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EDUCATION AND INTERROGATION: COMPARING *BROWN* AND *MIRANDA*

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INTRODUCTION

Although the Warren Court had its share of grand decisions, perhaps it should be known instead for its grand goals—particularly the goals of ending America's shameful history of segregation and of providing a broad array of constitutional rights to persons accused of committing crimes. *Brown v. Board of Education*[1] and *Miranda v. Arizona*,[2] the two most well-known decisions of the Warren Court (and possibly the two most well-known decisions in the history of the Supreme Court), best capture the Court's labor in the rocky fields of our nation's legal, political, and cultural life. In this Article, we explore certain parallels between *Brown* and *Miranda*.[3] These similarities re-

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1 347 U.S. 483 (1954).

2 384 U.S. 436 (1966).

3 This Article is not the first to explore the parallels between school desegregation and the criminal justice system. Indeed, others have considered similarities between the two areas in considering *Brown*'s fiftieth anniversary. *See, e.g.*, Catherine Beane, *Separate and Unequal*, CHAMPION, May 2004, at 54. Moreover, Professor Louis Michael Seidman has already contributed significant analysis of the parallels between *Brown* and *Miranda* in an article discussing how both decisions were seen as subverting power relationships in society and revolutionizing constitutional adjudication. *See* Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 673–80 (1992). He ultimately argues that both decisions

veal the Warren Court's strengths and weaknesses. Ultimately, however, both decisions reveal the Warren Court's failure to level the playing field for America's students and its suspects. Both decisions have failed to live up to their initial promise; their inherent flaws resonate even today, serving as a constant reminder of perhaps irretrievably lost progress.

Part I of this Article highlights similarities between *Brown* and *Miranda*. After examining the similarities, we explore the historical significance of these decisions in Part II. *Brown* and *Miranda*, the most controversial Supreme Court decisions of this century, were both efforts to dislodge entrenched institutional racism in American society, and both created a significant backlash. In the end, however, both decisions were successfully woven into our political and legal fabric, and today neither decision is particularly controversial.

In Part III, we consider some of the reasons *Brown* and *Miranda* were so easily integrated into American culture. We argue that America only accepted these decisions because both contained significant limitations on their enforcement. In other words, *Brown* and *Miranda* were not ultimately accepted due to their moral authority or logic—or even because of society's respect for the Court as the ultimate arbiter of constitutional questions. Rather, each decision's respective shortcomings ensured their survival. In *Brown*, the Court's "all deliberate speed" remedial standard[4] allowed states to drag their feet. In *Miranda*, the Court's decision to allow waivers of the right to silence and to counsel,[5] and to permit waivers to be taken by police officers,[6] permitted continued interrogation of suspects without the presence of an attorney. Both decisions, despite their grand intentions, symbolic statements, and constitutional imperatives, did not

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were actually retreats rather than revolutions. *Id.* This Article explores some additional parallels between the two decisions and reasons why both decisions failed to truly change segregated America—particularly because both of the Court's opinions opened the door to diluting their own effectiveness in combating racism in school systems and in police interrogation rooms.

4 *See* Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 301 (1955).

5 *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966) ("After . . . warnings have been given, . . . the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement.").

6 The *Miranda* decision is not clear on who must apply the "procedural safeguards" of a warning and waiver to the suspect prior to interrogation, but if read in context, it seems obvious that the Court contemplated that police officers would be the ones reading rights and securing waivers of those rights. *See, e.g., id.* at 444 ("By custodial interrogation, we mean questioning initiated by law enforcement officers . . . ."); *id.* at 469–70 ("A mere warning[, without further explanation,] given by the *interrogators* is not alone sufficient . . . ." (emphasis added)); *id.* at 472 ("If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, *the authorities* cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney." (emphasis added)). It is difficult to imagine that "interrogators" or "the authorities" under these circumstances would be anyone other than police officers.

truly jeopardize the status quo. Although the decisions' limitations may well have been political and institutional, and despite shortcomings which have surely been augmented by major subsequent miscalculations, we nonetheless consider in Part III the positive contributions of both decisions.

Finally, because the death penalty is what two of us know the most about, and because it is an immutable fact of academic life that law school professors cannot resist the temptation to opine about their primary interest, in Part IV we will also discuss how the Court's 1972 decision in *Furman v. Georgia*,[7] which invalidated all then-existing death penalty statutes, bears many important similarities to both *Brown* and *Miranda*.

I

THE WARREN COURT UNDER THE MICROSCOPE: JURISPRUDENTIAL SIMILARITIES OF *BROWN* AND *MIRANDA*

Before delving more deeply, we should first point out the most obvious similarities in the two cases. Both involved several consolidated cases raising identical or closely related constitutional questions. Five different cases were decided on the same day and on the same merits as *Brown*.[8] What we now know as *Miranda* involved four consolidated cases.[9] This first similarity may be due to a second similarity: in both *Miranda* and *Brown*, key actors from the NAACP Legal Defense and Education Fund (LDF) were involved.[10]

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7 408 U.S. 238 (1972) (per curiam).

8 *See* Brown v. Bd. of Educ., 347 U.S. 483, 486 n.1 (1954) (discussing the backgrounds of each of the four cases consolidated in *Brown*); Bolling v. Sharpe, 347 U.S. 497 (1954) (deciding a fifth case); *see also* Charles J. Ogletree, Jr., *Reflections on the First Half-Century of* Brown v. Board of Education*—Part I*, CHAMPION, May 2004, at 6 (describing the five individual cases before the Supreme Court).

9 *See Miranda*, 384 U.S. at 491–99 (applying the *Miranda* ruling individually to the four consolidated cases).

10 *See* JACK GREENBERG, CRUSADERS IN THE COURTS 116–32, 152–76 (1994) (discussing the history of the *Brown* litigation and the LDF's role). The LDF was not directly involved in the litigation surrounding *Miranda*, but it took a leading role in fighting racial discrimination in the criminal justice system long before *Miranda*. *See id.* at 440–60. Thurgood Marshall, in particular, played an active part in this campaign, but ironically argued the government's position in *Westover v. United States*, one of the companion cases to *Miranda*. *See* Bruce A. Green & Daniel Richman, *Of Laws and Men: An Essay on Justice Marshall's View of Criminal Procedure*, 26 ARIZ. ST. L.J. 369, 371 (1994); *see also* LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 135, 145–46 (1983) (discussing Marshall's role in the *Miranda* appeal). John Paul Frank, one of the lawyers who worked on the *Miranda* case on appeal to the Supreme Court, however, had previously served as an advisor to Thurgood Marshall in his school desegregation efforts. *See id.* at 65. Moreover, Professor Anthony Amsterdam crafted one of the most influential amicus briefs in *Miranda*, which the American Civil Liberties Union filed. *See* Brief of Amicus Curiae of the American Civil Liberties Union for Appellant, Miranda v. Arizona, 384 U.S. 436 (1966) (Nos. 584, 759, 760, 761, 762); *see also* Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From* Brown *to* Miranda, Furman *and Beyond*, 54 VAND. L. REV. 359, 400–01 (2001) (discussing

Finally, both opinions were authored by Chief Justice Warren himself.[11]

Now we move beyond the obvious. Conventional wisdom teaches us that the Warren Court era was a time of rapid—and at times radical—change in American constitutional law. Not only did the Court, for the first time in nearly a hundred years, become integrally involved in the advancing movement to address the racial power imbalance in the United States,[12] but it did so utilizing judicial reasoning that was novel to the contemporary court system. *Brown* and *Miranda* each represent the Warren Court's modified method of constitutional adjudication.

Here we will explore two of the Warren Court's hallmark approaches. The first is a willingness to promulgate rules in a legislative or quasi-legislative manner. The second is a willingness to embrace social science evidence and research in the constitutional debate, regardless of whether the information was fully part of the Court record or the fact that some of it was actually quite uncertain.

A. Quasi-Legislative Adjudication

Brown and *Miranda* are paradigmatic of the Warren Court's quasi-legislative approach to constitutional law. The Court did not restrict itself to identifying the constitutional error in the case before it, but laid down broad standards to be applied across the board in all states to all similarly situated parties.[13]

In *Brown*, the Court held that the mantra of Jim Crow laws and de jure segregation—"separate but equal"—not only failed Oliver Brown, Harry Briggs, Jr., Dorothy E. Davis, Spottswood Thomas Bolling, and Francis B. Gebhart (the plaintiffs in each of the consolidated cases before the Court in *Brown*), but also every black child in every segregated school system in America.[14] At least in theory, states all around the country were required to dismantle structural segregation and fully integrate their schools. Similarly, in *Miranda*, the Court held that interrogation without appropriate warnings regarding the rights to si-

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how the *Miranda* Court ultimately adopted the Fifth Amendment as the ground for its opinion, which was argued only by the ACLU in its amicus brief). Professor Amsterdam later became a pivotal figure in the LDF, particularly in its fight against the death penalty. *See* EDWARD LAZARUS, CLOSED CHAMBERS 90 (1998).

11 *See Miranda*, 384 U.S. at 439; *Brown*, 347 U.S. at 486.

12 *See* Seidman, *supra* note 3, at 750–51 (characterizing *Brown* and *Miranda* as the ultimate triumphs of liberal constitutionalism that began with the Civil War and the Reconstruction Amendments).

13 *See id.* at 678–79.

14 *See Brown*, 347 U.S. at 495 ("[W]e hold that the plaintiffs *and others similarly situated* for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." (emphasis added)).

lence and to counsel (and a valid waiver of those rights) violated the Fifth Amendment rights not just of Ernesto Miranda, Michael Vignera, Carl Westover, and Roy Stewart, but of all defendants in all states where such interrogations occurred.[15] Moreover, the Court provided a specific, talismanic set of warnings that police must issue prior to engaging in any custodial interrogation.[16] Although the Court left the door open for states and Congress to come up with equal or better safeguards,[17] its remedy in both cases was as legislative in character as any remedy it had previously crafted.

Perhaps to balance the breadth of these decisions, the Court soon "clarified" both *Brown* and *Miranda*. For *Brown*, the clarification came one year later in *Brown II*, where the Court tempered the requirement that states integrate schools by allowing schools to remedy segregation with "all deliberate speed."[18] In the end, "all deliberate speed" meant that many black children in school at the time *Brown* was decided—including children in kindergarten—spent their entire public school education in segregated schools.[19] For *Miranda* too, the Court determined that some delay was permissible, though the length of permissible delay was much shorter. Only a week after *Miranda*, the Supreme Court decided in *Johnson v. New Jersey* that the *Miranda* protections would only apply prospectively in cases where the "trials had not begun as of June 13, 1966," the date of the Miranda decision.[20] In other words, those defendants whose Fifth Amendment rights had been violated before *Miranda* had no recourse.

The notion that constitutional rights would be enforced when states became able to enforce them was novel. Normally, once the Court recognizes that some state action violates the Constitution, the states must desist from that action, no matter the inconvenience of immediate change.[21] To take the most dramatic example, in *Gideon v. Wainwright*, the Court did not tell states that they could gradually pro-

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15 *See Miranda*, 384 U.S. at 467 ("[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.").

16 *See id.* at 444–45.

17 *See id.* at 467.

18 *See* Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 301 (1955).

19 *See* JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 113 (2001) ("By early 1964, only 1.2 percent of black children in the eleven southern states attended schools with whites. Virtually all southern black children who had entered the first grade in 1954 and who remained in southern schools graduated from all-black schools twelve years later.").

20 Johnson v. New Jersey, 384 U.S. 719, 733–35 (1966); *see Miranda*, 384 U.S. at 734.

21 *See* J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 64 & n.11 (1979) ("[W]here constitutional rights hang in the balance, the Court has often dismissed administrative convenience as an insufficient state concern.").

vide defense counsel for indigent criminal defendants accused of serious crimes.[22] Rather, it held that those defendants whom states had incarcerated without having provided counsel at trial were entitled to new trials.[23] In many cases, the passage of time since the original conviction made retrial impossible, and the Court's ruling resulted in release rather than retrial;[24] the fact that felons would be released back into society did not alter the constitutional mandate. Thus, the restricted remedies of *Brown* and *Miranda*, as well as the breadth of the decisions, resembled legislative balancing more than did previously typical constitutional adjudication.

The breadth of the decisions, though obviously not their delayed enforcement, also reflected the aspirations of the architect's underlying litigation. For the LDF, using its new form of public interest law, plaintiffs were often proxies for all similarly situated clieuts.[25] The LDF's interest in having the cases brought was not just the personal well-being of the individuals involved, but also systematic societal change.[26] Ernesto Miranda and his colleagues may have been primarily interested in staying out of jail, but their lawyers definitely had bigger fish to fry.[27]

Both decisions crafted these quasi-legislative mandates through what Professor Henry Monaghan has referred to as a type of "constitutional common law" where the Court moves beyond the Constitution's explicit mandates to craft rules—often resembling statutes—that further constitutional values.[28] Though *Miranda* fits this construct more than *Brown*, both holdings lack a clear textual basis in the Constitution, and both were designed to broaden significantly certain constitutional ideals and goals. The text of the Fourteenth Amendment merely mandates equal protection of the laws,[29] and states attempted to meet this mandate—or at least claimed they were trying to com-

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22 *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

23 *See* Pickelsimer v. Wainwright, 375 U.S. 2, 2–4 (1963) (vacating judgments and remanding cases for consideration in light of *Gideon* over a dissent by Justice Harlan cautioning the Court that applying Gideon retroactively would "require the reopening of cases long since finally adjudicated"); Mark R. Brown, *Weathering Constitutional Change*, 2000 U. ILL. L. REV. 1091, 1099 n.58.

24 *See* Bruce R. Jacob, *Memories and Reflections About* Gideon v. Wainwright, 33 STETSON L. REV. 181, 222 (2003) (recounting experience compiling data, as an Assistant Attorney General of Florida working on *Gideon*, that "if the new decision was . . . made retroactive, more than 4,500 of the 8,000 inmates in Florida could be released and retried, or released without retrial").

25 *See* GREENBERG, *supra* note 10, at 107.

26 *See id.* at 126–27 (discussing the plaintiffs in the trial phase of *Brown* in Topeka, Kansas).

27 *See* BAKER, *supra* note 10, at 60–66 (describing the ACLU's involvement and the lawyers who ultimately represented Mr. Miranda before the Supreme Court).

28 *See* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975).

29 *See* U.S. CONST. amend. XIV, § 1.

ply—by creating a "separate," but nevertheless "equal" school system.[30] Similarly, the text of the Fifth Amendment prohibits compelled self-incrimination,[31] and states protected this right (again, theoretically in good faith) by barring the admission of involuntary statements.[32] The Warren Court looked at both of these practices and held that they did not fully comport with the goals and purposes of the Fourteenth and Fifth Amendments in a contemporary society. Unquestionably, a majority of the Court also believed the status quo was inherently wrong and that the brunt of the current system fell most heavily on minorities and the poor.[33] Thus, drawing on somewhat vague constitutional prohibitions against discrimination and self-incrimination, the Court intervened and attempted to rectify a nationwide imbalance of power.

In addition, it also seems evident that the Court employed this quasi-legislative approach to resolve the issues *Miranda* and *Brown* presented because the case-by-case approach it had previously utilized had not been effective, just as the LDF and others associated with the civil rights movement had adamantly argued. To the litigants and the Court, the limitations of case-by-case litigation were painfully obvious.[34] With respect to education, the Court had heard numerous cases involving segregation in specific academic settings, such as graduate and professional schools,[35] and cases regarding specific instances

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30 *See* Plessy v. Ferguson, 163 U.S. 537, 544 (1896) (

> Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.

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31 *See* U.S. CONST. amend V.

32 *See, e.g.*, Crooker v. California, 357 U.S. 433, 438–39 (1958) (holding that the absence of an attorney following the defendant's request for one does not render the defendant's custodial confession involuntary); Payne v. Arkansas, 356 U.S. 560, 566–67 (1958) (examining totality of circumstances to determine if the defendant's confession was coerced).

33 The Court cited the Wickersham Report as justification for reining in the use of "third degree" police interrogations. *See* Miranda v. Arizona, 384 U.S. 436, 445–47 & n.5 (1966). This report documented numerous police abuses, especially against racial minorities. *See* NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 158–60 (1931).

34 *See* GREENBERG, *supra* note 10, at 58–91 (describing the many desegregation cases brought before *Brown*).

35 *See, e.g.*, McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (addressing differential treatment of a black Oklahoma graduate student); Sweatt v. Painter, 339 U.S. 629 (1950) (mandating integration of the University of Texas law school even though a separate law school in Texas for blacks existed); Sipuel v. Bd. of Regents, 332 U.S. 631

of disparity in resource allocation between black and white public schools.[36] None of these decisions went so far as to end de jure segregation, though cases in the 1950s came close.[37] In part, the Court's failure to overturn *Plessy* and mandate equality in education had to do with political opposition at the time,[38] but *Brown* provided a new opportunity—a vehicle to specifically attack the segregation of black and white children in public school education and to establish a new brand of equality in public education.

Similarly, *Miranda* grew out of a painful history of cases addressing gross police over-reaching in the interrogation of suspects, many of whom were minorities. Indeed, police abuses against minority suspects, especially in the former slave states, often involved staggering and unabashed racism and injustice. One early example is *Moore v. Dempsey*,[39] where black suspects were tortured until they confessed. Later cases included *Brown v. Mississippi*,[40] where the Court overturned convictions because the suspects were whipped and beaten (though, according to state officials, "not too much for a Negro") and the Scottsboro cases,[41] where black defendants were railroaded through trial and sentenced to death based on flimsy evidence of their involvement in the rape of a white woman of dubious character.[42] The Court decided these cases on due process grounds, which required an examination of the totality of the circumstances.[43] But the

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(1948) (addressing racial disparities in Oklahoma legal education); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (addressing racial disparities with regard to Missouri law schools).

36 *See, e.g.*, Carter v. Sch. Bd., 182 F.2d 531 (4th Cir. 1950) (addressing disparities in high school facilities between white and black children); Corbin v. County Sch. Bd., 177 F.2d 924 (4th Cir. 1949) (same, with respect to high school and elementary students); Alston v. Sch. Bd., 112 F.2d 992 (4th Cir. 1940) (ruling that discrimination in teachers' salaries violated the Equal Protection Clause); Blue v. Durham Pub. Sch. Dist., 95 F. Supp. 441 (M.D.N.C. 1951) (overturning policy of averaging expenditures on the basis of average daily attendance and requiring equivalency, rather than adequacy, of school funding between racial groups).

37 *See* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2085–86 (2002) (discussing bow, in *Henderson v. United States*, 339 U.S. 816 (1950), the U.S. government for the first time confessed that *Plessy v. Ferguson* was wrong and the Court should overrule it).

38 *See* Dennis J. Hutchison, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 19–30 (1979); *see also* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, at 130–35 (1987) (discussing the Court's approach to cases in the early 1950s and the sentiment among the general public).

39 261 U.S. 86 (1923).

40 297 U.S. 278 (1936).

41 *See* Powell v. Alabama, 287 U.S. 45 (1932).

42 *See* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 11–50 (rev. ed. 1979); Faust Rossi, *The First Scottsboro Trials: A Legal Lynching*, CORNELL L. F., Winter 2002, at 1–6.

43 *See, e.g.*, Brown v. Mississippi, 297 U.S. 278, 285–86 (1936) (holding that a confession secured through violence violates due process); Moore v. Dempsey, 261 U.S. 86, 90–92

case-by-case totality standard had little effect in remedying these abuses of power,[44] and there was simply a practical limit on how many cases the Court could hear. Like *Brown*, by the time *Miranda* came to the Court, it presented an opportunity to set broader standards to address the problems the Court consistently had seen in these cases. The police had become increasingly skillful in using psychological tactics in persuading suspects to confess,[45] and state judges, who decided whether to admit or exclude the confession, almost invariably found such statements voluntary and admitted them into evidence.[46]

Thus, *Brown* and *Miranda* both represent a different approach to constitutional law—one that embraced broad quasi-legislative rulings to remedy broad-based forms of constitutional injustice. Though arguably not required by the Constitution's literal text, both cases certainly furthered the constitutional values at work in the Equal Protection Clause and the Fifth Amendment. At the same time, however, this type of adjudication brought with it tremendous criticism[47] and served as a fodder for numerous counterattacks on the Court. Before exploring this further, we turn to a second similarity in the decisions themselves.

B. Stretching the Record: The Use of Social Science and Other Research

More than a fair number of scholars have criticized the unreliability of the social science studies that the Court referred to in *Brown*. Indeed, Professor Mark Yudof has described this evidence, especially the famous doll study cited in *Brown*, as "methodologically unsound."[48] Similarly, commentators have focused on the *Miranda*

(1923) (holding that mob interference in trial proceedings violates the due process rights of defendants and sending the case back to the district court to determine if the facts alleged constituted an interference with trial).

44 *See* Yale Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59, 94–104 (1966).

45 *See* Miranda v. Arizona, 384 U.S. 436, 448 (1966) ("[T]he modern practice of incustody interrogation is psychologically rather than physically oriented.").

46 *See* Bettie E. Goldman, Oregon v. Elstad: *Boldly Stepping Backwards to Pre-*Miranda *Days?*, 35 CATH. U. L. REV. 245, 251 (1985) ("By leaving state courts with an imprecise standard, the Supreme Court invited judges to employ their subjective preferences in the voluntariness evaluation. The end result was judicial validation and affirmance by state courts of confessions of questionable constitutionality.").

47 *See, e.g.*, MELVIN I. UROFSKY, THE WARREN COURT: JUSTICES, RULINGS, AND LEGACY 85–86 (2001) (discussing how even Professor Herbert Wechsler, an opponent of segregation, had difficulty understanding the *Brown* Court's reasoning); WELSH S. WHITE, *MIRANDA*'S WANING PROTECTIONS 57 (2001) ("One police chief complained that the Court had mistakenly interpreted the Constitution so as to provide 'a shield for criminals.'").

48 Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS., Autumn 1978, at 57, 70; *see also* ROSEMARY J. ERICKSON & RITA J. SIMON, THE USE OF SOCIAL SCIENCE DATA IN SUPREME

Court's heavy reliance on police manuals.[49] These manuals detailed various police interrogation tactics, such as isolating the suspect, assuming his guilt, lying about the evidence, and the "Mutt and Jeff" good cop-bad cop technique.[50] The Court's use of this extra-record evidence in its judicial reasoning demonstrates another commonality in the two opinions. In both cases the Court found it necessary to look beyond the historical facts, the more traditional legal arguments, and, in some respects, the record established in the lower courts. This expansion of the perceived traditional appellate court role could be explained by the legislative nature of the rulings. In order to formulate such broad policy goals, the Court chose to rely more heavily on evidence of a different character.

The use of this evidence to bolster a decision, however, created a number of dangers. In *Brown*, the social science foundation jeopardized the integrity of the Court's ultimate decision.[51] Of course, in hindsight, the widespread branding of inferiority that segregation had on African-American children is obvious, but this truth was hardly demonstrated by the doll studies. If the Court wanted to reach outside the record, it should have taken notice of the historical fact that racial segregation—at least when imposed upon the minority by the majority—is *always* upon unequal terms. Taking note of this historical generalization, however, would have required a blanket condemnation of segregation and not merely condemnation of segregated schools. Perhaps such a sweeping ruling scared the Court, but the more limited, chosen alternative—using arguably unreliable evidence, not fully put to the test (or even testable) by fact-finders in lower courts—provided an easy avenue to attack the Court's conclusions.

With *Miranda*, a heavy reliance on indirect and circumstantial evidence of improper police interrogation from police manuals similarly placed the opinion at risk of criticism. The Court went out of its way to point out that the police manuals it quoted were representative of manuals found in police precincts all over the country. Not only did the Court cite several of the leading practice guides for investigators,

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COURT DECISIONS 16 (1998) (summarizing the primary criticisms of the social science research that the Court cited in *Brown*).

49 *See, e.g.*, H. RICHARD UVILLER, TEMPERED ZEAL: A COLUMBIA LAW PROFESSOR'S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE 191–92 (1988).

50 *See Miranda*, 384 U.S. at 448–54 (citing, *inter alia*, FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962); CHARLES E. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (1956)).

51 *See* GREENBERG, *supra* note 10, at 198 ("[Footnote 11] became tremendously controversial, giving rise to charges that *Brown* was based on social science, not law."); I. A. NEWBY, CHALLENGE TO THE COURT: SOCIAL SCIENTISTS AND THE DEFENSE OF SEGREGATION, 1954–1966, at 189–90 (1967); UROFSKY, *supra* note 47, at 85; Michael Heise, Brown v. Board of Education, *Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279 (2004).

it also noted the circulation (more than 44,000 copies) of one of the key sources detailing police interrogation procedures.[52] This reference to circulation was necessary because there was no evidence that any of the interrogation techniques the Court deemed so offensive were *actually employed* in Miranda's case. Though the Court attempted to explain that police investigators across the country used the techniques,[53] it could only do this with indirect and circumstantial evidence from the allegedly commonly used police manuals.

Thus, in both *Brown* and *Miranda,* the Court stretched the record to demonstrate the unconstitutional consequences of offensive state action. With respect to *Miranda,* one might ask whether it had any meaningful alternative. The evidence, while arguably suspect, was the best evidence that existed at the time. Due to the secrecy of most police interrogations, courts had very little way of knowing what actually went on behind closed doors in stationhouses across the country.[54] The best the Court could do was draw inferences from instruction manuals written by police officers, for police officers. With respect to *Brown,* if the Court was unwilling to embrace broader generalizations about all racial segregation, then the psychological studies were a similar, second-best option to advance the case that segregation harmed black school children.[55] The blatant disparity in funding for minority schools provided some evidence, but standing alone it could not adequately answer the argument that "separate but equal" could, sometime, somewhere, satisfy the Equal Protection Clause. The studies cited by the Court, flawed as they were, helped in that important regard.

So *Brown* and *Miranda* share two unusual characteristics: a policy-based, quasi-legislative approach to effectuating constitutional ideals and the use of evidence in ways that stretched existing notions of traditional legal reasoning by incorporating social science and other information to support its decisions. These characteristics—especially in combination—suggested a Supreme Court boldly going where no Court had gone before. These similarities may stem at least in part from a shared historical context and may foreshadow the eventual betrayal of both decisions' promise.

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52 *See Miranda,* 384 U.S. at 449 n.9.

53 *See id.* (noting that "these texts have had rather extensive use among law enforcement agencies and among students of police science").

54 *See* Tracey Maclin, Book Review, *Seeing the Constitution from the Backseat of a Police Squad Car,* 70 B.U. L. REV. 543, 583 n.133 (1990).

55 *See* ERICKSON & SIMON, *supra* note 48, at 16 ("The lesson of *Brown* was that social science can provide factual illumination to a willing court. By using social science, the Supreme Court suggested that the longstanding inequality of the two races was not due to any biological traits of blacks." (citations omitted)); *see also* Heise, *supra* note 51, at 293 (["T]he Court sought to push its psychological argument even further by framing it in social science research.").

II
BROWN AND *MIRANDA* IN HISTORICAL CONTEXT

Brown directly addressed entrenched, institutional racism in America. With *Miranda*, the connection to racism may not be so obvious, but it is nonetheless present. Protecting the constitutional rights of criminal defendants at the time the Court decided *Miranda* was inextricably intertwined with issues of race. As previously noted, most of the notorious examples of forced confessions through beatings and torture occurred in the heavily segregated South.[56] As police interrogation became more sophisticated, the victims were still largely minorities and the offenders were mainly white police officers.[57] Thus, it should come as no surprise that the NAACP's Legal Defense Fund directed the litigation in *Brown* and was indirectly involved with *Miranda*.[58]

Public reaction to the decisions also underscores the decisions' links to the state of race-relations at the time. Both opinions were viewed (correctly) as threats to the power structure existing in the United States. *Brown* attacked institutional white supremacy in the form of public education;[59] *Miranda* attacked institutional white supremacy in law enforcement.[60] Thus, both decisions shifted, in some respects, the balance of power from local and state actors to the federal courts, which assumed the primary role of enforcing the Supreme Court's mandates. For that reason, both decisions were highly offensive to conservative states' rights advocates.[61] While *Brown* served

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56 *See supra* notes 39–42 and accompanying text.

57 *See* Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 MINN. L. REV. 1447, 1478 (2003) ("While earlier criminal procedure cases like *Powell*, *Moore*, and *Brown*, were disguised cases about race, by the mid-1960s, many Whites viewed the Court's decisions as overtly about race because of their association in the public consciousness with urban riots and rising crime rates."); Seidman, *supra* note 3, at 678 ("Both supporters and opponents of *Miranda* understood that, in large measure, the crime problem *was* the race problem . . . .").

58 *See supra* note 10.

59 *See* GREENBERG, *supra* note 10, at 200 (discussing the hostile reaction to *Brown* by white supremacy groups, including the National Association for the Advancement of White People).

60 *See* UROFSKY, *supra* note 47, at 181 (stating that at Senate hearings later in 1966, Senator Sam Ervin "declared that the Court had 'stressed individual rights' at the expense of public safety"); WHITE, *supra* note 47, at 57 ("Richard Nixon . . . chastised the Supreme Court for contributing to the low conviction rate of serious criminals: [he claimed that *Miranda*] 'had the effect of seriously ham stringing [*sic*] the peace forces in our society and strengthening the criminal forces.'" (quoting 114 CONG. REC. 12, 936–38 (text of presidential candidate Nixon's May 8, 1968 position paper on crime)) (second alteration in original)).

61 Public reaction to *Brown* demonstrated the decision's offensiveness to states' rights advocates. *See, e.g.*, GREENBERG, *supra* note 10, at 200–01 (describing several states' reactions to *Brown*, including an amendment to the Louisiana state constitution to make segregation permanent, Florida's complex procedures to slow desegregation, and other outright defiance); PATTERSON, *supra* note 19, at 92 (quoting defiant statements of several

as the precursor to the civil rights movement in the late '50s and early '60s, it also hardened the resolve of many southern politicians to oppose civil rights legislation and to vow that white and black children would never attend the same schools.[62] Similarly, some viewed *Miranda* as ushering in a criminal-coddling anarchy, making the decision an easy target for Richard Nixon in his 1968 presidential race as he campaigned against the "*Miranda* Court."[63] The day after the Supreme Court handed down the decisions in both *Brown* and *Miranda*, the headlines in countless papers across this country seemed to imply that a collective gasp may have fueled the public reaction to the decisions.[64]

Despite the backlash, both decisions are now integrally woven into American political and legal culture and are hardly deemed controversial.[65] This was largely because both decisions ultimately failed

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state governors). With *Miranda*, states' rights advocates more often railed against the Court's interference with public safety, but most of these protesters spoke on behalf of the states. For instance, many of those who testified before Congress in the legislative effort to overturn *Miranda* were state judges, legislators, state and county executives, and state prosecutors. *See* BAKER, *supra* note 10, at 205. Indeed, Chief Justice Warren even attempted to assuage these protests in *Miranda* itself, when he wrote in the *Miranda* decision that the case was not a "constitutional straitjacket" and that the Court 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." Miranda v. Arizona, 384 U.S. 436, 467 (1966).

62 *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 348–60 (2004); PATTERSON, *supra* note 19, at 78; Ogletree, *supra* note 8, at 10 (describing Arkansas Governor Orval Faubus and his use of the Arkansas National Guard to prevent nine black students from enrolling in Central High School).

63 *See* BAKER, *supra* note 10, at 244–49 (describing Nixon's attacks on the Supreme Court in his presidential campaign); UROFSKY, *supra* note 47, at 181 (noting the critical response to *Miranda* by politicians and police forces); WHITE, *supra* note 47, at 57.

64 Certainly the most famous image of the *Brown* decision is of an African-American woman sitting on the Supreme Court steps with her arm around a young girl, holding a newspaper with the headline "High Court Bans Segregation in Public Schools." Of course, the aftermath of *Brown*, as discussed below, hardly demonstrates an outright ban of segregation, but this headline very much encapsulates the reaction at the time. For other banner headlines regarding *Brown*, see *High Court Bans School Segregation; 9-to-0 Decision Grants Time to Comply*, N.Y. TIMES, May 18, 1954, at A1; *Pupil Segregation Banned*, CHI. TRIB., May 18, 1954, at 1; *School Segregation Banned in Nation; High Court Defers Final Edict to Fall*, WASH. POST, May 18, 1954, at 1.

With *Miranda*, headlines were not quite as bold, but they, nonetheless, reflect the significance of the ruling. *See, e.g.*, Philip Dodd, *Supreme Court Rules Police Cannot Quiz Suspect Without His O.K.*, CHI. TRIB., June 14, 1966, at 7; Fred P. Graham, *High Court Puts New Curb on Powers of the Police to Interrogate Suspects*, N.Y. TIMES, June 14, 1966, at A1; *High Court Curbs Police Questioning*, WASH. POST, June 14, 1966, at A1.

65 It is particularly surprising how quickly the American public adapted to *Miranda* despite the dire predictions that commentators bandied immediately after the Court issued its opinion. Professor Urofsky has pointed out how popular culture both reflected, and perhaps contributed to, the acceptance of the warnings:

> [I]n many ways the public quickly internalized the *Miranda* decision. In 1967 the old police show *Dragnet* was brought back to the air, and Jack

to live up to their promise. Somewhat ironically, both decisions are now accepted by the same individuals and institutions that were (or would have been) fierce detractors at the time of the Court's rulings. The American public today, even in areas of the South that were hostile to *Brown*, by and large accepts the value of diversity, altbough there is still substantial ground to cover before actually achieving it.[66] While *Miranda* still has its critics, and arguments continue to simmer as to the validity and scope of the *Miranda* doctrine,[67] most police officers have come to appreciate its simplicity.[68] With a few magic words and an easily obtained waiver, police today can interview suspects using all of the interrogation techniques described in the police manuals the *Miranda* Court decried almost forty years ago.[69]

For the most part, it is safe to say that American society has accepted *Brown* and *Miranda* as constitutionally mandated. But why this acceptance, especially given the vociferous backlash each case initially faced? It is certainly possible that America has accepted *Brown* and *Miranda* because of their inherent correctness; that the Court got it right in both cases, the immediate backlash just the dying gasp of the recalcitrant. But it is more plausible that both decisions promised far

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> Webb as Joe Friday would give the requisite *Miranda* warning, although making it clear that he considered this a hindrance to good police work. In contrast, the star of the 1970s show, *Hawaii Five-O*, treated *Miranda* just as Earl Warren would have wanted, as a means of making the police more professional. Everyone in America who watched a police show on television soon became aware of the warnings; little children playing cops-and-robbers knew the words. Because giving the warning did not seem to interfere with good police work, before long all but the most fanatic conservatives stopped looking at *Miranda* as in any way "handcuffing" the police.

UROFSKY, *supra* note 47, at 181; *see also id.* at 191 (noting that "Warren Court decisions such as *Brown* . . . [and] *Miranda* . . . quickly became landmarks, and later Courts built upon these cases as foundations, even if at times they tried to limit or refine their impact").

66 *See* GARY ORFIELD, SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 6 n.15 (2001) (providing statistics regarding public opinion and trends in school segregation), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf.

67 *See* Dickerson v. United States, 530 U.S. 428, 449–50 (2000) (Scalia, J., dissenting) ("[W]hat is most remarkable about the *Miranda* decision—and what made it unacceptable as a matter of straightforward constitutional interpretation in the *Marbury* tradition—is its palpable hostility toward the act of confession *per se*, rather than toward what the Constitution abhors, *compelled* confession."); Oregon v. Elstad, 470 U.S. 298, 305–07 & n.1 (1985) (refusing to apply a "fruit of the poisonous tree" analysis to *Miranda* violations and holding that a *Miranda* violation creates only a bright-line presumption of coercion, not coercion itself).

68 *See* Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1021–22 (2001) ("By creating the opportunity for police to read suspects their constitutional rights and by allowing police to obtain a signed waiver form that signifies consensual and non-coercive interrogation, *Miranda* has helped the police shield themselves from evidentiary challenges, rendering admissible otherwise questionable and/or involuntary confessions.").

69 *See id.*

more than they actually delivered; that neither *Brown* nor *Miranda* truly created the revolution their critics predicted.

III
NOT THE END OF THE WORLD AS WE KNOW IT: WHY *BROWN* AND *MIRANDA* BOTH FAILED TO LIVE UP TO THEIR PROMISES

With respect to actually achieving school desegregation and fairness in the admissibility of confessions, we can see far less progress than one might have reasonably expected after the Court issued *Brown* and *Miranda*. Segregation is still a painful reality in schools across America.[70] Although it no longer bears the brand of state approval through legal recognition, segregation remains prevalent in the form of demographic disparity. African Americans are largely concentrated in urban and inner-city schools, while whites occupy more affluent suburban schools.[71] Moreover, the resource disparity between these two demographic zones reflects entrenched forms of racism. Statistics show that while the vast majority of white schools are populated by middle-class students, the majority of students in demographically segregated black and Latino schools are poor.[72] Furthermore, the effects of poverty on education have been well established. The obvious lack of resources, connections to schools of higher education, and teachers who are willing to stay for the long term place such demographically segregated schools far behind their white, suburban

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70 Indeed, school segregatiou has actually been growing since the late 1980s. *See* GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 53–55 (1996). Harvard University's Civil Rights Project has released several recent reports tracking this trend in segregation. *See, e.g.*, ERICA FRANKENBERG & CHUNGMEI LEE, RACE IN AMERICAN PUBLIC SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS 4 (2002) ("[*V*]*irtually all* school districts analyzed are showing lower levels of inter-racial exposure since 1986, suggesting a trend towards resegregation, and in some districts, these declines are sharp."), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Race_in_American_Public_Schools1.pdf; SEAN F. REARDON & JOHN T. YUN, PRIVATE SCHOOL RACIAL ENROLLMENTS AND SEGREGATION 3–7 (2002) (analyzing data that reveal widespread segregation among private schools), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Private_Schools.pdf; *see also* ORFIELD, *supra* note 66, at 17–19 (providing empirical evidence showing a trend toward resegregation in the United States).

71 *See* ORFIELD & EATON, *supra* note 70, at 55 ("A student in an intensely segregated African American and Latino school was fourteen times more likely to be in a high-poverty school (more than 50 percent poor) than a student in a school that was more than 90 percent white.").

72 *See id.*; *see also* FRANKENBERG & LEE, *supra* note 70, at 22 ("The isolation of blacks and Latinos has serious ramifications: this isolation is highly correlated with poverty, which is ofteu strougly related to striking inequalities in test scores, graduation rates, courses offered and college-going rates."); ORFIELD, *supra* note 66, at 10 ("[H]ighly segregated black and/or Latino schools are many times more likely than segregated white schools to experience concentration of poverty. This is the legacy of unequal education, iucome, and the continuing patterns of housing discrimination.").

counterparts.[73] And the number of minority students in these demographically segregated schools is escalating, rather than decreasing.[74] In fact, while America certainly made some progress reversing some of the entrenched, institutional forms of segregation in the 1960s and early 1970s, we slipped back toward the status quo ante in the late 1980s and 1990s.[75] So, if the measure of *Brown*'s success is whether integration has been achieved, it failed.[76]

Judged by its practical effects, *Miranda* was no less a failure. The vast majority of suspects submit to police interrogation[77] and the same police interrogation manuals still teach officers how to conduct the same psychologically coercive interrogation techniques.[78] In many ways, *Miranda* has made matters worse for criminal suspects. For example, a police officer who uses these interrogation techniques today can easily justify them with a requisite warning and waiver, effectively disabling the suspect from arguing in a later proceeding that his or her statement was involuntary.[79] New DNA technology has exoner-

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73 *See* ORFIELD & EATON, *supra* note 70, at 53–54.

74 *See id.* at 54–55; *see also* FRANKENBERG & LEE, *supra* note 70, at 4–5; ORFIELD, *supra* note 66, at 31–34 (discussing national resegregation trends).

75 *See* ORFIELD, *supra* note 66, at 2 ("From 1988 to 1998, most of the progress of the previous two decades in increasing integration in the [South] was lost. The South is still much more integrated than it was before the civil rights revolution, but it is moving backward at an accelerating rate.").

76 Indeed, in the wake of *Brown*'s fiftieth anniversary, a number of commentators, both in academia and in the press, have lamented *Brown*'s failure truly to bring about desegregation in America's public school system. *See, e.g.*, Sheryll D. Cashin, *American Public Schools Fifty Years After* Brown*: A Separate and Unequal Reality*, 47 How. L.J. 341, 351–60 (2004); Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1463–68 (2003); Richard Thompson Ford, Brown*'s Ghost*, 117 HARV. L. REV. 1305, 1311–17 (2004); Molly S. McUsic, *The Future of* Brown v. Board of Education*: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1341 (2004); Derrick Bell, *50 Years After* Brown v. Board of Education*: The Failed Legacy of Boston School Desegregation*, BOSTON GLOBE, May 16, 2004, at E11; William Douglas, *Campaign Focuses on Racial Issues; Bush, Kerry Address Shortcomings 50 Years After Historic* Brown *Case*, HOUSTON CHRON., May 18, 2004, at A3; Tracy Jan & Bill Graves, *50 Years Later, But Still Not Equal*, OREGONIAN, May 16, 2004, at B1; Chris Moran, *Not Separate, Yet Unequal*, SAN DIEGO UNION-TRIB., May 16, 2004, at A1; Leslie Postal & Dave Weber, *'Achievement Gap' Vexes Schools: Black Students—and Hispanics—Lag Behind White Classmates*, ORLANDO SENTINEL, May 16, 2004, at A1; Jason Spencer, Brown v. Board of Education*: 50 Years Later*, HOUSTON CHRON., May 16, 2004, at A1; Baye Betty Winston, *Fifty Years Later, Integration Still Remains a Person-By-Person Challenge*, COURIER-JOURNAL (Louisville, Ky.), May 20, 2004, at A8.

77 *See* Leo, *supra* note 68, at 1012–13 (revealing that "the overwhelming majority of suspects (some 78% to 96%) waive their rights").

78 *See* Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 663 (1986) (reviewing the latest edition of the widely used police manual, FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (3d ed. 1986), and finding that "the author's suggested interrogation tactics, even if refined and rearranged, have remained largely the same" as those in the editions published in 1962 and 1967); Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1235 (2001).

79 *See* Leo, *supra* note 68, at 1015, 1021–22.

ated many convicted persons and, in the course of doing so, has demonstrated that a number of confessions produced by an inherently coercive environment of police-dominated interrogation are false.[80] Moreover, it turns out (surprise!) that most suspects cannot call a private lawyer out of the blue, and most are reluctant to put their trust in a stranger appointed by the court. By virtually any measure, *Miranda* would have been far more effective in policing against involuntary confessions and abusive interrogation practices if it had banned the interrogation techniques themselves, required the presence of an attorney (or neutral observer), or better yet, required that police interrogations be taped.[81]

Why *Brown* and *Miranda* have been such failures is open to debate. Commentators frequently point to the fact that both decisions suffered at the hands of subsequent Supreme Court Justices who were appointed specifically to weaken or overrule these prime examples of judicial activism.[82] The Burger and Rehnquist Courts were largely appointed by conservative presidents who were elected in part to rein in the activist Court. Numerous cases support this argument. The Court's decisions in *Milliken v. Bradley*,[83] *Pasadena City Board of Education v. Spangler*,[84] and *Board of Education v. Dowell*[85] certainly took some of the wind out of *Brown*'s sails.[86] Similarly, the Court certainly limited *Miranda*'s protections in cases such as *New York v. Quarles*,[87]

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80 *See* Richard A. Leo & Richard J. Ofshe, *Missing the Forest for the Trees: A Response to Paul Cassell's "Balanced Approach" to the False Confession Problem*, 74 DENV. U. L. REV. 1135, 1137–39 n.12 (1997) (providing an extensive list of sources that discuss case examples of false confessions).

81 At present, only Alaska and Minnesota require by law the taping of police interrogations. *See* State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) (mandating the recording of all custodial interrogations in Minnesota); Stephan v. State, 711 P.2d 1156, 1158 (Alaska 1985) (holding that an unexcused failure to record a police interrogation violates a suspect's due process rights under the Alaska constitution). Several police departments in the southern region of Florida, however, have begun voluntarily taping interrogations, and some see this initiative as a possible growing trend. *See* Michael McGuire, *Taped Police Interrogations Gain Momentum in Florida*, CHI. TRIB., Mar. 8, 2003, at 1.

82 *See, e.g.*, WHITE, *supra* note 47, at 60–61 (noting hostility toward *Miranda* among members of the Burger Court). *But see* PATTERSON, *supra* note 19, at 147–69 (noting the Burger Court's surprising support of post-*Brown* desegregation cases).

83 418 U.S. 717, 744–45 (1974) (holding that a court may not order a multidistrict desegregation plan unless it finds that district boundary lines were established for the purpose of segregation).

84 427 U.S. 424, 436–37 (1976) (holding that the district court exceeded its authority by requiring annual readjustment of assignment zones to ensure no school had a majority of minority students where failures to comply with provisions were the result of population pattern shifts).

85 498 U.S. 237, 250 (1991) (allowing dissolution of desegregation decree where discrimination had been pratically eliminated).

86 *See* PATTERSON, *supra* note 19, at 177–83.

87 467 U.S. 649, 657 (1984) (creating "public safety" exception to *Miranda* warnings).

Rhode Island v. Innis,[88] *Oregon v. Elstad*,[89] and *Davis v. United States*,[90] as well as in several more recent decisions.[91]

But the subsequent erosion of *Brown* and *Miranda* was not the result of a bizarre twist of history. Rather, both decisions themselves allowed states to easily circumvent goals that the Court had in mind. First, as previously noted, *Brown II*'s "all deliberate speed" standard[92] created incentives for states to drag their feet in integrating schools.[93] Essentially, the Court only went so far as to identify a wrong, but declined to mandate a rapid redress—or even cessation of—the injury. In this respect, *Brown* still has no parallel, and the Court's lack of vigilance in monitoring the progress of desegregation,[94] combined with its vague standard of "all deliberate speed," planted the seeds for *Brown*'s failure.

Second, one could argue that the heart of the matter in *Brown* was never really just *feelings* of inferiority, but disparate resource allo-

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88 446 U.S. 291, 302 (1980) (holding that words or actions reasonably likely to elicit an incriminating response are forms of interrogation, but not applying this definition to an instance in which police voiced concern about the safety of children who might stumble upon the defendant's weapon).

89 470 U.S. 298, 318 (1985) (ruling that "fruit of the poisonous tree" analysis does not apply to *Miranda* violations).

90 512 U.S. 452, 462 (1994) (holding that requests for counsel must be unequivocal in order to require a halt to interrogation).

91 The Court bolstered *Miranda* in *Missouri v. Seibert*, 542 U.S. ___, 124 S. Ct. 2601 (2004), or at least rejected the constitutional validity of many transparent attempts to circumvent *Miranda*, by holding that police officers cannot intentionally refuse to provide *Miranda* warnings, interrogate the suspect, obtain an incriminating statement, and *then* administer *Miranda* warnings and secure a waiver in order to "re-obtain" the confession. *See id.* at 2611 ("[W]hen *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" (quoting Moran v. Burbine, 475 U.S. 412, 424 (1986))). But, what the Court giveth the Court can taketh away. On the same day, the Court ruled in *United States v. Patane*, 542 U.S. ___, 124 S. Ct. 2620 (2004), that physical evidence found as the result of information provided by a suspect in violation of *Miranda* is admissible. *See id.* at 2629. *Patane* also erased any doubts as to whether *Dickerson* might have overturned prior Court rulings that "fruit of the poisonous tree" analysis would not apply to *Miranda*. *See, e.g.*, *Elstad*, 470 U.S. at 307–08. The Court also chipped away at *Miranda*'s effectiveness in *Yarborough v. Alvarado*, 541 U.S. ___, 124 S. Ct. 2140 (2004), where it held that a state court's failure to consider the age of the suspect in determining whether the individual was in custody (thus, triggering the *Miranda* safeguards) was not an unreasonable application of clearly established federal law. *See Yarborough*, 124 S. Ct. at 2150.

92 *See* Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 301 (1955).

93 *See* ELLIS COSE, BEYOND *BROWN V. BOARD*: THE FINAL BATTLE FOR EXCELLENCE IN AMERICAN EDUCATION 8–10 (2004) ("All deliberate speed, as we now know, was seen by the South as an invitation to stall and gave opportunistic politicians a chance to mobilize against the very notion of integration."); Ogletree, *supra* note 8, at 10 ("Even though the Court's ruling was unanimous, its reluctance to take a more forceful position on ending segregation immediately played into the hands of the integration opponents.").

94 *See* Joel B. Teitelbaum, Comment, *Issues in School Desegregation: The Dissolution of a Well-Intentioned Mandate*, 79 MARQ. L. REV. 347, 357–62 (1995) (discussing the Court's retreat in mandating school desegregation and some of the possible reasons for it).

cation. Putting aside the much-criticized scientific studies before the Court in *Brown*,[95] one could question why the Court concluded that feelings of inferiority among minority children would so consistently stem from legally segregated schools that they declared to be "*inherently* unequal."[96] Widespread discrimination in resource allocation undoubtedly contributed to such feelings of inferiority and appeared to be a more important factor in generating those feelings than was the fact that black children did not sit next to white children. Nevertheless, the Court largely left issues of unequal resource allocation to the states.[97] As one might expect, offending states hardly took the initiative, and thus much of the progress states were forced to make soon after *Brown* has receded. Why the Court chose not to address general discrimination is not clear, but the Court likely did not *ever* believe that segregation was always wrong.

Alternatively, the Court could have concluded that it was the *fact* of segregation—not proof of its purposeful, state-sanctioned origins—that created inferior feelings and opportunities. The focus on the state of mind of state actors proved to be the death knell for true integration. *Brown* proved to be woefully ineffective in combating demographic, de facto forms of segregation, which are still as prevalent as ever.[98] Indeed, one recent landmark case regarding the disparity of resource allocation in Connecticut schools was decided purely on state-law grounds, because under the Supreme Court's analysis of the Equal Protection Clause, the Constitution was powerless to prohibit de facto segregation.[99]

Miranda can be analyzed in the same manner. The Court certainly expressed grave reservations about the fairness of psychological intimidation in police interrogations,[100] but the Court held that all such techniques were permissible as long as there was an explanation of rights and a valid waiver from the suspect.[101] In other words, the police officers who were responsible for violating suspects' rights in interrogation rooms could justify the use of the techniques by reading

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95 *See supra* notes 48–51 and accompanying text.

96 Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (emphasis added).

97 Indeed, the Court ultimately ruled that equal resource allocation was not a constitutional right. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 25 (1973).

98 *See supra* notes 70–76 and accompanying text.

99 *See* Sheff v. O'Neill, 678 A.2d 1267, 1270 (Conn. 1996) ("The public elementary and high school students in Hartford suffer daily from the devastating effects that racial and ethnic isolation, as well as poverty, have had on their education. Federal constitutional law provides no remedy for their plight.").

100 *See* Miranda v. Arizona, 384 U.S. 436, 446–48 (1966) (discussing the Court's concerns with modern, psychological tactics in police interrogations and stating that "[u]nless a proper limitation upon custodial interrogation is achieved . . . there can be no assurance that practices of this nature will be eradicated in the foreseeable future").

101 *See id.* at 478–79.

the suspect the four basic rights and declaring that he waived them. Rather than directly banning the shady interrogation techniques, or requiring that someone other than the police explain the rights to the suspect, the Court's procedures give an appearance of fairness rather than mandating it.[102]

So in both cases, the Court began with an expansive view of the Framers' intent, only to create very narrow remedies. Why did the Court fall so short? Perhaps it was practical: the Court just did not have the political capital to truly change the practices of the country's school boards and police officers. Maybe *Brown* and *Miranda* were the best the Court could do under the circumstances, and the subsequent backlash[103] and conservative Court packing[104] demonstrated that the Court really had pushed the envelope as far as it could. If the Court had gone any further it is arguable that there would have been a constitutional crisis in the making—though it could also be argued that it would have been a crisis worth enduring.

Perhaps the Court was overly optimistic in reading the winds of change. It may have felt that the time for change was right, its interpretation of the Constitution was sound, and with just a little nudge, Congress and the states would soon follow its lead. Indeed, both *Brown* and *Miranda* extended an invitation for Congress and the states to take the constitutional ball and run with it by enacting more effective legislation to eliminate segregation and reduce involuntary confessions.[105] Maybe the Court intended *Brown* and *Miranda* only as first steps. Unfortunately, the wind direction shifted quite rapidly in both cases, and the weak attempt by the Court to forge revolutionary change in constitutional doctrine turned out to be a flash in the pan.[106]

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102 For a vivid description of just how useless the *Miranda* procedures are according to the very officers who are responsible for executing these procedures, see UVILLER, *supra* note 49, at 208–12.

103 *See supra* note 64 and accompanying text.

104 *See supra* note 61 and accompanying text.

105 Both *Brown* and *Miranda* seemed to invite other actors to play a part in effectuating the judgments. *See, e.g.*, *Miranda*, 384 U.S. at 490 (1966) ("Congress and the States are free to develop their own safeguards for the privilege [against self-incrimination], so long as they are fully . . . effective . . . in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it."); Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 300 (1955) (holding that lower courts, in applying the *Brown* decision, should apply equitable principles that facilitate "adjusting and reconciling public and private needs" and allow elimination of school segregation in accord with the public interest in "a systematic and effective manner").

106 Ultimately, Congress did react in both cases. With respect to *Brown*, Congress finally stepped in with the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.), which attempted to "put some teeth into enforcement of desegregation." United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 849 (5th Cir. 1966). With respect to *Miranda*, Congress attempted to overrule the decision by enacting 18 U.S.C. § 3501, which was largely forgotten until the Court

Despair over the false promises of *Brown* and *Miranda* is appropriate, but it should not be overdone. Both cases had and still maintain tremendous symbolic importance in their assertions that certain types of conduct will not be tolerated.[107] Moreover, *Brown* may have inspired more than it accomplished, as many observers have credited the decision with ushering in a new and powerful wave of civil rights activism in the 1960s and 1970s.[108]

IV
OTHER PARALLELS

Parallels between *Brown* and *Miranda* exist in other decisions that generally fall within the Warren Court era. One example is *Furman v. Georgia*,[109] where the Court ruled that the death penalty, as then administered by all states with capital punishment, violated the Eighth Amendment.[110] Though the Court issued the *Furman* decision after

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overturned the statute 30 years later in *Dickerson v. United States*, 530 U.S. 428, 435–37, 443–44 (2000).

107 Indeed, several scholars have praised *Brown*'s simple appeal for racial equality. Professor Dennis Hutchinson has referred to the decision as "a moral prayer." Richard Brust, *The Court Comes Together*, 90 ABA J. 40, 44 (2004). Similarly, Professor Mark Tushnet has stated that *Brown* "was a statement about the moral imperative of racial equality, issued by one of the premier institutions when no one else would do it." *Id.* Professor Ogletree has noted how *Brown* was the beginning of decades of litigation to fight segregation in many institutions. *See* Ogletree, *supra* note 8, at 10–11.

Scholars have also offered at least some praise for *Miranda*'s attempt to restrain police abuses. *See, e.g.*, MILTON MELTZER, THE RIGHT TO REMAIN SILENT 96 (1972) ("With all its limitations, *Miranda* placed against the policeman's inevitable temptation to excess an opposing pressure to resist that temptation. The police are more likely to respect the law if it is made plain that the larger society demands it."). Others have similarly praised *Miranda* as a powerful, albeit flawed, symbol of the Fifth Amendment's protections for even the lowliest criminals in society. *See, e.g.*, Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1471 (1985) (

> For its supporters, *Miranda* is a gesture of government's willingness to treat the lowliest antagonist as worthy of respect and consideration. They have a point. There is something attractive about a legal system that insists that suspects have a right to refuse to answer police inquiries, that imposes on the police an obligation to communicate that right, and that provides counsel to the indigent. The fifth amendment, as much as any constitutional provision, illustrates that ours is a limited government.

); Welsh S. White, *Defending* Miranda*: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 21 (1986) ("*Miranda*'s symbolic value not only has produced a better atmosphere for people who come in contact with the police but also may have made a tangible contribution toward curbing abusive police practices.").

108 *See* GREENBERG, *supra* note 10, at 116 ("[*Brown*] destroyed the edifice of legitimacy upon which *Plessy* had placed segregation, laid the foundation for the civil rights movement, and revolutionized the notions of what courts, lawyers, and the law might do to expand racial justice."). For an excellent description of how the civil rights movement unfolded in South Carolina following the *Brown* decision, see John Monk, *No Longer Separate*, THE STATE (Columbia, S.C.), May 16, 2004, at S1.

109 408 U.S. 238 (1972) (per curiam).

110 *Id.* at 240.

Chief Justice Warren retired, it is often considered—correctly in our view—one of the final decisions of the Warren Court. After all, it was the Warren Court's queasiness about capital punishment and the de facto moratorium on executions which resulted from its "flip-flopping" on the issue that produced *Furman*.[111]

Most of the *Brown/Miranda* parallels make an appearance in *Furman*, albeit less conspicuously. As in *Brown* and *Miranda*, *Furman* was a clear case of a well-defined legal strategy designed by the NAACP Legal Defense Fund.[112] *Furman* also involved consolidated cases that shared a constitutional question.[113] The majority of the Court read the Constitution expansively, interpreting the Eighth Amendment as encompassing procedural application of criminal laws, as opposed to merely their facial content.[114] The Court in *Furman* was

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111 *Furman* grew out of increasing criticism of the death penalty as applied in the states, which began in the Warren Court era. *See* Trop v. Dulles, 356 U.S. 86, 99–101 (1958) (plurality opinion) (acknowledging the "forceful" arguments against the death penalty and holding that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"); *see also* LAZARUS, *supra* note 10, at 86–90 (detailing the early indications in the 1960s, particularly by Justice Goldberg, that the death penalty violated the Eighth Amendment). Later in the Warren Court era, the *Witherspoon v. Illinois* decision formed a significant landmark in the LDF's fight against the death penalty. *See* 391 U.S. 510, 521–23 (1968) (striking down the state practice of dismissing for cause capital jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction"); GREENBERG, *supra* note 10, at 446–47 (noting the LDF's role in the case). Finally, a Warren Court case that could very well have had the same effect as *Furman*—*Maxwell v. Bishop*, 398 U.S. 262 (1970) (per curiam), wound up being delayed and ultimately dispensed with a per curiam opinion based on *Witherspoon*. *See* LAZARUS, *supra* note 10, at 99–101; William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 316–18 (1986); *see also* BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 394–443 (1985) (discussing the history of the *Maxwell* case in the Supreme Court and reprinting key documents).

112 *See* GREENBERG, *supra* note 10, at 440–52 (discussing the LDF's role in fighting the death penalty); LAZARUS, *supra* note 10, at 104–10 (chronicling the history of the *Furman* decision and the LDF's involvement). *See generally* MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1974) (providing a thorough history of the LDF's role in fighting the death penalty).

113 *Furman*, 408 U.S. at 239.

114 *See id.* at 256 (Douglas, J., concurring) ("The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is . . . to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups."); *id.* at 274 (Brennan, J., concurring) ("[T]he State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others . . . . [T]he very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments."); *id.* at 310 (Stewart, J., concurring) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."); *id.* at 314 (White, J., concurring) ("Legislative 'policy' is . . . necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them."); *id.* at 364–66 (Marshall, J., concurring) (highlighting the discriminatory application of the death penalty as an additional justification for holding that it violates the Eighth Amendment).

heavily influenced by the disparate imposition of the death penalty against the poor and racial minorities,[115] and the decision can be seen as part of the Court's attempt to dismantle institutional racism.[116] Various Justices also justified their conclusions based on social science research.[117]

Like *Brown* and *Miranda*, *Furman* caused a vociferous backlash.[118] The Court's lack of consensus as to the legitimacy of the death penalty encouraged states to pass capital punishment statutes that conformed with *Furman*'s vague mandate.[119] *Furman*, like *Brown* and *Miranda*, was also a failure. The death penalty has not become fairer, and racism is still rampant in its application.[120] Why? Because, as with *Brown* and

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115 *See* GREENBERG, *supra* note 10, at 450–51 (examining how the arbitrary application of the death penalty was the "central vice" that the Court recognized); LAZARUS, *supra* note 10, at 107–08 (discussing the Court's concerns over discretionary application of the death penalty, as expressed by Justices Douglas, Stewart, and White); MELTSNER, *supra* note 112, at 295–96 (same).

116 *See* GREENBERG, *supra* note 10, at 440–50. Professor Greenberg discusses the history leading up to *Furman* and the indications that the Court was increasingly wary of the death penalty as an institution. Justice Goldberg's dissent to a denial of certiorari of a capital case in 1963 served as a strong indication to the LDF that the Court had some concerns about capital punishment. *See id.* at 441. Professor Greenberg also notes an "anti-capital punishment mood" among the Court in the early 1970s. *See id.* at 449. Eliminating the death penalty was also very much a personal crusade of Justice Marshall. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 241–51 (1979).

117 *See, e.g.*, *Furman*, 408 U.S. at 250–51 & n.15 (Douglas, J., concurring) (citing and discussing several studies of the death penalty); *id.* at 351–52 & nn.112–17 (Marshall, J., concurring) (citing and relying on numerous criminology studies regarding the effectiveness of the death penalty).

118 *See* GREENBERG, *supra* note 10, at 451–52 (noting the sharp rise in public support for the death penalty following *Furman* and the states' efforts to restore the death penalty with standards that would conform to *Furman*'s mandate); LAZARUS, *supra* note 10, at 111–12; MELTSNER, *supra* note 112, at 306–09.

119 Professor Edward Lazarus has claimed that *Furman* failed largely because the decision was rendered with little coherence or clarity:

> *Furman*'s failure was as much institutional as intellectual. For five Justices to issue one of the most far-reaching constitutional rulings in the Court's history without even agreeing among themselves on a legal rationale betrayed the very rule of law they claimed to be upholding. That rule depends on a shared language of principle, a common understanding of where the law has been, where the law should go, and how to travel the distance between. It depends on continuity, a sensible accounting of how long-standing appeals compel contemporary conclusions.
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> *Furman* contains none of this: no communal judgment, . . . no effort to take into account the profound changes in both public attitudes and the Court's own composition. Instead, five Justices abandoned the Court's institutional responsibility to justify and give coherence to a dramatic shift in the law.

LAZARUS, *supra* note 10, at 109.

120 *See* John H. Blume et al., *Post-*McCleskey *Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1774–75 (1998) [hereinafter Blume, *Post-*McCleskey]; John H. Blume, *Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the "Modern" Era of Capital Punishment in South Carolina*, 54 S.C. L. REV. 285, 306–09 (2002); *see also* John Blume et al., *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 167 (2004) (discussing the "race-of-victim" effect, which demonstrates signifi-

Miranda, the Court only went "so far." The Court did not say that it was impossible to have a nondiscriminatory death penalty. It did not say that it is never necessary to have a death penalty. In failing to declare the death penalty to be per se cruel and unusual[121] or inevitably discriminatory in a racially divided society, the Court's decision carried the seeds of its failure. As a result, states soon retooled and figured out a way around the ruling, setting up capital punishment procedures that looked formally more structured than those invalidated by the *Furman* Court.[122] Subsequent evidence, however, has demonstrated that these procedures were not productive in eliminating racially discriminatory results.[123] While proof of racially disparate distribution of deatb sentences exists, as in the case of proof of de facto segregation, it is not enough to affect litigation. Fifteen years after *Furman*, the Court in *McCleskey* held that only when an individual defendant establishes discriminatory purpose does the Equal Protection Clause speak to racial disparities in capital sentencing.[124] Yet, this proof of individualized discriminatory purpose is very hard to come by.[125] In fact, cultural changes, spurred in part by *Brown*, have made such proof virtually impossible to obtain since racial discrimination has become socially unacceptable and, therefore, much more covert.

CONCLUSION

The parallels between *Brown* and *Miranda*—and *Furman*, too—demonstrate both the bold judicial activism of the Warren Court era, as well as its ultimate failure to bring about real change in key areas of our society. Nevertheless, these decisions present ideals worth striving for, even if the courts ultimately proved inadequate in realizing them.

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cantly higher death penalty rates for black defendant-white victim cases than black defendant-black victim cases).

121 Indeed, only Justices Brennan and Marshall went so far as to hold that the death penalty is per se unconstitutional. *See Furman*, 409 U.S. at 286 (Brennan, J., concurring) ("[D]eath is today a 'cruel and unusual' punishment."); *id.* at 358–59 (Marshall, J., concurring) ("[T]he death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment."). The other three who formed the majority based their concurrences on the arbitrary nature of the death penalty as applied. *See, e.g.*, *id.* at 310–11 (White, J., concurring) ("I do not at all intimate that the death penalty is unconstitutional per se."). For a synopsis of how the concurring opinions broke down, see MELTSNER, *supra* note 112, at 293–96.

122 *See supra* note 118.

123 *See supra* note 120.

124 McCleskey v. Kemp, 481 U.S. 279, 292–93, 297–99 (1987). This is especially the case following the Court's ruling in *McClesky*, which lower courts have widely interpreted to mean that statistical evidence of systemic racism are irrelevant in determining the constitutionality of a state's death penalty system. *See* Blume, *Post*-McCleskey, *supra* note 120, at 1780–98 (discussing several post-*McCleskey* cases).

125 *See id.* at 1794–98.

Despite promise of revolution and upheaval, we are in many ways still stuck in the past, with a long, hard road left to travel if the initial promises of *Brown, Miranda,* and *Furman* are to be realized.

As Willie Stark, the great politician of *All the Kings Men,* said on his deathbed: "'It might have been all different, Jack. You got to believe that.'"[126] It is worth considering how things might have been different had the Warren Court taken a different approach with respect to racism in the United States. In *Brown,* the Court could have said that the only way to true equality is by sharing lives, and that whenever—and however—racial majorities segregate a racial minority, inequality is always the result. The Court, however, on the other hand, could have cut to the heart of inequality—different access to opportunities and resources. In *Miranda,* the Court could have held that some neutral party, such as a judge, must explain to every suspect his or her rights,[127] or the Court could have required the taping of all interrogations. Any of these steps would have been far closer to ending the violations that the Court decried. Finally, in *Furman,* the Court could have taken the best approach possible, which is to say that in a country with the racial history of the United States, one cannot have a death penalty and expect that it will not be discriminatory.

It might have been all different, and many of us wait for and believe in the day that it will be.

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126 ROBERT PENN WARREN, ALL THE KING'S MEN 436 (Second Harvest ed. 1996) (Jack Burden quoting Willie Stark as he died).

127 Indeed, the Petitioner argued for a ruling that counsel must be available for all interrogations. *See* Brief for Petitioner at 11–26, Miranda v. Arizona, 384 U.S. 436 (1966) (No. 759).