As a consequence, the *Miller* road map suggested that legislatures could efficiently enact a range of obscenity statutes that would survive constitutional challenges. And, in fact, lawmakers have subsequently crafted obscenity statutes consistent with the Court's decision,⁴⁶⁰ demonstrating that the road map was a feasible alternative.

⁴⁵⁷ See *Miller*, 413 U.S. at 25, 24 n.6.

⁴⁵⁸ See text accompanying notes 437-39, *supra*.

⁴⁵⁹ *Miller*, 413 U.S. at 25.

⁴⁶⁰ See, e.g., ALA. CODE §§ 13A-12-190, -195, -200.1 (2000); ARIZ. REV. STAT. § 13-3501 (2000); ARK. STAT. ANN. §§ 5-68-302, -403, -501 (1999); CAL. CIV. CODE § 3505 (2000); CAL. PENAL CODE §§ 311, 312.1, 313 (2000); COLO. REV. STAT. §§ 18-7-101, -501, -601 (2000); CONN. GEN. STAT. § 53a-193 (1999); DEL. CODE. ANN. tit. 10 § 7201, tit. 11 § 1364 (2000); FLA. STAT. §§ 365.161, 847.001 (2000); GA. CODE ANN. §§ 16-12-80, 16-12-102, 36-60-3 (2000); HAW. REV. STAT. § 712-1210 (2000); IDAHO CODE §§ 18-1514, 18-4101, 52-103 (2000); 720 ILL. COMP. STAT. 5/11-20, -21 (2000); IND. CODE §§ 35-49-2-1, -2 (2000); IOWA CODE §§ 728.1, 728.4, 904.310A (1999); KAN. STAT. ANN. §§ 21-4301, -4301c (1999); KY. REV. STAT. § 531.010 (1998); LA. REV. STAT. § 14:106 (2000); ME. REV. STAT. tit. 17 §§ 2911, 2912, 2913 (1999); MD. ANN. CODE art. 27, § 419 (1999); MASS. ANN. LAWS ch. 272, § 31 (2000); MICH. COMP. LAWS §§ 124.693, 722.674, 752.362 (2000); MINN. STAT. §§ 617.241, 617.292 (1999); MISS. CODE ANN. § 97-29-103 (2000); MO. REV. STAT. §§ 573.010, 573.050, 573.090, 573.100 (1999); MONT. CODE ANN. §§ 45-8-201, -205 (1999); NEB. REV. STAT. §§ 28-807, -814 (2000); NEV. REV. STAT. ANN. §§ 200.700, 201.235, 201.257 (2000); N.H. REV. STAT. ANN. §§ 571-B:1, 650:1 (2000); N.J. STAT. ANN. §§ 2C:34-2, -3 (2000); N.M. STAT. ANN. §§ 30-37-1, -38-1 (2000); N.Y. PENAL LAW §§ 235.00, 235.20 (1999); N.C. GEN. STAT. §§ 14-190.1, 14-190.13, 19-1.1, 19-12 (1999); N.D. CENT. CODE, §§ 12.1-27.1-01, -02 (2000); OHIO REV. CODE ANN. §§ 2907.01, 2919.22 (Anderson 2000); OKLA. STAT. tit. 21 §§ 1024.1, 1040.12, 1040.18, 1040.75 (1999); OR. REV. STAT. § 167.087 (1999); 18 PA. CONS. STAT. § 5903 (1999); R.I. GEN. LAWS §§ 11-31-1, 11-31-10, 42-43-3 (2000); S.C. CODE ANN. §§ 16-15-260, -305, -375 (1999); S.D. CODIFIED LAWS § 22-24-27 (2000); TENN. CODE ANN. §§ 39-17-901, -1002 (1999); TEX. PENAL CODE §§ 43.21, .24 (2000); UTAH CODE ANN. §§ 76-10-1201, -1203 (2000); VT. STAT. ANN. tit. 13 § 2801 (2000); VA. CODE ANN. §§ 18.2-372, -390 (2000); WASH. REV. CODE §§ 7.48.050, 7.48A.010, 9.68.050, 9.68A.140 (2000); W. VA. CODE §§ 7-1-4, 8-12-5b, 61-8A-1 (2000); WIS. STAT. §§ 134.46, 450.155, 944.21, 948.11 (1999); WYO. STAT. § 6-4-301 (2000).

Let me make clear that *Miller* does not represent a normatively superior stance on the appropriate protections for sexually explicit materials. I am no fan of "community standards" when individual constitutional rights are at stake.⁴⁶¹ Instead, the consistently libertarian position of William O. Douglas⁴⁶² seems preferable to either ad hoc Supreme Court adjudication or deference to criminal juries. But if we put aside the moral debate surrounding *Miller* and instead examine the vehicle for delivering that decision, the constitutional road map seems to have served its purposes without imposing undue institutional costs on the Court. Legislatures were given guidance as to what they could or could not ban, while the Justices lightened their docket and largely eliminated the need for "movie day"⁴⁶³ at the Supreme Court.

2. *Brown v. Board of Education*

If *Miller* represents a case example conducive to the road mapping strategy, the Court's desegregation decisions seem to offer an opposing scenario. Following the Civil War, the "dark days of slavery"⁴⁶⁴ gave way not to egalitarian government but to a new era of racism under color of law. Involuntary servitude was replaced by the Southern system of Jim Crow, ensuring racial segregation and subjugation backed by both official prosecution of Black Codes⁴⁶⁵ and private enforcement of the lynch mob.⁴⁶⁶ Statutes separated the races in all facets of life, from segregated railroad cars for colored patrons to segregated cor-

⁴⁶¹ See, e.g., Luna, *Models of Criminal Procedure*, *supra* note 397, at 454-76 (detailing an "individual rights" model of criminal procedure); Luna, *Sovereignty and Suspicion*, *supra* note 397, 818-861 (similar).

⁴⁶² Compare *Miller*, 413 U.S. at 37-47 (1973) (Douglas, J., dissenting), with *Roth v. United States*, 354 U.S. 476, 508-14 (1957) (Douglas, J., dissenting).

⁴⁶³ See WOODWARD & ARMSTRONG, *supra* note 427, at 233-35.

⁴⁶⁴ Frederick Douglass, *The Civil Rights Case*, Speech at the Civil Rights Mass-Meeting Held at Lincoln Hall in Washington, D.C. (Oct. 22, 1883), in *NEGRO SOCIAL AND POLITICAL THOUGHT 1850-1920: REPRESENTATIVE TEXTS* 303 (Brotz ed., 1966).

⁴⁶⁵ "The Black Codes of 1865, passed in almost all of the states of the old Confederacy, were meant to replace slavery with some kind of caste system and to preserve as much as possible of the prewar way of life." FRIEDMAN, *A HISTORY OF AMERICAN LAW*, *supra* note 24, at 504.

⁴⁶⁶ "The Ku Klux Klan terrorized the blacks. Ultimately, the South saw to it that blacks did not vote or hold office. Blacks were relegated to a kind of peonage." *Id.* at 505. See also *id.* at 506-07 (describing the use of lynch mobs to suppress blacks).

rections facilities for colored inmates. "Law and social custom defined a place—a subordinate place—for blacks," legal historian Lawrence Friedman notes. "[T]hose who violated the code were severely punished," while "[m]ajor infractions could mean death."⁴⁶⁷ In one of its darkest moments,⁴⁶⁸ even the Supreme Court placed its imprimatur on racial segregation into "separate but equal" facilities.⁴⁶⁹

Against this background, the NAACP forged a sophisticated litigation strategy in the 1920's to undermine the "separate but equal" doctrine and eventually force the Court to reconsider its stance on segregation.⁴⁷⁰ Even supporters were skeptical of the campaign's chances of success, as "the forces that keep the Negro under subjection will find some way of accomplishing their purposes, law or no law."⁴⁷¹ Undaunted, the NAACP proceeded to attack "targets of opportunity,"⁴⁷² where it could clearly show that the separate facilities were, in fact, not equal. Such a strategy could chip away at segregation without a facial challenge to the practice itself, thereby preventing an adverse judgment from "an exceedingly conservative Supreme Court" or "engender[ing] a violent backlash" from the Southern white establishment.⁴⁷³ The result was a series of Court victories between 1938 and 1950 forcing the admission or accommodation of black students in state universities.⁴⁷⁴

⁴⁶⁷ *Id.* at 506.

⁴⁶⁸ The ignobility of *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding segregation), can only be met by that of *Dred Scott v. Sanford*, 60 U.S. 393 (1857) (upholding slavery).

⁴⁶⁹ See *Plessy*, 163 U.S. at 548 ("enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the fourteenth amendment").

⁴⁷⁰ For excellent reviews of the NAACP's strategy, see RICHARD KLUGER, *SIMPLE JUSTICE* (1975); MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987).

⁴⁷¹ KLUGER, *supra* note 470, at 132 (quoting Roger Baldwin of the ACLU).

⁴⁷² TUSHNET, *supra* note 470, at 145.

⁴⁷³ KLUGER, *supra* note 470, at 134-37.

⁴⁷⁴ See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (striking down Missouri law that denied African-American students admission to in-state law school but paid their tuition to an out-of-state institution); *Sipuel v. Board of Regents*, 332 U.S. 631, 632 (1948) (holding that a qualified African-American student is "entitled to secure legal education afforded by a state institution"); *Sweatt v. Painter*, 339 U.S. 629,

By 1954, the stage was set for the most important decision of the twentieth century, *Brown v. Board of Education*.⁴⁷⁵ Before the Court was a facial attack on Jim Crow—whether the states must end racial segregation in public schools “even though the physical and other ‘tangible’ factors may be equal.”⁴⁷⁶ In a short opinion for a unanimous Court, Chief Justice Warren suggested that despite the “inconclusive nature of the [Fourteenth] Amendment’s history,”⁴⁷⁷ there could be no doubt as to the importance of education in modern America⁴⁷⁸ and segregation’s “detrimental effect upon the colored children.”⁴⁷⁹ The Chief Justice then concluded that “in the field of public education the doctrine of ‘separate but equal’ has no place,” as “[s]eparate educational facilities are inherently unequal.”⁴⁸⁰

What was admittedly lacking, however, was clear guidance for government officials.⁴⁸¹ There was no constitutional road map for local or state legislators on integrating public schools consistent with the Fourteenth Amendment; instead, the Court simply informed the nation that segregation was unconstitutional without suggesting political solutions. The Supreme Court did consider legal remedies the very next term, emphatically restating that “[a]ll provisions of federal, state, and local law requiring or permitting [racial] discrimination must yield”⁴⁸² to its pronouncement in *Brown*. But this time the Court essentially punted to trial judges the issue of appropriate relief, not-

635 (1950) (holding that an African-American student must be admitted to the University of Texas Law School because a “legal education equivalent to that offered by the State to students of other races” “is not available to him in a separate law school”); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 642 (1950) (holding that an African-American graduate student, “having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races”).

⁴⁷⁵ *Brown I*, 347 U.S. 483 (1954).

⁴⁷⁶ *Id.* at 493.

⁴⁷⁷ *Id.* at 489-90.

⁴⁷⁸ *Id.* at 492-93.

⁴⁷⁹ *Id.* at 494 (quoting lower court).

⁴⁸⁰ *Id.* at 495.

⁴⁸¹ *Id.* at 495-96 (noting that “the formulation of decrees in these cases presents problems of considerable complexity” and requesting reargumentation of that issue the next term).

⁴⁸² *Brown v. Board of Education (Brown II)*, 349 U.S. 294, 298 (1955).

ing that "the courts which originally heard these cases can best perform this judicial appraisal."⁴⁸³ With minimal advice, the opinion then directed lower courts to desegregate public schools "with all deliberate speed."⁴⁸⁴ In the immediate wake of these decisions, the Supreme Court would order the desegregation of various public facilities in short *per curiam* opinions, citing to *Brown* or its progeny but offering little guidance for political actors.⁴⁸⁵

The Court was widely criticized for its approach to desegregation—and not just by white supremacists.⁴⁸⁶ While lauding the moral principle announced in *Brown*, some commentators argued that the lack of definitive rules ensured local chicanery, with the "all deliberate speed" language producing more deliberateness than speed. Instead, the Supreme Court should have forwarded, in explicit terms, the structure of government obligations and discretion under *Brown*. In other words, the desegregation decisions should have laid out a constitutional road map of sorts for local and state officials to follow in integrating their public school systems. And in a perfect world, the road mapping strategy might have offered a nice solution: On May 17, 1954, the Justices would have issued definitive rules and guidelines for implementing its decision, and the following day—*voilà!*—the schools would have been desegregated. Unfortunately, the real world doesn't work that way; it takes time to

⁴⁸³ *Id.* at 299.

⁴⁸⁴ *Id.* at 301.

⁴⁸⁵ See, e.g., *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954) (municipal amphitheaters); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (public beaches, pools, and bathhouses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (municipal golf courses); *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956) (state graduate schools); *Gayle v. Browder*, 352 U.S. 903 (1956) (buses); *Pennsylvania v. Board of Directors*, 353 U.S. 230 (1957) (school for orphans); *New Orleans City Park Improvement Association v. Detiege*, 358 U.S. 54 (1958) (public parks); *State Athletic Comm'n v. Dorsey*, 359 U.S. 533 (1959) (athletic contests); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (restaurant in municipal airport); *Johnson v. Virginia*, 373 U.S. 61 (1963) (public facilities); *Schiro v. Bynum*, 375 U.S. 395 (1964) (municipal auditorium).

⁴⁸⁶ See, e.g., Charles L. Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 16-31 (1970); Robert Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237 (1968); Louis Lusky, *Racial Discrimination and the Federal Law*, 63 COLUM. L. REV. 1163 (1963).

institute a change in social policy affecting millions of people, even when that change is of undoubted moral correctness.

At least three factors militated against the Court's use of a road map in its desegregation decisions. First, *Brown* in itself was a powerful statement from an authoritative institution that could expect *some* obedience even without explicit guidance.⁴⁸⁷ And, in fact, some compliance followed: A year after its first decision, the Court announced "that substantial steps to eliminate racial discrimination in public schools have already been taken, not only in some of the communities in which these cases arose, but in some of the states appearing as *amici curiae*, and in other states as well."⁴⁸⁸ This is not to say that desegregation had come quick and easy; most segregated schools remained as such well after *Brown*. Yet by simply announcing a constitutional principle and little else, the Court persuaded more than 500 school districts to abandon segregation⁴⁸⁹ without triggering the dangers of creative dicta.

A second consideration was the competence of the Supreme Court to fashion a solution for diverse school systems spread across the nation. Untold numbers of statutes and regulations would have to be conformed to *Brown*; schoolhouses would have to be built or torn down; teachers and administrators would have to be hired or reassigned; transportation for students would have to be adjusted; new school district lines might have to be drawn;⁴⁹⁰ most of all, money would have to be raised and

⁴⁸⁷ See BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 2, at 245-46:

Like poetry, then, as a verse by Auden tells us, the great *School Segregation* decision of May 17, 1954, made nothing happen. But only like poetry. Only as it may sometimes seem that nothing but power, purposefully applied, can affect reality, only thus could it be said that this first decision had no consequences. And this is a species of romantic illusion. In fact, announcement of the principle was in itself an action of great moment, considering the source from which it came. Immediately, in the phrase Lincoln used about slavery, segregation was placed "where the public mind shall rest in the belief that it is in the course of ultimate extinction"

⁴⁸⁸ *Brown II*, 349 U.S. at 299. See also BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 2, at 246.

⁴⁸⁹ See BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 2, at 246. See also KLUGER, *supra* note 470, at 720.

⁴⁹⁰ Of course, any redistricting or change in student matriculation would have to survive judicial scrutiny under the Fourteenth Amendment or (eventually) the Voting Rights Act. See, e.g., *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000); *Shaw v.*

spent. Given the judiciary's limited expertise on such subjects, offering judgment without detailed guidance may have been the only path open to the Court. "Seen in its totality, as involving some 5,000 school districts, nearly nine million white children and nearly three million colored, the situation exhibited great variety and complexity," argued Professor Bickel. "No solution could be fabricated and made effective overnight, no matter what anyone might wish."⁴⁹¹

The third and most important consideration was the institutional legitimacy of the Supreme Court. No modern scholar⁴⁹² can doubt the validity of the Court's judgment on May 17, 1954; it remains the moral apogee of American jurisprudence. But the Justices recognized the dangerous ground on which they had ventured, "subject to scurrilous attack by men who predicted that integration of the schools would lead directly to 'mongrelization of the race' and that this was the result the Court had really willed."⁴⁹³ Racists are, almost by definition, obstinate in their beliefs and dull in their cognitive powers. They are also quick to use intimidation and violence against those seeking equality of treatment, as more than aptly demonstrated by the angry mobs that engulfed black students seeking admission in various Southern schools and universities. Segregationist politicians only stoked the fire of race-hate, advancing their careers by vowing to fight integration at every turn.⁴⁹⁴

The threat to the ongoing authority of the Court was palpable, as "any head-on challenge to the segregated South . . .

Hunt, 517 U.S. 899 (1998); *Reno v. Bossier Parish School Bd.*, 520 U.S. 471 (1997); *Keyes v. Denver School District No. 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1 (1971); *Green v. County School Bd.*, 391 U.S. 430 (1968).

⁴⁹¹ BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 2, at 248.

⁴⁹² *But see* Wechsler, *supra* note 369, at 31-35 (arguing that no "neutral principle" could justify *Brown*). For a brief attempt to resuscitate Wechsler's "neutral principles" thesis in law enforcement, see Luna, *Principled Enforcement*, *supra* note 283.

⁴⁹³ BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 2, at 174.

⁴⁹⁴ For example, nearly all congressional representatives from segregated states signed on to a "Southern Manifesto," attacking "the decision of the Supreme Court in the school cases as a clear abuse of power" and pledging "ourselves to use all lawful means to bring about the reversal of this decision which is contrary to the Constitution and to prevent the use of force in its implementation." *Id.* at 257-58. *See also* 102 CONG. REC. H3948, 4004 (daily ed. Mar. 12, 1956) (reprinting "Southern Manifesto").

would have produced civil strife sufficient to make Little Rock and Birmingham seem gatherings of good will."⁴⁹⁵ Nor was it clear that President Eisenhower would enforce the desegregation decisions against recalcitrant Southern states, let alone a detailed set of rules issued in the form of an opinion.⁴⁹⁶ In this context, outright defiance by the South coupled with acquiescence by the President and Congress would have emasculated the Supreme Court. It could still issue orders, but who would listen? The original decision and the subsequent charge to desegregate "with all deliberate speed" were cautiously crafted against this background.⁴⁹⁷

What was needed more than detailed judicial guidelines was a swelling of national opinion against segregation and resolute action from the federal government. And eventually that sentiment did take hold, culminating in the adoption of the Civil Rights Act of 1964.⁴⁹⁸ Yet one is left to wonder whether the ultimate consequences of *Brown* would have come to fruition had the Justices issued a comprehensive road map toward desegregation, whether this strategy would have given segregationists

⁴⁹⁵ J. HARVIE WILKINSON, FROM BROWN TO BAKKE 68 (1979).

⁴⁹⁶ See BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 2, at 264-65. See also EARL WARREN, THE MEMOIRS OF EARL WARREN 291 (1977) (quoting President Eisenhower's attempt to justify Southern resistance to school desegregation: "These are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit alongside some big overgrown Negro."). Eventually, President Eisenhower did use force to implement the Supreme Court's desegregation decisions. See FISHER & DEVINS, *supra* note 273, at 267-68 (reprinting excerpts from President Eisenhower's public announcement to send federal troops to Little Rock, Arkansas).

⁴⁹⁷ See, e.g., FISHER & DEVINS, *supra* note 273, at 256-57:

When *Brown* was decided, segregation was so ingrained in the South that the outlawing of dual school systems promised social turmoil and massive resistance. . . . These deep feelings were not lost either on the Court or on the Department of Justice. In an effort to temper Southern hostility, Chief Justice Warren sought to craft a unanimous opinion of limited reach and the Justice Department recommended that the Court *not* specify a remedy in the case. . . . By not insisting on immediate implementation of its policy, the Court was able to unanimously agree upon a brief declaration that segregation in education was unconstitutional. A year later the Court issued its remedy for *Brown*, declaring that desegregation must proceed with "all deliberate speed." The Court's bifurcation of merits and remedies, as well as the absence of judgmental rhetoric in its segregation decisions, reveals that the Justices sought to improve the acceptability of their decision by speaking in a single moderate voice.

⁴⁹⁸ See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243 (codified at 42 U.S.C. § 2000a *et seq.* (1994)).

more fodder against the Court, whether Southern states would have loudly defied not only the principle of *Brown* but also its dictates, and whether the President and Congress would have stood to defend the Supreme Court against such challenges. Given these ambiguous circumstances, the initial⁴⁹⁹ lack of detailed rules or guidance for desegregation seems entirely defensible.⁵⁰⁰

3. *City of Chicago v. Morales*

Having laid out an analytic framework and considered cases where the application or rejection of the judicial strategy appeared reasonable, we turn now to the use of constitutional road maps in the Supreme Court's criminal procedure jurisprudence. To reiterate the sequence of events in *Morales*: Chicago enacted a loitering ordinance aimed at gang congregation, the Supreme Court struck down the law but offered a road map toward constitutional legislation in Justice O'Connor's concurrence, and the City recently enacted a new gang-loitering ordinance consistent with the O'Connor road map. The question, then, is the propriety of the road mapping strategy in the context of *Morales*.

A handful of arguments can be made against issuing a road map in this case. Neither the Court nor the lower judiciary confront the void-for-vagueness doctrine and, in particular, vagrancy-type statutes on any consistent basis. Certainly, Illinois judges considered various constitutional challenges after the gang-loitering ordinance was passed. But in general, this species of law is sporadically litigated and hardly constitutes the type of frequently confronted issue requiring definitive guidance from the Supreme Court. Likewise, it is not entirely clear

⁴⁹⁹ The Court would eventually have to face a variety of thorny issues. See, e.g., *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) (busing to achieve desegregation).

⁵⁰⁰ This does not mean that the entire opinion can be defended. For example, the Court's reliance on scientific evidence to justify desegregation was empirically dubious. See Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 72 LAW & CONTEMP. PROBS. 57, 70 (1978) ("Virtually everyone who has examined the question now agrees that the Court erred [in using social science studies]. The proffered evidence was methodologically unsound."). Instead, the *Brown* Court should have announced a moral principle—forced separation by race produces inherent inequality, for instance—without regard to scientific data.

that the lower courts have considered a sufficient number of similar cases to provide trends and practical experience for the Justices. And unlike *Miller*, the *Morales* Court was not faced with an endless stream of litigation squandering limited time and docket space.

By and large, though, *Morales* seemed to present a fairly strong case for using the road mapping strategy. As an initial matter, the Supreme Court was not dealing with a polycentric issue that involved, for example, choosing among various public policies and allotting tax dollars among rivals.⁵⁰¹ Massive social change was an unlikely consequence of the Court's decision, regardless of whether the ordinance was upheld or struck down. Chicago's approach to gang loitering remains relatively unique, with most jurisdictions opting for more traditional policing strategies, focusing on harmful conduct rather than congregation alone.⁵⁰²

The stakes were high, however, for individuals subject to the law's bite and community members living in constant fear of gang activity. On one side were the suspected gang members and their associates, rousted and sometimes jailed for merely standing on a street corner. On the other side were law-abiding citizens and families, burdened by the devastation of their communities and the danger accompanying even simple, every-

⁵⁰¹ It is true, however, that Chicago would have to make resource allocation decisions as a necessary consequence of the Court's decision.

⁵⁰² See, e.g., Gaylord Shaw, *Justices Reject Chicago's Anti-Gang Loitering Law*, ARIZ. REPUB., June 11, 1999, at A3 (police official stating that "the case will not affect Phoenix procedures"); David Savage, *High Court Rejects Ban on Gang Loitering*, L.A. TIMES, June 11, 1999, at A1 ("Since Chicago's law was new and untested, its demise should have no direct impact on California . . . San Jose Mayor Ron Gonzales said that his city had never even considered the Chicago approach 'because it seemed obviously constitutionally defective.'"); James H. Burnett III, *Ruling unlikely to affect Milwaukee ordinances*, MILWAUKEE J. & SENTINEL, June 11, 1999, at 3 ("In spite of Thursday's U.S. Supreme Court ruling striking down a Chicago anti-loitering ordinance aimed at keeping gang members from congregating, Milwaukee's anti-loitering laws are likely to remain intact, city officials say."). Moreover, the decision was unlikely to have major effects even on Chicago law enforcement, "because Chicago police already have adjusted their tactics since the law was first declared unconstitutional in state court more than three years ago." Marx & Wilson, *supra* note 34. But see Mark LeBien, *The U.S. Supreme Court strikes down Chicago's gang loitering ordinance*, CHI. TRIB., June 10, 1999, at 1 ("Legal experts say the Court's decision in the Chicago case could be its most important law-enforcement ruling in decades. Cities all over the country, plagued by gang violence in mainly poor, minority communities, have moved to new systems of policing that could be affected by the ruling.").

day activities. With an obligation to ensure fairness in the criminal justice system and, in particular, adequate notice of banned conduct, the *Morales* Court was acting within an area of alleged judicial expertise and on an issue that called for definitive guidelines. Given that the ordinance's very defect was a failure to "provide sufficiently specific limits on the enforcement discretion of the police,"⁵⁰³ it seemed fitting for the Supreme Court to suggest such limits through the road mapping strategy.

Although efficiency gains were doubtful for the Court itself, the political branches had much to benefit from a constitutional road map. From the law enforcement perspective, a freshly minted loitering ordinance would resume police intervention at an early stage in the timeline of street crime. Rather than waiting for a drug deal, youth violence, or physical intimidation, officers could interrupt a precursor to such conduct—gang congregation on street corners—allowing preventative measures before crime occurs. From the legislative point of view, a constitutional road map would permit lawmakers to efficiently reenact just such a tool for police. If the *Morales* Court had struck down the ordinance in a terse opinion, the Chicago City Counsel might have foregone new legislation or spent its time finding the defect rather than correcting it. The road mapping strategy could allow the City to focus its efforts on crafting a fresh loitering ordinance consistent with the Constitution. Moreover, a constitutional road map seemed likely to spur political action, as the ordinance had been enacted in the recent past, public support remained high for this type of community policing technique, and the City had made clear its intentions to pursue legislative alternatives.⁵⁰⁴

The placement and phrasing of the *Morales* road map seemed to limit the potential downside as well. It was located within a concurring rather than a majority opinion, avoiding appearances of brazen judicial activism or at least limiting such claims to discrete members of the Supreme Court. The road map was backed, however, by swing votes necessary for the Court's judgment, giving it a heightened degree of influence on

⁵⁰³ *Morales*, 527 U.S. at 64.

⁵⁰⁴ See, e.g., Jan Crawford Greenburg, *Justices Look at City Law*, CHI. TRIB., Dec. 10, 1998, at 3 ("Daley defended the ordinance and said that if the Supreme Court decision goes against the city, it 'will come back and correct' it.")

political actors. Legislators need only conduct a simple head-count of the Justices to assess the chances of a new gang-loitering law: An ordinance that follows, more or less, the *Morales* road map will likely receive the votes of concurring Justices O'Connor and Anthony Kennedy and those of the three dissenters, Chief Justice Rehnquist and Justices Scalia and Thomas. Through its location, the road map thus minimized any appearances of judicial lawmaking while maximizing the potential guidance for the political branches.

Likewise, Justice O'Connor was careful to package her road map in accommodating, even sympathetic terms. "I share Justice Thomas' concern about the consequences of gang violence," O'Connor opined, "and I agree that some degree of police discretion is necessary to allow the police 'to perform their peacekeeping responsibilities satisfactorily.'"⁵⁰⁵ And though concurring with the majority that the ordinance was unconstitutionally vague, she felt it "important to courts and legislatures alike that we characterize more clearly the narrow scope of today's holding."⁵⁰⁶ Justice O'Connor then suggested that Chicago had reasonable alternatives at its disposal to fight gang intimidation and violence.⁵⁰⁷ In addition to providing "examples" of such alternatives, O'Connor noted that much of her road map "would be consistent with the Chicago City Council's findings and would avoid the vagueness problems of the ordinance."⁵⁰⁸ Her suggestions also appear in harmony with established principles of criminal liability and due process—distinguishing "harmful" purposes and conduct from facially innocuous activity, for instance, and limiting coverage to gang members to avoid the problem of guilt by association.⁵⁰⁹

The strongest argument in favor of the *Morales* road map, and the one that seemed to animate Justice O'Connor's concurrence, was the plight of crime-infested neighborhoods and their efforts to protect law-abiding residents. According to its advocates, Chicago's gang-loitering ordinance was but one example

⁵⁰⁵ *Morales*, 527 U.S. at 65 (O'Connor, J., concurring).

⁵⁰⁶ *Id.* at 66.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.* at 68.

⁵⁰⁹ See *id.* at 67-68. As noted earlier, however, the new ordinance maintained criminal liability for non-gang members who congregate with gang members. See Appendix B, *infra* (providing text of new ordinance).

of poor, urban, largely-minority communities retaking the streets from criminals.⁵¹⁰ Such efforts deserve acknowledgement if not deference from the courts, supporters contend, as strict scrutiny is little more than the second-guessing of judges who don't live in gangland.⁵¹¹

The challenge for the *Morales* Court, then, was striking down an unconstitutionally vague statute without stifling commendable reforms and crime fighting techniques in the inner-city. As always, the Justices had many options before them. They might have exercised the "passive virtues" and denied certiorari, given that the Illinois Supreme Court had already invalidated the ordinance.⁵¹² Or the Court might have issued a minimalist opinion, striking down the law without any deep theorizing or prognostication on future issues. But had the *Morales* Court followed the advice of Professors Bickel or Sunstein, the idea of a new gang-loitering ordinance may well have been scuttled.⁵¹³ If

⁵¹⁰ See Meares & Kahan, *Antiquated Procedural Thinking*, *supra* note 38, at 208:

Perhaps the most important reason why courts should take notice . . . is that minority communities are using their new political power to take charge of the crime problems that plague their neighborhoods. They are working with their elected officials to establish law enforcement policies that will help them reinforce weak social structures that accompany neighborhood poverty. They are not shunning the police. Instead, they are demanding that police give them the protection they always deserved.

⁵¹¹ See Kahan & Meares, *The Coming Crisis*, *supra* note 38, at 1167-69 (describing "strict scrutiny as second guessing"). See also Mowatt, *supra* note 101 ("[Chicago Mayor Richard Daley] said critics who have defended the rights of suspected gang members don't live in gang-infested communities. 'I don't see to many gangbangers hanging on Lake Shore Drive,' Daley said, drawing applause and laughter."); note 38, *supra* (listing scholarship supporting judicial deference to the "new community policing"). But see note 39, *supra* (listing scholarship opposing judicial deference).

⁵¹² See *City of Chicago v. Morales*, 687 N.E.2d 53 (Ill. 1997).

⁵¹³ For many liberals and libertarians, discouraging reenactment might seem a good thing, as vagrancy-type laws typically license dangerous levels of police discretion without a substantial showing of necessity. See, e.g., Grossman, *supra* note 24 ("Leaders in Chicago are stuck in a time loop, making the same mistake again and again We can repeat the mistakes of the past by adopting a street-sweep-based policy. We know the certain outcome. Thousands of unnecessary arrests will occur followed by years of expensive litigation and—finally—rejection of the policy by some court. Sadly, we also know the policy will have little impact on the crime rate.").

Told that the law might run afoul of the Constitution, one supporter snorted, "I don't believe when the Founding Fathers were drafting the Constitution that the Latin Kings were sitting in Philadelphia." . . . It would be interesting to transport James Madison to a street corner on Chicago's Southwest Side to engage a Latin King in a discussion of where a free society should draw the line between protecting liberties and upholding public safety. Under the city ordinance, though, Madison could have found himself ordered by a police officer to terminate the conversation and leave the vicinity, or else see how he liked talking

the Supreme Court was fearful of dampening experimentation in the field of police science and truly believed that "reasonable alternatives" "remain open,"⁵¹⁴ avoidance and minimalism were not appropriate vehicles for relaying that sentiment. In contrast, a strategy such as road mapping could illustrate the limits of the Court's decision and its willingness to accommodate other legislative solutions. And the consequence of the *Morales* road map was just that—reenactment of the gang-loitering ordinance consistent with the Court's opinion.

4. *Dickerson v. United States*

Little more than a year after *Morales*, the Supreme Court was faced with another dubious statute with even broader implications for criminal procedure doctrine. As previously detailed, the stages in the *Dickerson* saga were: the Court's announcement of its *Miranda* rules for custodial interrogation in 1966, Congress' enactment of 18 U.S.C. § 3501 to abrogate *Miranda* in 1968, relative non-enforcement of 3501 throughout the ensuing three decades, and the Supreme Court's invalidation of 3501 on June 26, 2000. Unlike *Morales*, the *Dickerson* Court did not suggest that valid alternatives existed nor did it encourage creativity in the political branches; and needless to say, Chief Justice Rehnquist's opinion did not include a road map for crafting a constitutional confession statute. Not surprisingly, the months following the decision have been filled with legislative silence.

law with fellow inmates of the Cook County Jail. Madison was never affected by the ordinance, but plenty of Chicagoans were . . . One approach to war, as the old saying goes, is "kill them all and let God sort them out." The law takes a similar view of loitering, creating a broad prohibition and trusting police to distinguish unwholesome loitering from the tolerable kind. But though most police are decent and well-intentioned, many are not, and giving them dictatorial powers over the streets inevitably means that many law-abiding people taking part in innocent activities will be coerced, inconvenienced or even hauled off to jail.

Chapman, *supra* note 34. In addition, violent retaliation against Chicago officials may be an unexpected consequence of the new gang-loitering ordinance. See Shu Shin Luh, *Office explosion may be gang work*, CHI. SUN-TIMES, Aug. 30, 2000, at 19 ("An explosion that broke two windowpanes in Alderman Ray Frias' office late Monday night may be tied to gang retaliation . . . Frias said his opposition to gang loitering and his efforts to evict gang members from the neighborhood have angered gangs. He has received threatening phone calls about plans to bomb or shoot up his office, and his windows have been broken several times with bottles and metal objects, he said.").

⁵¹⁴ *Morales*, 527 U.S. at 67 (O'Connor, J., concurring).

The question, then, is whether the Court would have better served its objectives by employing the road mapping strategy.

On first cut, incorporating a constitutional road map into the *Dickerson* opinion might have made sense. After all, *Miranda* itself had encouraged legislators “in the exercise of their creative rule-making capacities” and, conversely, disavowed the notion “that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process.”⁵¹⁵ And while the Court’s strict adherence to *Miranda* may have impeded political alternatives during the intervening decades,⁵¹⁶ the States were perched for reform efforts with a favorable ruling in *Dickerson*.⁵¹⁷ Some jurisdictions were already experimenting with videotaping schemes,⁵¹⁸ but large-scale change in the practice of custodial interrogation seemed to require a loosening of *Miranda*’s mandatory status. A well-placed road map might have done the trick, allowing the Court to strike down 3501 while simultaneously reaffirming that it had not created a “constitutional straitjacket”⁵¹⁹ out of the Fifth Amendment.

Certainly, the Court had sufficient experience and (alleged) competence to justify the use of the road mapping strategy.

⁵¹⁵ *Miranda*, 384 U.S. at 467. See also *id.* at 490.

⁵¹⁶ See Brief of Criminal Justice Legal Foundation, *supra* note 202, at 23-24:

The original *Miranda* opinion invited legislative participation but under conditions no responsible legislator could support. The invitation to construct alternatives came with the implied threat to strike them down *ex post facto* if the Court found they did not provide equally effective protection for the suspect. Invalidation of a standard practice is a disaster, requiring an already overburdened system to retry and possibly set free thousands of convicted criminals. *Miranda*’s invitation gave legislatures a choice between a procedure the Court had endorsed and a stroll through a minefield. While a state might add additional procedures on top of *Miranda*, no responsible legislature or executive could risk experimenting with a substitute under such conditions.

⁵¹⁷ See Brief of South Carolina et al., as Amici Curiae in Support of Affirmance at 14-16, *Dickerson v. United States*, 2000 WL 271989 (U.S. Mar. 9, 2000) (No. 99-5525) (“If 3501 is upheld as establishing standards for determining the admissibility of confessions obtained without the *Miranda* warnings in federal cases, the effect of such a decision will be to permit the States to craft standards of their own.”).

⁵¹⁸ See *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985) (requiring electronic recording of custodial interrogation under the Alaska Constitution); *State v. Scales*, 518 N.W.2d 587, 591-93 (Minn. 1994) (same per the court’s supervisory power).

⁵¹⁹ *Miranda*, 384 U.S. at 467.

The case involved a judicially sheltered privilege⁵²⁰ and, in particular, the Supreme Court's self-crafted confession rules. Questions relating to custodial interrogation regularly face each level of the judiciary—often in cases with exceptionally high stakes for suspects, defendants, victims, community members, and the criminal justice system in general. And after 32 years of *Miranda*, the Court could feel confident that the major issues concerning custodial interrogation had already been explored by itself or the lower courts. A constitutional road map in *Dickerson* would not have been, in other words, a leap into uncharted terrain.

In fact, the road mapping strategy might have provided an ideal means for extracting the Court from comprehensive oversight of confession law. If they had any inkling to retreat from their present position, the Justices could have suggested as much with appropriate dicta while still demonstrating institutional authority through the invalidation of 3501. One way to keep the debate alive, then, would be to reiterate *Miranda's* invitation to the political branches and at that point offer a road map for legislative consumption. Without such guidance or at least some encouragement, the only apparent option is a political nonstarter—an Article V amendment to the Constitution.

On the other hand, a number of persuasive arguments could be made against a road mapping approach in *Dickerson*. In 3501, the Justices were confronted with a rather stale law that, for the most part, sat idle in the U.S. Code for three decades.

⁵²⁰ Cf. *Carter v. Kentucky*, 450 U.S. 288, 305 (1981) (holding that "a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify"); *Griffin v. California*, 380 U.S. 609 (1965) (holding that prosecutors may not comment on a defendant's invocation of his privilege against self-incrimination); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (the privilege "reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; . . . our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government . . . in its contest with the individual to shoulder the entire load,' . . . our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent'").

Aside from occasional rumblings,⁵²¹ there was no massive political movement to change American confession law nor any indication that Congress would reenact 3501 in the event of an adverse ruling by the *Dickerson* Court. Moreover, the constitutional defect of 3501 was not a small glitch in statutory language or some element that might be severed from the larger congressional scheme. Instead, the entire force and function of the law—abrogating a Court decision by turning back the clock—seemed fundamentally obnoxious to the Supreme Court's role in a post-*Marbury*⁵²² world.

Pragmatic considerations also weighed against the use of a constitutional road map in *Dickerson*. The most promising alternative to *Miranda*—videotaping confessions—creates a whole host of issues that the Court may not have been prepared to answer or even raise: When should the videotaping commence—immediately after a suspect is taken into custody or just when he is ready to talk? Must *Miranda* warnings still be given prior to questioning, or does the videotape itself guarantee a voluntary confession consistent with the Constitution? How can the courts be sure that promises, threats, or violence did not precede or follow the taped events? Will the camera focus only on the suspect, or will the gestures of interrogating officers also be recorded? These and other issues were only compounded by the Court's limited expertise on scientific advancements and its inability to gather evidence on both the potential and limits of modern police technology.

Another practical concern was *Miranda*'s effects on law enforcement, the courts, and the public. Far from impeding the police, some argue that *Miranda* has provided substantial benefits to law enforcement.⁵²³ It offered a clear, simple set of ad-

⁵²¹ See, e.g., CONG. TESTIMONY (May 13, 1999) (statement of Edwin Meese III), available at 1999 WL 16947871 (former U.S. Attorney General discussing Reagan DOJ's investigation into overturning *Miranda*).

⁵²² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁵²³ See, e.g., Brief of Petitioner, *supra* note 179, at 31-33, 43-44; Reply Brief for United States, *supra* note 179, at 16-17; Brief of Griffin B. Bell et al., as Amici Curiae in Support of Petitioner at 2, 6-13, 26-29, *Dickerson v. United States*, 2000 WL 122087 (U.S. Jan. 27, 2000) (No. 99-5525); CONG. TESTIMONY (Mar. 15, 1995) (statement of Prof. Carol S. Steiker), available at 1995 WL 108463. Consider also the experience of author and former prosecutor Scott Turow:

monitions that must be given prior to custodial interrogation.⁵²⁴ If a confession is obtained after a suspect's waiver of rights, officers know with near certainty that the statement will be admissible at trial. While claims of involuntariness are still possible, "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that law enforcement authorities adhered to the dictates of *Miranda* are rare."⁵²⁵

In contrast, the voluntariness test—informed by the "totality of the circumstances" of each case and subject to a judge's own predispositions—seems likely to introduce confusion among police on the limits of interrogation techniques. Generations of law enforcement have been trained on *Miranda* and guided by its rules, becoming almost second nature to officers on the beat. Large-scale change to law enforcement expectations may lead, in turn, to more unconstitutional (but possibly reasonable) police conduct in the vacuum left by *Miranda*.⁵²⁶ Because confession law "has become reasonably clear and law enforcement practices have adjusted," Chief Justice Warren Burger claimed

To whatever degree *Miranda* ever impeded law enforcement, its effect abated a long time ago. I have been practicing criminal law for nearly 22 years now, eight years as a federal prosecutor and 14 years in private practice. In that time, I have been involved in exactly one case where the result was changed after a confession was declared inadmissible under *Miranda*, and that matter involved a juvenile who, in addition to not being told his rights, did not enjoy the benefit of a number of other safeguards applied in Illinois to the questioning of minors. Nor is my experience idiosyncratic. After a couple of hours of computer research, I could not find a single reported decision in Illinois in the last 12 months in which a confession was suppressed or a conviction reversed because of a *Miranda* violation.

Scott Turow, *Miranda Rule Makes Little Difference*, PLAIN DEALER (Clev.), June 30, 2000, at B13.

⁵²⁴ See *Moran v. Burbine*, 475 U.S. 412, 425 (1986) ("[a]s we have stressed on numerous occasions, '[o]ne of the principal advantages' of *Miranda* is the ease and clarity of its application"); *Berkemer v. McCarty*, 468 U.S. 420, 432 (1984) (noting "the simplicity and clarity" of *Miranda*); *New York v. Quarles*, 467 U.S. 649, 664 (1984) (O'Connor, J., concurring in part and dissenting in part) (suggesting that *Miranda* "afforded police and courts clear guidance on the manner in which to conduct a custodial investigation"); *Fare v. Michael C.*, 439 U.S. 1310, 1324 (1978) (Rehnquist, J., in chambers) ("[R]igidity [i]s the strength of the *Miranda* decision.").

⁵²⁵ *Berkemer*, 468 U.S. at 433 n.20.

⁵²⁶ See Brief of Griffin B. Bell et al., *supra* note 523, at 28 ("A retreat from *Miranda* could disrupt decades of settled police practice and introduce new opportunity for police to make mistakes—mistakes that may render the evidence they gather inadmissible.").

some twenty years ago, "I would neither overrule *Miranda*, disparage it, nor extend it at this late date."⁵²⁷

Efficiency gains from the Court's confession rules have accrued to prosecutors and trial judges as well. State attorneys can predict with a degree of certainty whether a given confession will be admissible at trial: If the defendant received his *Miranda* warnings and waived them, the statement can be introduced without reservation. But if the officer failed to give the required admonitions or continued to interrogate after a suspect invoked his rights, the confession will be excluded from the state's case-in-chief.⁵²⁸ Given that the standard is fairly straightforward to litigate, prosecutors can factor the likely results into their charging and plea bargaining decisions while also recognizing when to press investigators for more untainted evidence. The trial court's task in assessing confessions is also facilitated by *Miranda*. Rather than having to determine and analyze all factors surrounding custodial interrogation, judges need only ask whether a suspect received and waived his constitutional rights. In this way, trial courts avoid elongated hearings on the circumstances and psychology of confession and instead focus on a discrete factual question.

Miranda may have produced a similar reliance interest in members of the public. As noted earlier, I do have some concerns with explicit use of "our national culture"⁵²⁹ as a bellwether of constitutional cases, particularly when other justifications for a decision are either nonexistent or flimsy. Nevertheless, the expectations of the general population and the consequences from altering those beliefs are always *sub rosa* considerations for the Court. Thanks to the fame of the original decision and its subsequent pervasiveness in popular culture, *Miranda* warnings have become ingrained in public consciousness; the memorable mantra may be the only bit of

⁵²⁷ *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring in the judgment).

⁵²⁸ *But see* *New York v. Quarles*, 467 U.S. 649 (1984) (articulating a "public safety" exception that allows admission of un-*Mirandized* statements in the prosecution's case-in-chief).

⁵²⁹ *Dickerson v. United States*, 120 S. Ct. 2326, 2336 (2000). See text accompanying notes 255-56, *supra*.

constitutional law known to those in custody. Many Americans, in fact, are likely to view *Miranda* warnings as constitutional rights in themselves rather than mere prophylactics, establishing boundaries between law enforcement and private individuals and setting a tone of respect and fairness in the most coercive of police-citizen interactions. As such, a decision renouncing *Miranda* and its required warnings might well be viewed as a misappropriation of constitutional rights, possibly undermining public confidence and the perceived legitimacy of the Court.⁵³⁰

All of these arguments, both for and against the road mapping strategy, might have weighed on the Supreme Court in crafting *Dickerson*. But my sense of the Court, both from the seven votes behind the majority opinion and the identity of its author,⁵³¹ is one of satisfaction with current doctrine and an un-

⁵³⁰ See Brief of Griffin B. Bell et al., *supra* note 523, at 28 ("A retreat from these warnings might lead many to believe that they had lost underlying rights, and it would surely undermine public confidence in the security of basic legal protections."). But see *Dickerson*, 120 S. Ct. at 2347 (Scalia, J., dissenting):

I am not convinced by petitioner's argument that *Miranda* should be preserved because the decision occupies a special place in the "public's consciousness." As far as I am aware, the public is not under the illusion that we are infallible. I see little harm in admitting that we made a mistake in taking away from the people the ability to decide for themselves what protections (beyond those required by the Constitution) are reasonably affordable in the criminal investigatory process. And I see much to be gained by reaffirming for the people the wonderful reality that they govern themselves

See also Brief of Former U.S. Attorneys General, *supra* note 183, at 17-18; Brief of Arizona Voices for Victims et al., as Amici Curiae in Support of Affirmance at 13-14, *Dickerson v. United States*, 2000 WL 271994 (U.S. Mar. 9, 2000) (No. 99-5525); CONG. TESTIMONY (May 13, 1999) (statement of Maricopa County Attorney Richard M. Romley), available at 1999 WL 16947865.

⁵³¹ See Linda Greenhouse, *Court used Miranda ruling to assert constitutional role*, PITT. POST-GAZETTE, July 2, 2000, at A14 ("In a real sense, the surprisingly lopsided decision last week said more about the Court itself than about *Miranda* or about defendants' rights."); Robert S. Greenberger, *Supreme Court Reaffirms Miranda Rule*, WALL ST. J., June 27, 2000, at A2 ("The decision is a strong reaffirmation of *Miranda*, given its wider-than-expected 7-2 decision and its author, Chief Justice William Rehnquist."); David Savage, *Supreme Court Reaffirms '66 Miranda Ruling*, L.A. TIMES, June 27, 2000, at A1 ("By a lopsided 7-2 vote, the Court reaffirmed the *Miranda v. Arizona* ruling of 1966, the most well-known criminal law decision of the liberal Court led by Chief Justice Earl Warren. And most surprisingly, the announcement came from a conservative Arizonan and longtime critic of the *Miranda* decision, Chief Justice William H. Rehnquist."); Biskupic, *Rehnquist shifts*, *supra* note 228 ("[Both civil libertarians and police groups] agreed on one point: what a jolt it was to hear conservative Chief Jus-

willingness to spur political action that might upset the status quo. Some contend that a young Associate Justice Rehnquist would have voted with Justices Scalia and Thomas to uphold 3501, but an older Chief Justice Rehnquist has undertaken a position of leadership on the Court and was reluctant to wipe out 32 years of *Miranda* jurisprudence in one-fell swoop.⁵³²

More importantly, the Supreme Court seems perfectly content with the effects of current doctrine on law enforcement and the public. A few years ago, Carol Steiker applied Meir Dan-Cohen's metaphor of "acoustic separation"⁵³³ to the criminal procedure jurisprudence of the post-Warren Court.⁵³⁴ To paraphrase Professor Steiker, the Justices have essentially established two sets of *Miranda* rules, one for popular edification and the other for law enforcement. The public seems well aware of the *conduct* rules governing custodial interrogation: Police must read a suspect his constitutional rights per *Miranda*. The average citizen, however, is generally oblivious to a variety of *decision* rules that limit the consequences of *Miranda* violations. These

tice William Rehnquist endorse a decision so identified with the liberal Court led by Earl Warren three decades ago. 'We weren't surprised that he wrote the opinion. We were surprised at what he said,' explained University of Utah law professor Paul Casell[.]"

⁵³² See, e.g., Yale Kamisar, *Your Sort-Of Right to Remain Silent*, NAT'L L.J., July 17, 2000, at A18; Linda Greenhouse, *Supreme Court decides to keep Miranda ruling intact*, MILWAUKEE J. & SENTINEL, June 27, 2000, at A15 ("Rehnquist, despite his record as an early and tenacious critic of [*Miranda*], evidently did not want its repudiation to be an imprint of his own tenure.").

[Rehnquist] has never been known for changing his mind, and there is no reason to think that he has changed his basic view of the decision. What quite clearly gave him pause was not some newfound affection for *Miranda*, but the possible consequences to the Court of overturning it at this point, after dozens of decisions had applied *Miranda* to state-court convictions and to state prisoners' federal petitions for habeas corpus. As the Chief Justice noted in his opinion, the only possible source of the Court's authority to apply *Miranda* came from the decision's status as a direct interpretation of the Constitution. To decide now that Congress had legislatively overruled *Miranda* 32 years ago—a colossal "never mind"—would have made the Court look ineffectual if not fatuous. A close student of the Court's history, on which he has published three well-received books, Rehnquist may well have been dismayed by the prospect that a decision to overturn *Miranda* might go down in the public mind as the main legacy of his tenure as Chief Justice.

Greenhouse, *Court used Miranda ruling*, *supra* note 531.

⁵³³ See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

⁵³⁴ See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996).

"inclusionary rules," as Steiker calls them,⁵³⁵ allow the use of un-Mirandized statements for purposes of impeachment,⁵³⁶ permit the admission of evidence derived from *Miranda* violations,⁵³⁷ and dispense with *Miranda* warnings altogether under a "public safety" exception.⁵³⁸

But while the citizenry may be unaware of decisions cutting back on *Miranda*'s practical effects, the police have access to these inclusionary rules through training and frequent contact with prosecutors and trial courts. The resulting disparity in knowledge between law enforcement and the public may, in fact, produce an optimal state of affairs—at least from the Court's perspective.⁵³⁹ After *Dickerson*, the typical American is led to believe that *Miranda* remains a bulwark against police misconduct. Yet the police know better, that *Miranda* was never as exacting as popularly assumed and that unwarned statements or their fruits are frequently admissible at trial. The Court could then have it both ways: Average citizens are reassured that their constitutional rights remain intact, while law enforcement agents can continue extracting confessions consistent with a scaled-back version of *Miranda*. Chief Justice Rehnquist "can live with *Miranda*," Professor Kamisar contends, "and he is confident that the police can do so as well—now that it has been downsized in various ways."⁵⁴⁰

Certainly, there is much to dislike about the Chief Justice's opinion in *Dickerson*.⁵⁴¹ He seemed less than persuasive, for ex-

⁵³⁵ *Id.* at 2469.

⁵³⁶ See *Harris v. New York*, 401 U.S. 222 (1971).

⁵³⁷ See *Oregon v. Elstad*, 470 U.S. 298 (1985); *Michigan v. Tucker*, 417 U.S. 433 (1974).

⁵³⁸ See *New York v. Quarles*, 467 U.S. 649 (1984).

⁵³⁹ Professor Steiker, however, finds troublesome the resulting "acoustic separation" and suggests a number of negative consequences. Steiker, *supra* note 534, at 2540-51.

⁵⁴⁰ Kamisar, *Your Sort-Of Right*, *supra* note 532. See also Editorial, *Miranda Rules: The Court Stands Fast on Suspects' Rights*, PITT. POST-GAZETTE, June 28, 2000, at A16 ("[S]ome—though not all—police have learned to live with *Miranda*. Thanks to Chief Justice Rehnquist and the other six justices in the majority, they won't have to unlearn that lesson.").

⁵⁴¹ See, e.g., Editorial, *Miranda Survives*, PLAIN DEALER (Clev.), June 30, 2000, at B12 (arguing that *Dickerson* offered "a less-than-ringing defense of the way in which the *Miranda* warning has come to be part of constitutional law," that "the ruling and its

ample, in justifying prophylactic constitutional rules. For what it's worth, I sensed a certain amount of pain in the opinion,⁵⁴² as though Rehnquist didn't *really* believe what he was saying but nonetheless felt obligated to write for the Court as its steward. Even so, if the Supreme Court was satisfied with the status quo and not interested in hearing political alternatives to *Miranda*, the Chief Justice's opinion served its purposes.⁵⁴³ While a constitutional road map might have provoked a legislative response, *Dickerson* has all but ended the debate.⁵⁴⁴

reasoning leave questions sure to fire law school debates for years to come as to whether this Court has done the right thing in the right way," and that the *Dickerson* majority "declined to be . . . straightforward" and wrote an opinion lacking "clarity"); Editorial, *Decisions Show Court's Tippy Balance*, NEWSDAY, July 2, 2000, at B3 ("Rehnquist, a long time critic of the *Miranda* rule, in effect threw up his hands and acknowledged that it has 'become part of our national culture.'"); Greenhouse, *Miranda ruling intact*, *supra* note 532 ("Both in his courtroom announcement and in his written opinion, Rehnquist made only passing reference to a series of opinions throughout the 1970s, '80s and '90s suggesting that *Miranda* was not itself embedded directly in the Constitution but was rather just a 'prophylactic' effort to protect the underlying Fifth Amendment right against compelled self-incrimination."); Krauthammer, *supra* note 61 ("[The current Court] cobbled together an opinion that simply says: Well, we made the rule many years ago, it seems to work and we are not about to overturn precedent. Q.E.D.").

⁵⁴² See, e.g., Editorial, *Miranda Survives*, *supra* note 541 ("Rehnquist arrived at a majority opinion that read more like a meandering apologia than a clear endorsement.").

⁵⁴³ Whether a disinclination toward hearing political alternatives can serve as a constitutionally legitimate motivation for judicial decisionmaking and opinion writing is a distinct question—and one that I reserve for another day.

⁵⁴⁴ See, e.g., Amitai Etzioni, *'Golden middle' ends conflicts*, USA TODAY, Aug. 21, 2000, at A17 (arguing that compromise on custodial interrogation is "unlikely . . . in the prevailing confrontational culture"); David Broder, *Supreme Court: Activism Overruled*, WASH. POST, July 5, 2000, at A21 ("[A] look at last week's final round of decisions from the Supreme Court's current term tells us that radical change is not likely to emanate from the judicial branch of government no matter who is president *Miranda* is 34 years old Could a differently constituted Supreme Court reverse it? Certainly. Is it likely? Not unless precedent loses its force in the minds of judges and is replaced by an appetite for controversy."); Opinion, *Correct ruling on Miranda*, KAN. CITY STAR, July 10, 2000, at B4 (arguing that *Dickerson* "should put to rest future legal attacks on *Miranda*"); Krauthammer, *supra* note 61 ("In the best of all possible worlds, the Court would overturn *Miranda* and Congress would reinstate it as a statute. That won't happen. Instead, we get to live with a delicious contradiction: We keep *Miranda*; we enjoy Scalia. Who says God doesn't smile upon the United States of America?"); Greenhouse, *Court used Miranda ruling*, *supra* note 531 ("The Court is telling Congress: You can't overturn our good decisions, and you can't overturn our bad decisions. You can't overturn our decisions—period," said Louis Friedman, a constitutional law professor at Hofstra Law School.); Editorial, *Miranda Survives a*

Scare, CHI. TRIB., July 1, 2000, at 20 ("[t]hanks to Monday's Supreme Court decision, [*Miranda*] will remain firmly in place"); Editorial, *Miranda Rules*, *supra* note 540 ("Ironically, by pressing the Court to reconsider *Miranda*, opponents have produced not a repudiation of the rule but a more secure enshrinement of *Miranda* in American constitutional law."); Matt Flores & Adolfo Pesquera, *Few stay silent on Miranda*, SAN ANTONIO EXPRESS-NEWS, June 28, 2000, at B1 ("I think [the Justices] found a constitutional basis for *Miranda*, and I'm not going to second-guess the Supreme Court on this," said U.S. Rep. Charlie Gonzalez of San Antonio. 'I respect their decision.'"); Savage, *Supreme Court Reaffirms Miranda*, *supra* note 531 ("UC Berkeley law professor Charles D. Weisselberg said that Rehnquist's opinion 'erases all the doubts. It makes clear *Miranda* is the law of the land . . . I hope it will tell officers that they must comply with *Miranda*."); Greenhouse, *Miranda ruling intact*, *supra* note 532 ("Yale Kamisar, a University of Michigan law school professor and staunch defender of the *Miranda* decision, said that as a result of Monday's ruling, *Miranda* warnings would become even more deeply ingrained in the criminal justice system. Kamisar added that Rehnquist's authorship of the majority opinion should mean 'it will be received better by the country and by the police. After all, this is the guy who over the years has been more pro-police than anyone on the Supreme Court.'"); Biskupic, *Rehnquist shifts*, *supra* note 228 ("Mincing no words Monday, Rehnquist said Congress cannot overrule *Miranda*."); Kent Scheidegger, *Troubling gray area remains*, USA TODAY, June 27, 2000, at A14 ("Although the Court has said Congress can come up with alternatives, any statute would be merely a proposal, until the Court decided whether it was 'adequate.' If Congress guessed wrong, all confessions obtained under the new statute would be thrown out. No responsible legislator could take such a risk. As a result, we are stuck with this piecemeal process of deciding the rules after the fact . . ."); Editorial, *As Miranda fight raged, others reduced crime*, USA TODAY, June 27, 2000, at A14 ("On Monday, the Supreme Court [ruled] that a lower court's startling 'discovery' of the law last year under prodding by legal and political ideologues was wrong: Congress can't overturn constitutional rights without amending the Constitution."); Edward Walsh, *High Court Upholds Miranda Rights*, WASH. POST, June 27, 2000, at A1 ("Now *Miranda* is stronger than it ever was, which is the last thing people like [Prof. Paul] Cassell wanted," [Prof. Yale] Kamisar said. 'I would think that if a President [George W.] Bush got elected and appointed three new justices, they would have a much harder time overturning *Miranda* than if this case had never reached the Court. You gave it your best shot and you lost by a much bigger vote than anybody expected.'"); Brooke A. Masters, *A Court Ruling's Clear Message*, WASH. POST, June 27, 2000, at A6 ("[T]he 7 to 2 vote makes it clear that the warnings are here to stay, law enforcement officials said. 'Very often, police officers can say, maybe next year there will be another decision or maybe in a couple of years it will be different,' said Elliot Spector, an instructor with the Center for Police and Security Training in Connecticut. 'But judging from what the Court said, *Miranda* is going to be with us forever.'") Editorial, *Decision's Effects all to the Good*, SUN-SENTINEL (Ft. Lauderdale), June 29, 2000, at A30 ("The so-called '*Miranda* warning' has become a part of the law-enforcement culture, not to mention the TV and movie culture . . . This won't change in the years to come. . . . The lopsided vote [in *Dickerson*] coupled with the imprimatur of the Chief Justice will likely head off further challenges in the years to come."). But see Jeff Barker & Brent Whiting, *State officials' reactions mixed toward Miranda*, ARIZ. REPUBLIC, June 27, 2000, at A8:

It's likely, however, that there will be further attempts to alter *Miranda*, either by Congress or in the courts. "One of the first things that will be litigated is a [possible] good-faith ex-

CONCLUSION

Did the opinions in *Morales* and *Dickerson* achieve optimal interbranch dialogue? Assuming the unconstitutionality of both the gang-loitering ordinance and 3501, the answer depends on the Supreme Court's ultimate goal in each case. As noted in the introduction, the Court itself is not, strictly speaking, a being capable of having an intent. In fact, it seems impossible to know the actual purpose of a single Justice (absent a tell-all book by a journalist or former law clerk).⁵⁴⁵ But opinions do exude goals, at least from the reader's standpoint, that might then inform legislative responses.⁵⁴⁶ In this sense, an opinion can have an "intent," perceived by the political branches and the public yet not necessarily consistent with the individual goals of each Justice.

Specifically, an opinion striking down legislation can seek to encourage a political response, it can attempt to discourage reactions by the political branches, or it can have no dialogic aspirations whatsoever. Constitutional road maps offer only one means of provoking dialogue, with a variety of less aggressive

ception," said Paul Cassell, the University of Utah law professor who had asked the High Court to overturn *Miranda*. "If a police officer is acting in good faith but makes some mistake in complying with the *Miranda* procedures, then the confession could still come into evidence." [Senator Jon] Kyl said Congress may take action, too, but would need time first to digest the decision. "A good-faith exception combined with some other things seems to me to be a logical approach," Kyl said.

See also Greenberger, *supra* note 531 ("Mr. Cassell said the battle isn't over. 'We will continue to look at alternatives to *Miranda*,' he said, particularly the notion of videotaping confessions to show they were made voluntarily."); Biskupic, *Rehnquist shifts*, *supra* note 228 (noting that Prof. Cassell "said he would continue his quest"); Jack Torry, *Gun control a bigger issue than overall crime control*, PITT. POST-GAZETTE, Oct. 1, 2000, at A19 ("[Gov. George W. Bush] has supported weakening the *Miranda* warning After the Supreme Court in June reaffirmed the earlier ruling, Bush said, 'Voluntary confessions should be allowed without a *Miranda* reading.'").

⁵⁴⁵ See WOODWARD & ARMSTRONG, *supra* note 427; EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998). As Gerald Rosenberg notes, "the concern that greeted the publication of [these] two books purporting to offer an inside view of the Supreme Court is testimony to the unwillingness of Justices to publicly explore their motivations for decisions." Gerald N. Rosenberg, *Incentives, Reputation, and the Glorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 637, 640 (2000).

⁵⁴⁶ Cf. Schauer, *Incentives*, *supra* note 379, at 636 ("[absent] candid self-revelation about motives [of the Justices], we are left with external indicia"). Professor Schauer laments the lack of "a more realistic analysis of judicial incentives and judicial behavior" in the legal literature and notes that "the reluctance to engage in critical inquiry into judicial motivation exists" in the social science literature as well. *Id.* at 615.

strategies available to the Court. Conversely, the Justices can fine-tune deterrence of political responses through an opinion's rhetoric. If the Court's apparent "intentions" are manifested by its opinion,⁵⁴⁷ as has been assumed throughout this article, the issue of interbranch dialogue in *Morales* and *Dickerson* might then be distilled to a single question: Could the Court have achieved the same political encouragement or discouragement with a more passive strategy?

Despite striking down the Chicago law, *Morales* and, in particular, Justice O'Connor's concurrence stimulated further political debate and eventually inspired the enactment of a new gang-loitering ordinance. In fact, the decision could hearten community policing advocates on any number of fronts,⁵⁴⁸ from civil injunctions⁵⁴⁹ to youth curfews.⁵⁵⁰ Far from stifling local ex-

⁵⁴⁷ In other words, I have assumed that the Court intends an opinion's dialogic message as perceived by political actors, commentators, and the general public. Cf. *United States v. Beltran-Garcia*, 179 F.3d 1200, 1205 n.4 (9th Cir. 1999) ("Common sense supports the conclusion that a person intends the consequences of his actions.").

⁵⁴⁸ See, e.g., Savage, *High Court Rejects Ban*, *supra* note 502 ("There might be something to extract from the [*Morales*] opinion that could be used to draft an ordinance that is permissible," [Los Angeles County Deputy District Attorney Brent Riggs] said.); Cheryl Lu-Lien Tan, *Council OKs bill aimed at loitering*, BALT. SUN, Oct. 12, 1999, at B1 ("The Annapolis city council narrowly passed last night a bill that allows police officers to arrest loiterers suspected of sidewalk drug activity in public housing communities."). But see Cheryl Lu-Lien Tan, *Withdrawal of loitering bill urged; Foes say ruling by Supreme Court invalidates it*, BALT. SUN, June 11, 1999, at B1 ("The American Civil Liberties Union and the National Association for the Advancement of Colored People called for an Annapolis alderman to withdraw his anti-loitering bill yesterday, saying the Supreme Court's decision yesterday that a Chicago loitering law is unconstitutional would invalidate the proposed Maryland law, too."); Stephanie Grace & Vicki Hyman, *Parish Rethinks Loitering Statutes*, NEW ORLEANS TIMES-PICAYUNE, June 15, 1999, at A1 ("Less than a week after the U.S. Supreme Court ruled Chicago's anti-gang loitering law unconstitutional, attorneys for Jefferson Parish and Kenner are re-evaluating their own loitering measures, and officials in Jefferson are considering taking their law off the books altogether."); Savage, *High Court Rejects Ban*, *supra* note 502 ("The Supreme Court struck down a Chicago anti-loitering law Thursday that authorized police to sweep the streets of those who look like gang members, disappointing Los Angeles area prosecutors who had hoped for a new weapon in their war against street gangs.").

⁵⁴⁹ See, e.g., *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090 (1997) (upholding civil injunction against alleged street gang members). See also David McLemore, *San Antonio sets up safety zones to shut down gangs*, DALLAS MORNING NEWS, Aug. 29, 1999, at A49:

Armed with a 1997 state law, Bexar County District Attorney Susan Reed obtained a civil injunction July 7 to have 36 documented members of the Klik and the Klan, two of the city's most violent street gangs, barred from associating with fellow gang members to plan or

perimentation, the *Morales* road map may someday be seen as stimulating new approaches to crime and grime in urban America. Of course, other, less assertive judicial strategies might have reached the same end; the Court might have encouraged legislative alternatives in a sentence or two, for instance, without expressly providing options itself. But it is also possible that nothing short of a constitutional road map could have provoked new legislation from the Chicago City Counsel. As such, it seems hard to second-guess the *Morales* road map as being too aggressive. If the goal was interbranch-dialogue-quia-political-reaction, the Court clearly achieved this through the O'Connor concurrence.

In contrast, the *Dickerson* Court made clear that its *Miranda* jurisprudence has "constitutional underpinnings"⁵⁵¹ which lawmakers "may not supersede legislatively."⁵⁵² Chief Justice Rehnquist's opinion offered just a passing reference to *Miranda*'s invitation for reform efforts and even then only to support the invalidation of 3501.⁵⁵³ *Dickerson* provided no encouragement, let alone a road map, for legislators interested in crafting a new confession law consistent with the Constitution. In retrospect, the Court probably could have achieved the same result without appearing to foreclose all political solutions. The

commit criminal activity within two "safety zones" encompassing the Culebra Park subdivision A decision earlier this year by the U.S. Supreme Court makes Bexar County prosecutors feel more secure in the constitutionality of their efforts. In a 6-3 decision, the Supreme Court struck down a Chicago anti-gang loitering statute as too vague to meet constitutional standards. In a concurring opinion, however, Justice Sandra Day O'Connor said it might meet constitutional muster if the statute distinguished gang members from nongang members in the community. "The California law that Bexar County used as a model does just that," said Assistant District Attorney Steve Fry, who will prosecute the civil litigation. So far, the California law has passed all appellate challenges, and the U.S. Supreme Court refused to hear an appeal on constitutional grounds.

⁵⁵⁰ See, e.g., *Hutchins v. District of Columbia*, 188 F.3d 531 (D.C. Cir. 1999) (upholding juvenile curfew); *Schleifer v. Charlottesville*, 159 F.3d 843 (4th Cir. 1998) (same); *Quth v. Strauss*, 11 F.3d 488 (5th Cir. 1993) (same); *Nunez v. San Diego*, 114 F.3d 935 (9th Cir. 1997) (striking down juvenile curfew). See also *Pratt v. Chicago Hous. Auth.*, 848 F. Supp. 792 (N.D. Ill. 1994) (striking down public housing sweeps); *Rob D. Kaiser, Eviction Ordinance, Suit Would Gang Up on Thugs*, CHI. TRIB., Apr. 27, 1999, at 1 (detailing efforts in Cicero, Illinois to "evict people from the western suburb if they are identified as gang members," to file "a class action lawsuit against gang members for violating the civil rights of town residents," and to "give the town the right to tow the cars of evicted gang members if they return to the 'gang-free zone'").

⁵⁵¹ *Dickerson*, 120 S. Ct. at 2334 n.5.

⁵⁵² *Id.* at 2336.

⁵⁵³ *Id.* at 2334.

majority opinion might have emphasized that reforms must be "at least as effective"⁵⁵⁴ as *Miranda* at informing suspects of their rights and securing an opportunity to exercise those rights, for example, and that 3501 was wholly inadequate on these grounds. But if thwarting legislative responses was the very objective, the Chief Justice's opinion will almost certainly serve this goal and, conversely, the road mapping strategy would have been blatantly counterproductive. Assuming as much, *Dickerson* cannot be faulted for its lack of a road map if the Court truly wanted to dissuade legislative alternatives to *Miranda*.

Stepping back for a moment, I am not convinced that constitutional road maps are inevitably superior or inferior to other dialogic strategies, or that they will, in fact, increase interbranch dialogue in particular cases. With perfect hindsight, one can point to past opinions as illustrating the appropriate use or non-use of this strategy; the road map in *Miller v. California*, for instance, can be contrasted with the indefinite charge of the desegregation decisions. *Morales* and *Dickerson* present closer calls, however, as it remains unclear whether a road map was necessary to spur political action in the former case or whether rhetorical discouragement was crucial to avoiding legislative responses in the latter case. With the post-decision debates in an embryonic stage, only time can provide a better understanding of the political implications. But by isolating the road mapping strategy, its manifestation in *Morales* and absence in *Dickerson*, and the resulting consequences for the political branches, this article has highlighted an important feature of judicial decisionmaking sometimes overlooked by criminal procedure scholarship—the vehicle for a particular decision can be as important as the outcome itself.

⁵⁵⁴ *Miranda*, 384 U.S. at 467.

APPENDIX A: CHICAGO'S ORIGINAL GANG LOITERING-ORDINANCE

PREAMBLE:

WHEREAS, The City of Chicago, like other cities across the nation, has been experiencing an increasing murder rate as well as an increase in violent and drug related crimes; and

WHEREAS, The City Council has determined that the continuing increase in criminal street gang activity in the City is largely responsible for this unacceptable situation; and

WHEREAS, In many neighborhoods throughout the City, the burgeoning presence of street gang members in public places has intimidated many law abiding citizens; and

WHEREAS, One of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas; and

WHEREAS, Members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present, while maintaining control over identifiable areas by continued loitering; and

WHEREAS, The City Council has determined that loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity; and

WHEREAS, The City also has an interest in discouraging all persons from loitering in public places with criminal gang members; and

WHEREAS, Aggressive action is necessary to preserve the city's streets and other public places so that the public may use such places without fear[.]

TEXT:

(a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

(b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.

(c) As used in this Section:

(1) "Loiter" means to remain in one place with no apparent purpose.

(2) "Criminal street gang" means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

(3) "Criminal gang activity" means the commission, attempted commission, or solicitation of the following offenses, provided that the offenses are committed by two or more persons, or by an individual at the direction of, or in association with, any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members: The following sections of the Criminal Code of 1961: 9-1 (murder), 9-3.3 (drug-induced homicide), 10-1 (kidnapping), 10-4 (forcible detention), subsection (a)(13) of Section 12-2 (aggravated assault-discharging firearm), 12-4 (aggravated battery), 12-4.1 (heinous battery), 12-4.2 (aggravated battery with a firearm), 12-4.3 (aggravated battery of a child), 12-4.6 (aggravated battery of a senior citizen), 12-6 (intimidation), 12-6.1 (compelling organization membership of persons), 12-11 (home invasion), 12-14 (aggravated criminal sexual assault), 18-1 (robbery), 18-2 (armed robbery), 19-1 (burglary), 19-3 (residential burglary), 19-5 (criminal fortification of a residence or building), 20-1 (arson), 20-1.1 (aggravated arson), 20-2 (possession of explosives or explosive or incendiary devices), subsections (a)(6), (a)(7), (a)(9) or (a)(12) of Section 24-1 (unlawful use of weapons), 24-1.1 (unlawful use or possession of weapons by felons or persons in the custody of the Department of Corrections facilities), 24-1.2 (aggravated discharge of a firearm), subsection (d) of Section 25-1 (mob action-violence), 33-1 (bribery), 33A-2 (armed violence); Sections 5, 5.1, 7 or 9 of the Cannabis Control Act where the offense is a felony (manufacture or delivery of cannabis, cannabis trafficking, calculated criminal cannabis conspiracy and related offenses); or Sections 401, 401.1, 405, 406.1, 407 or 407.1 of the Illinois Controlled Substances Act (illegal manufacture or de-

livery of a controlled substance, controlled substance trafficking, calculated criminal drug conspiracy and related offenses).

(4) "Pattern of criminal gang activity" means two or more acts of criminal gang activity of which at least two such acts were committed within five years of each other and at least one such act occurred after the effective date of this section.

(5) "Public place" means the public way and any other location open to the public, whether publicly or privately owned.

(d) Any person who violates this Section is subject to a fine of not less than \$100.00 and not more than \$500.00 for each offense, or imprisonment for not more than six months, or both.

CHICAGO, ILL., MUN. CODE § 8-4-015 (added June 17, 1992; repealed Feb. 16, 2000).

APPENDIX B: CHICAGO'S REENACTED GANG-LOITERING
ORDINANCE

PREAMBLE:

WHEREAS, The City of Chicago, like other cities across the nation, faces alarmingly high rates of murder and other violent crimes, and of drug offenses; and

WHEREAS, The City Council has determined that criminal street gang activity in the City is largely responsible for this unacceptable situation; and

WHEREAS, In many neighborhoods throughout the City, the burgeoning presence of street gang members in public places has intimidated many law-abiding citizens; and

WHEREAS, One of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas; and

WHEREAS, Criminal street gangs establish control over identifiable areas in order to control narcotics sales and other illegal activities in those areas, and to intimidate law-abiding residents; and

WHEREAS, Members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know police are present, while maintaining control over identifiable areas by continued loitering; and

WHEREAS, The City Council has determined that loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, including unacceptably high rates of drive-by shootings, drug-dealing and vandalism often associated with such activity; and

WHEREAS, The City also has an interest in discouraging all persons from loitering in public places with criminal street gang members because persons who are not gang members in those circumstances are at risk from drive-by shootings and other gang-related violence, and at risk to be recruited by gangs; and

WHEREAS, Aggressive action is necessary to preserve the City's streets and other public places so that the public may use such places without fear; and

WHEREAS, The use of public places to facilitate trafficking in narcotics and controlled substances has become an increasing problem in certain areas of the City; and

WHEREAS, Persons frequently loiter in public places in the course of engaging in trafficking in narcotics and controlled substances; and

WHEREAS, When police officers observe individuals engaging in loitering and other suspicious activity they are often unable to make an arrest, even though the persons engaged in that behavior will resume trafficking in narcotics and controlled substances as soon as the police depart; and

WHEREAS, Loitering by individuals in areas where loitering is frequently associated with trafficking in narcotics and controlled substances intimidates law-abiding citizens, diminishes the value of nearby property and has the potential to destabilize communities and attract violence; and

WHEREAS, Current laws are inadequate to deal with problems posed by gang loitering and loitering as a means to facilitate trafficking in narcotics and controlled substances, principally because conventional laws generally depend upon the willingness of civilians to testify against gang members and drug dealers, and many civilians are understandably reluctant to put themselves in harm's way by providing such testimony[.]

TEXT:

(a) Whenever a police officer observes a member of a criminal street gang engaged in gang loitering with one or more other persons in any public place designated for the enforcement of this Section under subsection (b), the police officer shall, subject to all applicable procedures promulgated by the Superintendent of Police: (i) inform all such persons that they are engaged in gang loitering within an area in which loitering by groups containing criminal street gang members is prohibited; (ii) order all such persons to disperse and remove themselves from within sight and hearing of the place at which the order was issued; and (iii) inform those persons that they will be subject to arrest if they fail to obey the order promptly or engage in further gang loitering within sight or hearing of the place at which the order was issued during the next three hours.

(b) The Superintendent of Police shall by written directive designate areas of the City in which the Superintendent has determined that enforcement of this Section is necessary because gang loitering has enabled criminal street gangs to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities. Prior to making a determination under this subsec-

tion, the Superintendent shall consult as he or she deems appropriate with persons who are knowledgeable about the effects of gang activity in areas in which the ordinance may be enforced. Such persons may include, but need not be limited to, members of the Department of Police with special training or experience related to criminal street gangs; other personnel of that Department with particular knowledge of gang activities in the proposed designated area; elected and appointed officials of the area; community-based organizations; and participants in the Chicago Alternative Policing Strategy who are familiar with the area. The Superintendent shall develop and implement procedures for the periodic review and update of designations made under this subsection.

(c) The Superintendent shall by written directive promulgate procedures to prevent the enforcement of this Section against persons who are engaged in collective advocacy activities that are protected by the Constitution of the United States or the State of Illinois.

(d) As used in this Section:

(1) "Gang loitering" means remaining in any one place under circumstances that would warrant a reasonable person to believe that the purpose or effect of that behavior is to enable a criminal street gang to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities.

(2) "Criminal street gang" means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

(3) "Criminal gang activity" means the commission, attempted commission, or solicitation of the following offenses, provided that the offenses are committed by two or more persons, or by an individual at the direction of, or in association with, any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members: The following sections of the Criminal Code of 1961: 9-1 (murder), 9-3.3 (drug-induced homicide), 10-1 (kidnapping), 10-4 (forcible detention), subsection (a)(13) of Section 12-2 (aggravated assault-discharging firearm), 12-4 (aggravated battery), 12-4.1 (heinous battery), 12-4.2 (aggravated battery with a firearm), 12-4.3 (aggravated battery of a child), 12-4.6 (aggravated battery of a senior citizen), 12-6 (intimidation), 12-6.1 (compelling organiza-

tion membership of persons), 12-11 (home invasion), 12-14 (aggravated criminal sexual assault), 18-1 (robbery), 18-2 (armed robbery), 19-1 (burglary), 19-3 (residential burglary), 19-5 (criminal fortification of a residence or building), 20-1 (arson), 20-1.1 (aggravated arson), 20-2 (possession of explosives or explosive or incendiary devices), subsections (a)(6), (a)(7), (a)(9) or (a)(12) of Section 24-1 (unlawful use of weapons), 24-1.1 (unlawful use or possession of weapons by felons or persons in the custody of the Department of Corrections facilities), 24-1.2 (aggravated discharge of a firearm), subsection (d) of Section 25-1 (mob action-violence), 33-1 (bribery), 33A-2 (armed violence); Sections 5, 5.1, 7 or 9 of the Cannabis Control Act where the offense is a felony (manufacture or delivery of cannabis, cannabis trafficking, calculated criminal cannabis conspiracy and related offenses); or Sections 401, 401.1, 405, 406.1, 407 or 407.1 of the Illinois Controlled Substances Act (illegal manufacture or delivery of a controlled substance, controlled substance trafficking, calculated criminal drug conspiracy and related offenses).

(4) "Pattern of criminal gang activity" means two or more acts of criminal gang activity of which at least two such acts were committed within five years of each other.

(5) "Public place" means the public way and any other location open to the public, whether publicly or privately owned.

(e) Any person who fails to obey promptly an order issued under subsection (a), or who engages in further gang loitering within sight or hearing of the place at which such an order was issued during the three hour period following the time the order was issued, is subject to a fine of not less than \$100 and not more than \$500 for each offense, or imprisonment for not more than six months for each offense, or both. A second or subsequent offense shall be punishable by a mandatory minimum sentence of not less than 5 days imprisonment. In addition to or instead of the above penalties, any person who violates this section may be required to perform up to 120 hours of community service pursuant to Section 1-4-120 of this Code.

CHICAGO, ILL., MUN. CODE § 8-4-015 (added Feb. 16, 2000).

APPENDIX C: CONGRESS' CONFESSION STATUTE

TEXT:

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limi-

tation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

18 U.S.C. § 3501 (1968).