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## TWO CHEERS FOR *MIRANDA*

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“An understanding of the nature and setting of . . . in-custody interrogation is essential to our decisions today.”

—*Miranda v. Arizona*, 384 U.S. 436, 445 (1966).

Many commentators, including some of the contributors to this Symposium, have few kind words for *Miranda*, either as a decision or as a body of doctrine operationalized in the world.<sup>1</sup> I, however, come to praise *Miranda*, not to bury it.<sup>2</sup> But I invoke (and invert) Marc Antony’s speech because my praise is tempered by some reservations and worries about the very quality that I claim to endorse.

What is the quality that I come to praise? I take no position here on *Miranda* as a constitutional doctrine or on its effects within the criminal justice system, the topics of much of the critical commentary over the fifty years since the landmark decision. Rather, my praise is “meta” in that it is methodological: I cheer the *Miranda* Court’s direct and unapologetic attempt to understand policing in its then-present context, to ground its decision in facts about how police officers were actually operating and what was happening behind the closed doors of the interrogation room. It is the *way* that the *Miranda* Court approached its task of constitutional interpretation, rather than the result that the Court reached, that I seek to highlight and praise.

Context matters for all constitutional interpretation, but there are few if any areas in which it matters more than in the constitutional regulation of the police. Law enforcement practices are continually evolving, and their impact on individuals and communities is immense. Yet police departments are often opaque institutions whose internal workings and policies are not easily accessible. Any attempt to apply the very general terms of the Bill of Rights, which forbid “unreasonable” searches and seizures and “compelled” self-incrimination, should proceed grounded in a realistic assessment of current police practices and their likely effects.<sup>3</sup>

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<sup>1</sup> See, e.g., Albert W. Alschuler, *Miranda’s Fourfold Failure*, 97 B.U. L. REV. 849 (2017); Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of Miranda’s Harmful Effects on Law Enforcement*, 97 B.U. L. REV. 685 (2017).

<sup>2</sup> Cf. WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 3, sc. 2 (“I come to bury Caesar, not to praise him.”).

<sup>3</sup> U.S. CONST. amends. IV, V.

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The need for contextual engagement in constitutional interpretation regarding police practices may seem obvious, but it is not widely recognized or endorsed by courts. In what follows, I will contrast *Miranda* with two other Supreme Court decisions that illustrate two of the most common noncontextual approaches to regulating police practices. I will then highlight the desirable features of *Miranda* and offer some examples of other judicial opinions that employ *Miranda*'s contextual approach. I will conclude by explaining why I withhold a third cheer for *Miranda*. I will raise some concerns that the *Miranda* contextual approach engenders—concerns that do not change my bottom line, but that courts and litigants should nonetheless recognize and respond to in individual cases.

### I. NONCONTEXTUAL APPROACHES TO POLICE PRACTICES

I start with a disclaimer: Although I am a former public defender and a criminal-justice liberal, I do not promote contextual constitutional adjudication with a covert ideological goal. It is not necessarily the case that *Miranda*'s contextual approach will benefit defendants challenging the constitutionality of police practices more often than noncontextual approaches. Deeper engagement with the context of policing may underscore the importance of the law enforcement goals served by challenged police practices or the lack of alternative means to secure those goals, thus benefiting the prosecution rather than the defense. Similarly, noncontextual approaches may establish bright-line rules that benefit defendants rather than the prosecution. Thus, to illustrate noncontextual approaches to the constitutional regulation of the police, I have chosen two contrasting opinions, one that rules in favor of the defendant and one that rules in favor of the prosecution.

Let us start with the Supreme Court's opinion in favor of the defendant in *Arizona v. Hicks*.<sup>4</sup> In that case, police officers responded to a report that a bullet had been fired from the defendant's apartment through the floor, injuring a person in the apartment below. The police lawfully entered the defendant's apartment to search for the shooter, other possible victims, and weapons. They did in fact find several weapons as well as a stocking-cap mask. Moreover, in what Justice Scalia described as a "squalid and otherwise ill-appointed" apartment, the police observed two expensive stereo sets, including a Bang & Olufsen turntable.<sup>5</sup> (These events took place in the 1980s, when such devices were state-of-the-art equipment rather than ironic relics.) Suspecting that the stereo components might be stolen, a police officer found and recorded their serial numbers, moving the turntable in the process. A check of the serial numbers at the police station revealed that the stereos were indeed stolen, and Hicks was ultimately charged with armed robbery.

Hicks challenged the admissibility of the stolen stereo equipment as evidence against him, arguing that the officer's action in moving the turntable to access

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<sup>4</sup> 480 U.S. 321 (1987).

<sup>5</sup> *Id.* at 323.

the serial numbers constituted an unlawful search of his belongings because the officer lacked the probable cause required by the Fourth Amendment. According to Hicks, even granting that the search for a shooter, victims, and weapons was reasonable based on the bullet that had been fired through the floor, the officer lacked sufficient grounds to “search” the stereo equipment, which had no plausible connection to the shooting. The Supreme Court agreed. Justice Scalia, joined by Justice White and the four liberal members of the Court, ruled that the officer’s action was indeed an “unreasonable search” unsupported by the requisite “probable cause.”<sup>6</sup> Justice O’Connor dissented, arguing that the officer’s action (moving the turntable to look for serial numbers) was merely a “cursory inspection” that should have been permissible on “reasonable suspicion” rather than probable cause.<sup>7</sup> In essence, Justice O’Connor was promoting a sliding scale of reasonableness under the Fourth Amendment, with less justification needed for less intrusive police interventions. Justice Scalia rejected this proposed approach primarily on textual grounds, reasoning that a “search” is something that produces more information than is available through mere visual inspection (“plain view”): “A search is a search, even if it happens to disclose nothing but the bottom of a turntable.”<sup>8</sup> Similarly, Justice Scalia rejected the creation of a new, lesser justification for a minimally intrusive search: “[W]e choose to adhere to the textual and traditional standard of probable cause.”<sup>9</sup>

Justice Scalia’s textual approach in *Hicks* is thoroughly noncontextual. Justice O’Connor made policy arguments about the need in modern law enforcement for a more nuanced sliding scale of police interventions and justifications, rather than the blunt on/off switch of either a full-blown search supported by probable cause, or nothing. Justice Powell echoed Justice O’Connor in a separate dissent, asking plaintively what the Court would have had the officer do under the circumstances.<sup>10</sup> Justice Scalia rejected these arguments not on their policy merits but rather primarily because of his reading of the words “search,” “unreasonable,” and “probable cause” in the constitutional text, concluding, “[a] search is a search.”<sup>11</sup> But those terms—especially the open-textured concept of (un)reasonableness—clearly leave room for interpretation and evolution in response to changing law-enforcement needs. Nonetheless, Justice Scalia’s textualist approach rejected the relevance of on-the-ground context to the task of interpreting the “majestic generalities” of the Constitution.<sup>12</sup>

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<sup>6</sup> *Id.* at 327-28.

<sup>7</sup> *Id.* at 333 (O’Connor, J., dissenting).

<sup>8</sup> *Id.* at 325 (majority opinion).

<sup>9</sup> *Id.* at 329.

<sup>10</sup> *Id.* at 332 (Powell, J., dissenting) (“It is fair to ask what Officer Nelson should have done in these circumstances.”).

<sup>11</sup> *Id.* at 325 (majority opinion).

<sup>12</sup> *Fay v. New York*, 332 U.S. 261, 282 (1947).

This is not to say that Justice Scalia got it wrong in *Hicks*. One could certainly support the result and reject Justice O'Connor's proposal in *Hicks* on contextual rather than purely textual grounds, as Justices Brennan or Marshall would likely have done had they authored the opinion for the Court. A *Miranda*-style contextual approach in support of the judgment in *Hicks* might argue against Justice O'Connor's proposal to validate cursory inspections on less than probable cause on the ground that sliding scales do not provide enough bright-line guidance to police officers and provide too much temptation for courts to uphold police overreach. Indeed, Anthony Amsterdam made exactly this argument more than a decade before the *Hicks* decision in his classic article, *Perspectives on the Fourth Amendment*, warning against the adoption of sliding scales in the Fourth Amendment regulation of the police on the ground that "a general sliding scale approach could only produce more slide than scale."<sup>13</sup> This kind of debate—Justice O'Connor's prudential call for a more nuanced sliding-scale approach to Fourth Amendment reasonableness versus Amsterdam's insistence on the need for bright-line rules to regulate the police—is preferable to Justice Scalia's arid textualism, which approaches constitutional language as independent of changing institutional context.

For a noncontextual decision that comes out the other way (in favor of the police), consider the Court's opinion in *Atwater v. City of Lago Vista*.<sup>14</sup> This is the so-called "soccer mom" case in which a woman was stopped by a police officer for driving with her two young children in her pickup truck without wearing seatbelts. Despite the fact that the Texas seatbelt law authorized a punishment only of a monetary fine rather than imprisonment, the officer conducted a full custodial arrest, leading to Gail Atwater's brief jailing before she could post bond. Atwater filed a § 1983 suit challenging the constitutionality of the officer's action, arguing that custodial arrests for fineable-only misdemeanors are unreasonable under the Fourth Amendment.

Justice Souter, writing for the Court, upheld the officer's arrest against Atwater's constitutional challenge, relying primarily on historical sources. The opinion addresses at considerable length the question whether the common law at the time of the Founding era permitted or forbade such arrests.<sup>15</sup> First, the opinion considers English common law; then there is a long section on American common law. At that point, Justice Souter explains: "We simply cannot conclude that the Fourth Amendment, as originally understood, forbade peace officers to arrest without a warrant for misdemeanors not amounting to or

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<sup>13</sup> Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 393-94 (1974).

<sup>14</sup> 532 U.S. 318 (2001).

<sup>15</sup> *Id.* at 326 ("[A]n examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant . . . consideration of what the Framers of the Amendment might have thought to be reasonable." (quoting *Payton v. New York*, 445 U.S. 573, 591 (1980))).

involving breach of the peace.”<sup>16</sup> But the historical exegesis is not over; the opinion continues with yet another long section on nineteenth-century common law. Finally, after nearly thirty pages of historical analysis, Justice Souter sums up his findings: “This . . . is not a case in which the claimant can point to ‘a clear answer [that] existed in 1791 and has been generally adhered to by the traditions of our society ever since.’”<sup>17</sup>

Only after this extended attempt to determine the “original understanding” of the Fourth Amendment and its later development in the nineteenth century does Justice Souter touch on any contemporary context. Noting that “Atwater does not wager all on history,”<sup>18</sup> Justice Souter sets forth Atwater’s policy arguments against allowing police to have the potentially tyrannical power to arrest misdemeanants for fineable-only offenses. Justice Souter acknowledges that the officer’s arrest of Gail Atwater showed “extremely poor judgment” and resulted in “pointless indignity.”<sup>19</sup> But he then raises countervailing policy concerns about the difficulty of administering a rule against custodial arrests for fineable-only misdemeanors. The Fourth Amendment, explains Justice Souter, “has to be applied on the spur (and in the heat) of the moment.”<sup>20</sup> Consequently, the police need clear and easily administrable rules. But the complexity of many penalty schemes, which often turn on factors like the weight of drugs or the defendant’s prior record, among many other details, would make it difficult for the police to know in many cases whether an offense was “fineable only.”<sup>21</sup> In addition to such administrability concerns, Justice Souter also raises at the end of the opinion what might be considered the real nub of the issue—the seriousness of the threat to liberty posed by the police power at issue. Justice Souter notes that one of the Justices had asked at oral argument “how bad the problem is out there” and that Atwater’s counsel could call to mind only one other similarly outrageous case.<sup>22</sup> Given the “dearth of horrors demanding redress,” Souter found his historical analysis validated by context.<sup>23</sup>

Justice Souter’s ultimate conclusion is certainly debatable, but it is not implausible. However, the *Atwater* opinion is deeply unsatisfying because the most important contextual question—“how bad is the problem?”—is treated as a postscript to an essentially originalist analysis. In deciding whether any particular contemporary police practice is “unreasonable” under the Fourth Amendment, the nature and scope of the intrusions at issue and their impact on individuals and communities should be at the heart of the analysis rather than an

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<sup>16</sup> *Id.* at 340.

<sup>17</sup> *Id.* at 345 (alteration in original) (quoting *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting)).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 346-47.

<sup>20</sup> *Id.* at 347.

<sup>21</sup> *Id.* at 348 n.18.

<sup>22</sup> *Id.* at 351, 353.

<sup>23</sup> *Id.* at 353.

afterthought. Justice Souter's opinion in *Atwater* represented the high-water mark of Fourth Amendment originalism, a methodology that has received substantial criticism in the academy and skepticism even from some of the more conservative members of the Court.<sup>24</sup> *Atwater* is a good example of what is lost by the utterly noncontextual approach of originalism: the parties on both sides filed legal briefs that more resembled historical monographs than the Brandeis briefs that were called for under the circumstances to understand the significance of the challenge at issue.

## II. CHEERING MIRANDA AND ITS METHODOLOGICAL PROGENY

The *Miranda* opinion takes an approach that is altogether different from Justice Scalia's textualism in *Hicks* or Justice Souter's originalism in *Atwater*. The approach in *Miranda* also diverges from a third common noncontextual approach—the formalist parsing of precedential rules. In contrast to these noncontextual approaches, *Miranda* is an example of what one might call a Brandeis opinion (a riff on the idea of the Brandeis brief) in that its analysis relies heavily on judicial notice of facts about the world.<sup>25</sup> True, *Miranda* invokes history in its explanation of the importance of the privilege against self-incrimination, calling the reader's attention to abusive state trials that have been lost to common historical knowledge, such as those of Sir Nicholas

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<sup>24</sup> For one of the most thoughtful and comprehensive scholarly critiques of Fourth Amendment originalism, see generally David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000). For skepticism from conservatives on the Court about originalism in the Fourth Amendment context, see Chief Justice Roberts's majority opinion in *Riley v. California*, 134 S. Ct. 2473 (2014), which held that a warrant is required to search an arrested defendant's cellphone, *id.* at 2484. The Chief Justice declined to try to come up with a Founding-era analogy, explaining instead, "[a]bsent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.* (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). Similarly, Justice Alito concurred in the judgment in *United States v. Jones*, 132 S. Ct. 945, 957-64 (2012) (Alito, J., concurring), which invalidated the Government's use of a GPS device attached to the undercarriage of the defendant's car to track his movements for several weeks, *id.* at 948 (majority opinion). He rejected Justice Scalia's attempt to apply the common law of trespass to the case, noting "it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case. (Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach's owner?)" *Id.* at 958 (Alito, J., concurring) (footnote omitted).

<sup>25</sup> See Alan B. Morrison, *The Brandeis Brief and 21st Century Constitutional Litigation*, 18 LEWIS & CLARK L. REV. 715, 715 (2014) (describing the Brandeis brief as "an advocacy tool used to persuade a court facing a difficult constitutional question how extra-record materials can help the court decide in favor of the advocate").

Throckmorton and of Udal, the Puritan minister.<sup>26</sup> But very quickly, the Court explains that “our contemplation cannot be only of what has been but of what may be” because otherwise, “[r]ights declared in words might be lost in reality.”<sup>27</sup> The Court goes on to assert its central and guiding premise: “An understanding of the nature and setting of . . . in-custody interrogation is essential to our decisions today.”<sup>28</sup>

Luckily for the Court (and for Ernesto Miranda), some sources were available to illuminate the opaque world of custodial police interrogations. The Court notes that the Wickersham Commission’s report to Congress on law enforcement during the Prohibition era, as well as scholarly treatments of police interrogation published in the 1930s, made it clear that “police violence and the ‘third degree’ flourished at that time.”<sup>29</sup> The Court also surveys cases that had come before it, as well studies of police interrogation practices by the U.S. Commission on Civil Rights, the ACLU, and legal scholars in the decades leading up to *Miranda*, to conclude that “physical brutality and violence [in police interrogations] is not, unfortunately, relegated to the past or to any part of the country.”<sup>30</sup>

The Court’s primary concern in *Miranda*, however, was not physical violence but rather psychological coercion: “[W]e stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented.”<sup>31</sup> As a result, the Court gives pride of place to consideration of police training manuals and texts, most notably those of Fred Inbau and John Reid, who were members of the Chicago Police Scientific Crime Detection Laboratory and who trained police interrogators for more than two decades, as well as Charles O’Hara, who served both as a lecturer and as a federal criminal investigator himself.<sup>32</sup> All of the texts cited by the Court were widely used, “with total sales and circulation of over 44,000.”<sup>33</sup> The Court quotes lengthy excerpts from the manuals, thoroughly documenting the carefully planned psychological manipulation and trickery taught to the police interrogators of the time. Most memorable are the quoted canned scripts provided by the manuals, which allow readers half a century later to recreate in their imaginations the interrogations of the past: “Joe, I’m only looking for the truth, and if you’re telling the truth, that’s it. You can handle this by yourself [without a lawyer].”<sup>34</sup> The Court describes the strategy of the manuals as isolating the suspect “to prevent distraction and to deprive him

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<sup>26</sup> *Miranda v. Arizona*, 384 U.S. 436, 443 (1966) (citing *Brown v. Walker*, 161 U.S. 591, 596-97 (1896)).

<sup>27</sup> *Id.* (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910)).

<sup>28</sup> *Id.* at 445.

<sup>29</sup> *Id.* at 445 & n.5.

<sup>30</sup> *Id.* at 446 & nn.6-7.

<sup>31</sup> *Id.* at 448.

<sup>32</sup> *See id.* at 448-55.

<sup>33</sup> *Id.* at 449 n.9.

<sup>34</sup> *Id.* at 454.

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of any outside support,” after which the police “persuade, trick, or cajole him out of exercising his constitutional rights.”<sup>35</sup>

Only after twenty pages of describing the police manuals and their significance does the Court get to the individual cases before it. The Court suggests that the facts of the cases matter less than the “background” facts it has unearthed about widespread police interrogation techniques: “In the cases before us today, given this background, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring.”<sup>36</sup> Ultimately, the Court concludes that “in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”<sup>37</sup> What follows is the most famous part of the decision—the *Miranda* “warnings” that are meant to “appris[e] accused persons of their right of silence and . . . assur[e] a continuous opportunity to exercise it.”<sup>38</sup>

Whether or not it crafted the right rules, and whether or not, looking back, these rules have had salutary effects, the *Miranda* Court was surely right that its analysis required something akin to the in-depth investigation into police interrogation techniques that the Court performed. Reading *Miranda*, one has the slightly disorienting impression that parts of the opinion seem more like a piece of investigative journalism than a judicial opinion. But in order to answer the question whether custodial police interrogations constituted a form of unconstitutional “compulsion,” the Court needed to understand not only the Constitution, but also the nature of police interrogation as it was then widely practiced. *Miranda* was surely not the first time that the Court used a contextual approach in constitutional adjudication, but it is one of the most thoroughgoing and most famous examples of this methodology.

Two recent cases, one from the U.S. Supreme Court and one from the Massachusetts Supreme Judicial Court (“SJC”), demonstrate the different contexts that may be relevant to contemporary constitutional analysis of police practices. In the Supreme Court case, the dissenters use contextual analysis to criticize the majority’s opinion in favor of the Government, while in the SJC case, a unanimous court employs a contextual approach to rule in favor of the defendant. In both cases, the contextual opinions frame the question at issue and the relevant sources of information in a manner strongly reminiscent of the approach taken by the *Miranda* Court.

In *Utah v. Strieff*,<sup>39</sup> the case began with an anonymous tip to the police about drug activity in a home in Salt Lake City. In response, a narcotics detective conducted intermittent surveillance and observed a number of people make brief visits to the house over the course of a week. The officer stopped Edward Strieff

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<sup>35</sup> *Id.* at 455.

<sup>36</sup> *Id.* at 456.

<sup>37</sup> *Id.* at 467.

<sup>38</sup> *Id.*

<sup>39</sup> 136 S. Ct. 2056 (2016).

after observing him leave the house and asked him to produce identification. As a result, the officer learned that Strieff had an outstanding arrest warrant for a traffic violation. The officer then arrested Strieff pursuant to the warrant and searched him incident to the arrest, discovering a baggie of methamphetamine and drug paraphernalia.

Strieff was charged with unlawful possession of drugs and drug paraphernalia. He moved to suppress the evidence on the ground that that it was the product of an unlawful investigatory stop. The prosecutor conceded that the officer lacked the “reasonable suspicion” necessary for a lawful stop but argued that the existence of a valid arrest warrant attenuated the connection between the unlawful stop and the discovery of the evidence. The trial court agreed and admitted the evidence against Strieff, who entered a conditional guilty plea that reserved his right to appeal the trial court’s denial of his suppression motion. The Utah Supreme Court reversed, holding that the existence of an arrest warrant was not sufficient to break the connection between an illegal search and the discovery of evidence.<sup>40</sup>

The U.S. Supreme Court reversed again in an opinion by Justice Thomas that took a mechanical, noncontextual approach to the question. The Court held that the three-factor test of *Brown v. Illinois*<sup>41</sup> governed the inquiry about what circumstances “break the causal chain” between an unlawful stop and the discovery of evidence.<sup>42</sup> Justice Thomas explained that the first factor, “temporal proximity,” favored the defendant’s motion for suppression because no substantial time passed between the stop of Strieff and the discovery of the drugs and paraphernalia on his person.<sup>43</sup> But Justice Thomas went on to conclude that the second and third factors of the *Brown* analysis favored the State. According to the Court, the second factor, “intervening circumstances,” included the existence of a valid warrant that predated the officer’s unlawful stop.<sup>44</sup> Once the officer discovered that a warrant existed, the officer’s arrest of Strieff, and by extension, the search incident to that arrest, became “a ministerial act that was independently compelled by the pre-existing warrant.”<sup>45</sup> The third factor, “the purpose and flagrancy of the official misconduct,”<sup>46</sup> also weighed in the State’s favor, held the Court, because the unlawful stop of Strieff was not “part of any systemic or recurrent police misconduct” but rather was “an isolated instance of negligence.”<sup>47</sup>

Two dissenting opinions, one by Justice Sotomayor, and one by Justice Kagan, criticize the Court’s noncontextual application of *Brown* by reframing

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<sup>40</sup> *Id.* at 2060 (citing *State v. Strieff*, 2015 UT 2, ¶ 54, 357 P.3d 532).

<sup>41</sup> 422 U.S. 590 (1975).

<sup>42</sup> *Strieff*, 136 S. Ct. at 2061-62 (citing *Brown*, 422 U.S. at 603-04).

<sup>43</sup> *Id.* at 2062.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 2063.

<sup>46</sup> *Id.* (quoting *Brown*, 422 U.S. at 604).

<sup>47</sup> *Id.*

the question more broadly and bringing to bear a wider universe of facts.<sup>48</sup> For the majority, the question in the case is solely whether the weighing of *Brown*'s three factors tip in favor of the State or the defendant. But Justice Sotomayor writes: "Do not be soothed by the opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong."<sup>49</sup> Justice Kagan takes a more measured approach, but she explicitly broadens the question. Yes, the case involves consideration of the *Brown* factors, but more broadly, it involves striking "a sound balance" between avoiding "reflexive" use of the exclusionary rule and insisting on exclusion when it will produce "appreciable deterrence" of police misconduct.<sup>50</sup> Justice Kagan maintains that this purposive perspective must be kept in mind during the more mechanical (or "technical," in Justice Sotomayor's language) task of applying the three-part *Brown* test.

Both dissents fault the majority for failing to take account of current realities about the nature and consequences of police practices involving arrest warrants, much the way the *Miranda* Court insisted that it needed to take account of prevailing police interrogation techniques. As Justice Sotomayor explains, "[o]utstanding warrants are surprisingly common."<sup>51</sup> Citing statistics kept by the states and the federal government, Justice Sotomayor notes that there are over 7.8 million outstanding warrants in current databases, "the vast majority of which appear to be for minor offenses."<sup>52</sup> Justice Kagan builds on this by comparing the number of outstanding warrants in California, Pennsylvania, and New York to their populations, yielding proportions of nine percent and higher of adults with outstanding warrants.<sup>53</sup>

Like the *Miranda* Court, the dissenters cite studies done both by nonprofit organizations and by the government. Justice Sotomayor invokes studies by the ACLU and Human Rights Watch as well as reports issued by the Department of Justice to illustrate the "staggering" number of warrants that are issued for probation violations, traffic offenses, and city-ordinance infractions, as well as for failure to pay fines associated with the above.<sup>54</sup> The widely-disseminated Ferguson Report issued by the Civil Rights Division of the Justice Department revealed the stunning fact that of the 21,000 residents of the town of Ferguson, Missouri, 16,000 people had outstanding warrants.<sup>55</sup> Justice Sotomayor goes on

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<sup>48</sup> Justice Ginsburg joined all but Part IV of Justice Sotomayor's dissent and joined Justice Kagan's dissent in full.

<sup>49</sup> *Strieff*, 136 S. Ct. at 2064 (Sotomayor, J., dissenting).

<sup>50</sup> *Id.* at 2071 (Kagan, J., dissenting).

<sup>51</sup> *Id.* at 2068 (Sotomayor, J., dissenting).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 2073 (Kagan, J., dissenting).

<sup>54</sup> *Id.* at 2068 (Sotomayor, J., dissenting).

<sup>55</sup> *Id.* (citing U.S. DEP'T OF JUST., CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 6, 55 (2015)).

to cite two further reports issued by the Civil Rights Division after its investigations of the police departments of New Orleans and Newark. Both reports, along with the Ferguson Report, revealed that the police “routinely” stopped people for the sole purpose of checking for outstanding warrants.<sup>56</sup> Both dissenters also make a point of demonstrating that checking for outstanding warrants without reasonable suspicion was a common practice locally as well as nationally, quoting a Utah Supreme Court opinion that described the running of warrant checks on pedestrians detained without reasonable suspicion as a “routine procedure” or “common practice” in Salt Lake City.<sup>57</sup> But the closest echo of *Miranda* comes in Justice Sotomayor’s opinion, when she quotes a “widely followed police manual” that instructed narcotics officers to use warrant checks as a means of developing legal grounds to arrest and search suspects.<sup>58</sup>

The dissenters connect their portrait of the police practices surrounding arrest warrants to the constitutional analysis through the third part of the *Brown* test, the “flagrancy” factor. As the dissenters argue, Justice Thomas’s claim that “there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct”<sup>59</sup> does not comport with the facts on the ground about the extraordinary number of outstanding arrest warrants for minor crimes, the incentives this situation creates for police officers, and the frequency of illegal stops that in fact are made specifically to check for outstanding warrants.<sup>60</sup> The dissenters’ essential claim boils down to the central methodological claim of *Miranda*: context matters.

Justice Sotomayor, writing for herself, seeks to make another contextual point at a greater remove from the formal constitutional doctrine. She uses a variety of sources, including cases, scholarship, advocacy, and memoirs, to try to deepen our understanding of the indignity that police stops and arrests inflict and to note that such degradation is disproportionately imposed on racial and ethnic minorities.<sup>61</sup> Here, Justice Sotomayor does a different version of what Justice Kagan did in broadening the constitutional question. For Justice Sotomayor, the ultimate Fourth Amendment question is the effect of policing on our democracy. Given the seriousness of police intrusions and their discriminatory use, she argues, the incentives created by the majority’s holding in *Strieff* “risk treating members of our communities as second-class citizens.”<sup>62</sup> Although this point fits less neatly into the three-part *Brown* test applied by the Court, it too is a form of

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<sup>56</sup> *Id.* at 2068-69.

<sup>57</sup> *Id.* at 2069; *id.* at 2073 (Kagan, J., dissenting).

<sup>58</sup> *Id.* at 2069 (Sotomayor, J., dissenting).

<sup>59</sup> *Id.* at 2063 (majority opinion).

<sup>60</sup> *Id.*

<sup>61</sup> *See id.* at 2069-71 (“The indignity of the stop is not limited to an officer telling you that you look like a criminal. . . . [I]t is no secret that people of color are disproportionate victims of this type of scrutiny.”).

<sup>62</sup> *Id.* at 2069.

contextual analysis, bringing to bear on constitutional law the reality of actual practices through the invocation of lived experience.

For a majority opinion, rather than a dissent, that uses *Miranda*-style contextual analysis, consider the recent decision of the SJC in *Commonwealth v. Warren*.<sup>63</sup> A unanimous court, per Justice Hines, held that the police lacked reasonable suspicion for an investigative stop of Warren, who ran away when the police sought to question him on the street, presumably about a breaking and entering that had occurred a mile away and a half-hour earlier. The police then chased Warren down and stopped him, finding a gun nearby. Warren was charged with unlawful possession of a firearm. He moved to suppress the gun as evidence, arguing that the police pursued and stopped him without reasonable suspicion. The trial court denied Warren's motion, ruling that the police had reasonable suspicion that Warren was one of perpetrators of the breaking and entering, and the intermediate appellate court affirmed.

The SJC reversed. The court first established that the stop of Warren took place when the police ordered him to stop running and pursued him.<sup>64</sup> In the court's view, the police lacked sufficient grounds to stop Warren, given the time that had passed since the breaking and entering, the distance from the site of the crime, and the "vague" description of the suspects.<sup>65</sup> The legal issue then narrowed to whether Warren's flight from the police was sufficient, when considered in conjunction with the other circumstances, to cross the legal threshold of reasonable suspicion. Although the SJC recognized that prior cases established that flight from police is a factor relevant to establishing reasonable suspicion to stop, the court held that it should be given "little, if any, weight as a factor probative of reasonable suspicion" at least "[w]here a suspect is under no obligation to respond to a police officer's inquiry."<sup>66</sup>

In particular, the court noted:

[W]here the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department (department) report documenting a pattern of racial profiling of black males in the city of Boston. . . . [I]n such circumstances, flight is not necessarily probative of a suspect's state of mind or consciousness of guilt. Rather, the finding that black males in Boston are disproportionately and repeatedly targeted [for stops] suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the

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<sup>63</sup> 58 N.E.3d 333 (Mass. 2016).

<sup>64</sup> *Id.* at 337.

<sup>65</sup> *Id.* at 339-40.

<sup>66</sup> *Id.* at 341.

recurring indignity of being racially profiled as by the desire to hide criminal activity.<sup>67</sup>

As the *Miranda* Court did, the SJC here looks to information about police practices *created by the police* to understand the context of police encounters in order to formulate and apply the relevant constitutional standard.

Moreover, Justice Hines echoes Justice Sotomayor's concern about the "indignity" of racial profiling in a context in which it is directly relevant to the application of the legal standard.<sup>68</sup> It is appropriate that this updating and extension of *Miranda*'s contextual approach should be championed by Justices who come from minority communities themselves. Justice Hines was born in the segregated South and became a civil rights attorney and appeals court judge in Massachusetts before becoming the first African American woman to serve on the commonwealth's highest court.<sup>69</sup> Justice Sotomayor was born in the Bronx to Puerto Rican parents and became an assistant district attorney and a board member of the Puerto Rican Legal Defense and Education Fund before becoming the first Latina to serve on the Supreme Court.<sup>70</sup> Sometimes it takes new eyes to see the context that is relevant. In an era in which the racially disproportionate burdens of policing are finally becoming more widely understood, it is helpful to have judges on the highest courts who are attuned to bringing evidence of that context to bear on the constitutional regulation of police, in the proud tradition of *Miranda*.

Two cheers for *Miranda*!

### III. WITHHOLDING THE THIRD CHEER

Why only two cheers for *Miranda*'s contextual approach, despite the praise I have lavished on it? I want to raise three potential problems for the contextual approach that I champion—not to suggest that courts should avoid it, but rather to urge courts and advocates to overcome their resistance to this perspective and to use it wisely.

#### A. *Judicial Discomfort and Inexperience with Statistical Evidence*

More and more often, our understanding of the world has become quantified. I advocate for courts to recognize "context" or facts about the world. But facts

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<sup>67</sup> *Id.* at 342 (citations omitted).

<sup>68</sup> *Utah v. Strieff*, 136 S. Ct. 2056, 2069-71 (2016) (Sotomayor, J., dissenting) ("Writing only for myself, and drawing on my professional experiences, I would add that unlawful 'stops' have severe consequences much greater than the inconvenience suggested by the name.").

<sup>69</sup> *Honorable Geraldine S. Hines Sworn In as Associate Justice of the Supreme Judicial Court*, MASS. CT. SYS. (July 31, 2014), <http://www.mass.gov/courts/news-pubs/sjc/2014/hines-sworn-in-as-sjc-associate-justice.html> [<https://perma.cc/6TC9-V27Y>].

<sup>70</sup> See *Sonia Sotomayor Biography*, BIOGRAPHY.COM, <http://www.biography.com/people/sonia-sotomayor-453906> [<https://perma.cc/5VXD-6H7U>] (last updated June 23, 2016).

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become data, which statisticians then analyze using increasingly sophisticated and opaque methods. Courts today are frequently presented with empirical studies that use tools like multiple regression analysis that judges lack the training to understand or to critique. Judicial inexperience with data analysis may undermine the project of contextual constitutional adjudication in at least three different ways.

First, judges may simply avoid dealing with relevant empirical evidence when it is presented in abstruse statistical form. An example of such avoidance is the opinion for the Court authored by Justice Powell in *McCleskey v. Kemp*,<sup>71</sup> a case that challenged the imposition of capital punishment on a black man convicted of killing a white police officer in Georgia on the basis of an empirical study of racial disproportion in capital verdicts in that state.<sup>72</sup> The Baldus study was a multiple regression analysis of the effects of the race of the defendant and the race of the victim on capital sentencing decisions, in which David Baldus and his coauthors controlled for 230 potentially confounding variables.<sup>73</sup> The Court raised some questions about the study's methodology but ultimately assumed without deciding that the study was valid and ruled against the defendant on the ground that statistical proof of discrimination was not sufficient to prove discrimination in his individual case. The decision not to decide the study's validity was likely motivated at least in part by the Court's lack of enthusiasm for the task of evaluating the soundness of the Baldus study. Justice Powell noted his unease with the study's methodology in a memo to his clerks: "[M]y understanding of statistical analysis—particularly what is called 'regression analysis' ranges from limited to zero."<sup>74</sup> Moreover, if the Court had ruled that the study was flawed or insufficient, it would have invited researchers to return to the Court with even more comprehensive and sophisticated empirical studies of the issue. The discomfort of judges with empirical evidence thus may lead them to try to find ways to rule such evidence irrelevant to the legal issue—and thus might ironically lead to *less* contextual adjudication, at least when "context" is presented in statistical form.

Second, when judges do attempt to assess empirical studies, they may simply get it wrong because of their lack of expertise with empirical methods. Finally, even if courts are not wrong to accept (or reject) an empirical analysis, when judicial decisions accepting or rejecting abstruse empirical studies contravene what the public widely believes to be true, contextual constitutional adjudication may undermine the legitimacy of those decisions. For example, the district court judge in the *McCleskey* litigation (unlike the court of appeals and the Supreme

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<sup>71</sup> 481 U.S. 279 (1987).

<sup>72</sup> *Id.* at 282-83, 286 (relying on a study of over 2000 murder cases).

<sup>73</sup> *Id.* at 286-87 ("Baldus subjected his data to an extensive analysis, taking account of 230 variables that could have explained the disparities on nonracial grounds.").

<sup>74</sup> Memorandum from Justice Lewis F. Powell to Leslie S. Gielow, Law Clerk, U.S. Supreme Court 1 (Sept. 16, 1986) (on file with the Thurgood Marshall Papers, Library of Congress).

Court) *did* consider the validity of the Baldus study and ultimately ruled it insufficiently reliable.<sup>75</sup> Had the Supreme Court endorsed the district court's critique, the Court's decision may well have engendered even greater resistance and disillusion than its purely legal analysis did, by rejecting proof of what many people felt they knew to be true.

These concerns about contextual constitutional adjudication when "context" is presented in the form of sophisticated empirical studies are not frivolous, but they are manageable. The discomfort that courts may feel with empirical evidence is not fundamentally different from the discomfort that courts may feel with any kind of expert testimony or evidence. Courts might prefer to avoid such evidence and might marginally push constitutional doctrine away from reliance on it, but litigants whose cases will benefit from such evidence will still have incentives to present it. These same litigants can help judges see the relevance of such evidence and understand it through their choice of experts (and their cross-examination of opposing experts). Moreover, in constitutional adjudication in the Supreme Court, the collection, explanation, and critique of relevant studies can be, and often is, elaborated in amicus briefs.<sup>76</sup> Finally, the chance that the Court will undermine public confidence in its decisions by getting (or appearing to get) context wrong is probably no greater than the chance that the Court will undermine public confidence in its decisions by ignoring context altogether.

#### B. *Bias in the Creation and Deployment of Empirical Studies*

Another reason that judges may eschew reliance on statistical studies is their fear that the complexity of statistical methods can hide political agendas. This is not a spurious concern. Greater reliance on contextual evidence may well spur partisan production of such evidence. The answer to such anxiety is the same answer given above to the worry about judicial competence: the adversary system. The adversarial process is supposed to be able to expose questionable or unreliable evidence, and judges are certainly well equipped to inquire into and assess the bias produced by research sponsorship by determining whether proffered studies were subjected to rigorous peer review.<sup>77</sup>

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<sup>75</sup> The district court concluded that McCleskey had failed to establish by a preponderance of the evidence that the data used in the Baldus study were trustworthy. *McCleskey*, 481 U.S. at 288-89, 288 n.6. On this basis, along with other critiques of the study's methodology, the district court held that the Baldus study "fail[ed] to contribute anything of value" to McCleskey's claim. *Id.* (alteration in original) (quoting *McCleskey v. Zant*, 580 F. Supp. 338, 372 (N.D. Ga. 1984)).

<sup>76</sup> See generally James R. Acker, *Social Science in Supreme Court Criminal Cases and Briefs: The Actual and Potential Contribution of Social Scientists as Amici Curiae*, 14 *LAW & HUM. BEHAV.* 25 (1990) (arguing for greater involvement by social scientists in constitutional adjudication in criminal cases).

<sup>77</sup> See John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 *U. PA. L. REV.* 477, 501 (1986) (arguing that courts can "evaluate a piece of social science research initially by assessing the degree to which it

But invocation of the adversarial process may be a too-facile retort in this context. Constitutional adjudication in criminal cases is not often a battle between equally trained and resourced opponents. Criminal defendants are overwhelmingly indigent and represented by public defenders or court-appointed counsel, whose resources are often wholly inadequate.<sup>78</sup> It is true that local district attorneys, the usual adversaries of indigent criminal defendants, are often themselves overburdened and under-resourced. But such conditions suggest that, at least at the trial level, contextual arguments may not be one sided so much as nonexistent. It is at the Supreme Court level—when contextual information floods into the Court via amicus briefs—that the inequality becomes starker. As Justice Kagan has noted, and Andrew Crespo has elaborated through a compelling empirical study, indigent defendants are at a systematic disadvantage in terms of advocacy in the Supreme Court.<sup>79</sup> The prosecution is much more likely to be represented by experienced, even expert counsel. Moreover, prosecutors are in a position to control, through the plea-bargaining process, which cases make it to appellate review. (Recall above that Edward Strieff's case made it to the Supreme Court only because he was permitted by the prosecutor to enter a conditional guilty plea, preserving the constitutional issue on appeal.) As a result, “structural imbalances in the manner in which criminal procedure cases make their way to the Supreme Court and in which they are argued once they arrive affirmatively *introduce* systemic biases and disparities into the Court's consideration of these important issues.”<sup>80</sup> Thus, reliance on the adversary system to uncover hidden biases in contextual information presented to the Supreme Court may be overly sanguine, unless the Court takes affirmative measures to equalize the presentations it receives in criminal cases.

### C. *Lack of Fit Between Contextual Facts and Legal Remedies*

Sometimes contextual understanding has a poor fit with available legal remedies. Consider, for example, all of the psychological studies and brain-science evidence invoked by the Supreme Court in its decisions exempting juvenile offenders from the death penalty and also from life-without-parole sentences for some crimes.<sup>81</sup> This wealth of evidence tends to suggest that, in

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has been subjected to, and has survived, critical review by other researchers in the area”).

<sup>78</sup> See generally NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf> [<https://perma.cc/9BDG-K9SF>] (addressing the many challenges, including inadequate resources, faced by lawyers for indigent defendants across the country).

<sup>79</sup> See Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 MICH. L. REV. 1985, 2005 (2016) (quoting Justice Kagan on the imbalance in presentations in criminal cases before the Court).

<sup>80</sup> *Id.* at 1988 (emphasis in original).

<sup>81</sup> See, e.g., *Graham v. Florida*, 560 U.S. 48, 82 (2010) (exempting juvenile offenders who

many important ways, young people are different from adults when it comes to culpability; but the evidence also suggests that the line is not the traditional legal demarcation of adulthood at eighteen, but rather something more like mid-twenties. Similarly, in the context of race discrimination, empirical evidence suggests that unconscious biases can be difficult or impossible to uproot, which can lead some jurists to conclude that the Fourteenth Amendment's promise of equal protection of the laws cannot be called on to provide a remedy. Justice Scalia, for example, wrote a memo to his colleagues in the *McCleskey* case urging his brethren not to call for further empirical research on bias in the criminal justice system, because contextual evidence showed that such bias was inevitable and ineradicable by law: "Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof."<sup>82</sup> Contextual understanding may thus sometimes have the paradoxical effect of leading some to give up on law's promise, because no viable legal remedies appear to be available to solve the problem that contextual evidence uncovers.

The lack of fit between context and legal remedies may well sometimes lead to disillusion with law on behalf of judges, litigants, and the wider public. But that disillusion is the inevitable by-product of the limits of legal remedies. Contextual evidence may make those limits more visible and undeniable, but it does not create the limits. And, while it may be fanciful to expect that contextual evidence will improve constitutional decision-making in every case, it seems reasonable to hope that there will be many instances in which fuller consideration of context will help to guide and improve constitutional decision-making.

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The concerns canvassed above are sobering, and they are not always easily assuaged. Nonetheless, I still am cheering, and more than faintly, for *Miranda's* contextual approach—not because it is perfect, but because it is superior to noncontextual approaches that preclude consideration of the ever-evolving environment of police practices. I cheer for *Miranda's* methodology in much the same way that Winston Churchill cheered for democracy. It's the worst form of

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committed crimes other than homicide from sentences of life without parole); *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005) (exempting juvenile offenders from the death penalty).

<sup>82</sup> Memorandum from Justice Antonin Scalia to the Conference (Jan. 6, 1987) (on file with the Thurgood Marshall Papers, Library of Congress); see also CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 108 n.92 (2016).

government, he said, until you consider “all those other forms that have been tried from time to time.”<sup>83</sup>

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<sup>83</sup> Winston Churchill, Speech, House of Commons, November 11, 1947, *in* 7 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897-1963, at 7563, 7566 (Robert Rhodes James ed., 1974).