NOTES

CONSTITUTIONAL DEFAULT RULES AND INTERBRANCH COOPERATION

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This Note explores whether "constitutional default rules," or judicially crafted constitutional rules designed to spur legislative action, can generate interbranch cooperation in the area of criminal procedure. The Note looks at two types of constitutional default rules—the "model" default rule and the "penalty" default rule—in theory and in practice, examining how the Court has employed such rules to generate a dialogue with Congress in order to implement constitutional rights. The Note argues that while there have been notable failures by the Court in using the default rule to elicit a rights-protective legislative reaction (namely, in the case of Miranda v. Arizona*) under the right conditions, the constitutional default rule may still be a viable tool for spurring progressive legislative policy and reform of the criminal justice system.*

INTRODUCTION

The story of "constitutional dialogue"—the shaping of constitutional meaning through discussions between the legislative and judicial branches—has not been a happy one in the area of criminal procedure. Rather, the specter of unpopular Warren Court decisions has dominated the discourse; these decisions have come to represent an out-of-control judiciary creating constitutional law that leads to "countermajoritarian" outcomes.[1] In response, Congress has attempted to overturn the Court's rulings by enacting legislation that

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[1] The term "countermajoritarian" refers to judicial decisions which run counter to the will of a political majority. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (Yale Univ. Press 2d ed. 1986) (1962) ("The root difficulty is that judicial review is a counter-majoritarian force in our system."); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998) (describing countermajoritarian difficulty as "the central obsession of modern constitutional scholarship" and explaining its genesis).

the Court subsequently rejected as unconstitutional, causing further public dissatisfaction with the judiciary. The result has not been dialogue, but a conflict wherein legislators confront "activist judges" and threaten to appoint justices who will eventually overturn unpopular decisions. In response, the judiciary backpedaled, attempting to align legal doctrine more closely with majoritarian preferences. Slowly, an uneasy equilibrium has emerged, though discontent with the judiciary's role remains lurking in the background of debates over defendants' constitutional rights.

We might label this phenomenon the "standoff model." Court observers use standoff as a general explanation for what happens when the Court confronts a sustained political backlash.[2] While this phenomenon is not limited to criminal procedure, the undesirable legal and social effects that flow from the standoff model appear most clearly in the criminal procedure context. One of these effects is a counterproductive legislative focus on the legitimacy of judicial decisionmaking rather than the best means of implementing the constitutional rights at stake. The standoff model also preempts dialogue on the real-world costs and benefits of the Court's rules—issues Congress would be better prepared to address were it not preoccupied with disputing the Court's authority to make the rules at all.

Is the standoff model inevitable, or could an alternative model—one of genuine cooperation between the judicial and legislative branches[3]—have emerged from the Warren Court's criminal procedure revolution? Decisions like *Miranda v. Arizona*,[4] in which the Court suggested that its judicially prescribed warnings for defendants were required only in the absence of a legislative solution,[5] hint at an alternative form of constitutional dialogue. In *Miranda*, the Supreme Court offered a constitutional default rule: a judicially created rule which governs in the absence of action by political actors but which

[2] For illustration and discussion of standoff with respect to several areas of constitutional law, see generally Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993) and Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005).

[3] While many of the examples discussed in this Note deal with the relationship between Congress and the Supreme Court, the idea that default rules can promote constitutional dialogue is relevant to state legislatures as well. Although important differences exist between federal and state politics, I make a general argument that broader trends in the politics of crime drive the public-choice narrative in both the federal and state contexts. I use the general term "legislature" in discussing the constitutional default rule theory, and I specify whether that legislature is federal or state in describing examples of the theory. Nevertheless, issues of federalism are generally outside the scope of this Note.

[4] 384 U.S. 436 (1966).

[5] *Id*. at 467.

can be displaced or modified by such actors.[6] In theory, the *Miranda* rule was the starting point for a dialogue between the Court and Congress about how to implement the commands of the Fifth Amendment. In practice, Congress's post-*Miranda* rejection of the Court's invitation to legislate and the Court's subsequent invalidation of Congress's attempt to restore the pre-*Miranda* status quo are examples of standoff.[7]

The concept of constitutional default rules appears periodically in legal scholarship.[8] But few have examined why legislatures pursue an approach that refuses to acknowledge the replaceable nature of Court-offered default rules and choose to resist the Court's rulings rather than legislate. In the criminal procedure context, one common explanation posits that legislative preferences persistently underprotect criminal defendants' and minorities' rights, such that these preferences necessarily conflict with the Court's duty to enforce constitutional guarantees.[9]

This Note challenges this theory and argues that, under certain political conditions, the Court can properly use constitutional default rules to spur legislatures to establish procedures that both enforce constitutional values and incorporate majoritarian preferences. By offering a more comprehensive account of constitutional default rules in the context of criminal procedure, I attempt to conceptualize how such rules may spur legislative solutions for the existing dysfunctions of the criminal justice system.

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[6] *See infra* Part III.A.

[7] The struggle between the Supreme Court and Congress after *Miranda* is well documented. *See generally* Yale Kamisar, *Can (Did) Congress "Overrule"* Miranda*?*, 85 CORNELL L. REV. 883 (2000) [hereinafter Kamisar, *Can (Did) Congress "Overrule"* Miranda*?*) (detailing history of Congress's attempt to overrule *Miranda* and analyzing constitutionality of anti-*Miranda* provision, 18 U.S.C. § 3501 (2000)); Yale Kamisar, *Foreword: From* Miranda *to § 3501 to* Dickerson *to* . . . , 99 MICH. L. REV. 879 (2001) (analyzing *Dickerson v. United States*, 530 U.S. 428 (2000), in light of history of § 3501); Erik Luna, *Constitutional Road Maps*, 90 J. CRIM. L. & CRIMINOLOGY 1125, 1149–72 (2000) (describing *Miranda* and post-*Miranda* history as example of failed interbranch dialogue).

[8] Some scholars have suggested the potential use of constitutional default rules to elicit legislative participation in implementing constitutional values. *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 459–65 (1998) (arguing, inter alia, for judicially created default rules as method of promoting "democratic experimentalism"); John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825, 838–53 (2006) (defining and categorizing various types of judicially created default rules); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 792 (2006) *(*arguing that default rules can "encourage legislative protection of constitutional interests").

[9] *See infra* Part II.A.

The argument that constitutional default rules can generate legislative solutions to flaws in criminal procedure proceeds in three parts. Part I sets out the default rule model, providing definitions and examples of two types of default rules—"model" default rules and "penalty" default rules—that have been or could be used as a judicial method to provoke legislative participation in the implementation of constitutional rights. Part I also assesses the benefits of default rules through the lens of legal process theory, arguing that default rules are a means for the judiciary and legislature to exercise their relative institutional competencies in effecting policy change. Part II surveys the Court's use of model and penalty default rules, analyzing strengths and weaknesses of each in eliciting legislative responses. Finally, Part III applies the principles discussed in Part II to construct a broader default rule theory. I argue that in order for a default rule to work, the Court must time its rule to fit with external political conditions, substantively craft the default rule to provide legislators with clear standards, and accord deference to good-faith policy responses. If these requirements are fulfilled, the default rule may be an effective way to bring legislatures into the project of "shared constitutional implementation."[10]

I
UNPACKING THE DEFAULT RULE MODEL

This Note focuses on two types of constitutional default rules that the Court has used or that scholars have suggested as tools to provoke legislative action: the model default rule and the penalty default rule. This Part defines both types of rules, examines their relative capacities for spurring interbranch dialogue, and offers a public-choice narrative to show that legislatures can and will respond to such judicial prompts.

A. Model Default Rules

Model default rules are designed to elicit a legislative response by prescribing a specific procedure to protect a given constitutional right while also inviting political actors to formulate alternative procedures to replace it.[11]

In the area of criminal procedure, the Court has employed model default rules in cases where bright-line direction to the relevant institutional actor (e.g., police or prosecutors) allowed the Court to judge

[10] This term is a variation on the term "shared constitutional interpretation," borrowed from Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 62–63.

[11] Ferejohn & Friedman, *supra* note 8, at 851.

more clearly and consistently the government's behavior against the relevant constitutional standard. In other words, the Court has experimented with model default rules in cases where the establishment of a uniform procedure enabled the Court to "fram[e] intelligible inquiries [that were] within the empirical competence of courts to answer."[12] In such instances, model default rules yielded "predictable results the overall benefits of which exceeded the costs."[13]

The paradigm case of a model default rule is *Miranda.*[14] There, the Court formulated the now-famous warnings as a prophylactic against violations of the Fifth Amendment's Self-Incrimination Clause.[15] The *Miranda* warning, however, was never absolute, as the Court built in a qualification that is instructive for understanding how the Court envisioned policymakers' role in implementing its constitutional commands:

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities . . . . Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect . . . . However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.[16]

The Court's language reflected an invitation to Congress and state legislatures to experiment with alternative, equally effective procedures for protecting a defendant's Fifth Amendment rights.

Miranda is not the only instance where the Court issued a prophylactic rule while simultaneously declaring it subject to replacement by the legislature.[17] In *United States v. Wade*, which held that evidence obtained from a police lineup in which the accused was denied access to counsel must be excluded from trial, Justice Brennan invited

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[12] Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1303 (2006).

[13] *Id*.

[14] *See* Miranda v. Arizona, 384 U.S. 436, 467–68 (1966) (establishing default rule as requiring that person in custody be "informed in clear and unequivocal terms that he has the right to remain silent").

[15] The Fifth Amendment mandates that no person be "compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

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

[17] Some of the following examples are derived from Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1037–47 (2001) (categorizing prophylactic rules).

legislatures to replace the Court's default rule.[18] Writing for the Court, Brennan first stated that the denial of counsel at a lineup did not per se violate the Sixth Amendment's guarantee of the right to counsel. He went on to set a default rule requiring a lawyer's presence in such situations unless legislatures or local police took action to protect the accused from the "risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial."[19]

Model default rules also appear in the realm of judicially created remedies for constitutional rights violations. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Court declared that federal officials were subject to suits by private individuals for violations of the Constitution.[20] However, the Court indicated that its rule was a model default rule which would only operate in the absence of legislative action, and it suggested that Congress could provide alternative tort remedies for such claims.[21] The creation of the exclusionary rule[22]—the rule that evidence seized in violation of the Constitution may not be used against a defendant at trial[23]—marked yet another Court-created model default rule: The Court mandated exclusion only in the absence of an acceptable legislative alternative.

United States v. Booker, a more recent example of a model default rule, struck down the Federal Sentencing Guidelines as violating the Sixth Amendment's jury trial guarantee.[24] The *Booker* Court held that any fact that raises a sentence above the statutory maximum must be proved to the jury beyond a reasonable doubt.[25] However, the Court "saved" the Federal Sentencing Guidelines by excising the portions of the federal sentencing statute that made the Guidelines mandatory,[26] (thus rendering them advisory) and estab-

18 United States v. Wade, 388 U.S. 218, 239 (1967).

19 *Id.* Justice Brennan cited *Miranda*, stating that *Wade*'s holding "'in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect.'" *Id.* (quoting *Miranda*, 384 U.S. at 467).

20 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

21 *Id*.

22 *See infra* Part II.A.

23 *See* Weeks v. United States, 232 U.S. 383, 398 (1914) (establishing exclusionary rule in federal trials); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (extending exclusionary rule to states under requirements of Fourteenth Amendment's Due Process Clause).

24 United States v. Booker, 543 U.S. 220, 226–27 (2005).

25 *Id.* at 244.

26 The guidelines were created by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.). The two sections which were excised were 18 U.S.C. §§ 3553(b)(1) and 3742(e) (2000). *Booker*, 543 U.S. at 259.

lishing a standard of review under which only reasonable departures from the Guidelines would be found constitutional.[27] This framework—existing guidelines with reasonable departures—thus became a model default rule protecting the right to a jury trial that the Court expressly invited Congress to modify.[28]

Model default rules are useful because they give specific instructions to legislatures. Consequently, such rules protect constitutional rights while preserving the opportunity for legislatures to create effective alternatives. The rules allow the Court to direct legislative attention to problem areas while curbing noncompliance with bright-line rules. If the Court fails to account for all the costs of such rules, the legislatures can propose a less costly scheme that also achieves constitutional compliance.

However, the use of model defaults also carries risks. For example, a suboptimal judicially crafted rule may become permanently entrenched if legislatures have few incentives to incorporate broader or more creative solutions.[29] A second problem is that any legislative solution will face uncertainty about whether the Court will find it constitutional, thus potentially dissuading legislatures from acting.[30] Finally, dissatisfaction with the existing rule is likely to lead to a standoff between the legislature and the Court.[31]

B. Penalty Default Rules

A penalty default rule is one which worsens one or both parties' social welfare, thus providing strong ex ante incentives for the party or parties to reveal otherwise concealed information and negotiate.[32] For example, *Hadley v. Baxendale*'s rule[33] that a party is not liable for unforeseeable consequential damages is a penalty default: It forces

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[27] *Booker*, 543 U.S. at 261; *see also* Christine DeMaso, Note, *Advisory Sentencing and the Federalization of Crime: Should Federal Sentencing Judges Consider the Disparity Between State and Federal Sentences Under* Booker*?*, 106 COLUM. L. REV. 2095, 2103 (2006) (explaining Court's action in finding implied standard of review in Sentencing Reform Act).

[28] *See infra* note 127 and accompanying text.

[29] *See infra* Part III.A.

[30] *See infra* Part III.A.

[31] *See infra* Part III.A.

[32] *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989) (explaining default rule concept in context of contract theory). *But see* Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389, 390 (1993) (critiquing application of default rule theory to contract law).

[33] Hadley v. Baxendale, (1854) 156 Eng. Rep. 145, 151 (Exch. Div.) (establishing common law contract rule that party cannot recover for unforeseeable damages unless explicitly contracted for).

the contracting parties to reveal any circumstances which might lead to consequential damages and to take that information into account in contract negotiations.

The penalty default rule, in its strictest sense, has never been employed in the Court's jurisprudence.[34] However, it has become the object of increasing attention in constitutional scholarship,[35] and the Court has employed rules akin to penalty default rules.[36]

Einer Elhauge's important work on "preference-estimating" and "preference-eliciting" statutory default rules extends the idea of penalty defaults to statutory interpretation.[37] Elhauge argues that courts should apply canons of interpretation to align their decisions with "enactable political preferences," which are the voting preferences that legislators would hold if the issue was on the legislative agenda.[38] Alternatively, when such preferences are unclear, judges should choose a default rule that is most likely to spur a legislative reaction either clarifying the statutory ambiguity or overruling the judicial interpretation.[39] For instance, a default rule might be chosen so as to burden politically powerful groups that are more likely to respond with legislative action.[40]

Similarly, a constitutional penalty default rule is one the Court chooses in the absence of legislative action in order to spur legislative response. While not strictly analogous to contracts or statutes, a constitutional penalty default rule works in the same type of situation as a model default: where the absence of legislative regulation leads to the persistent violation of a constitutional right. Unlike model default rules, however (which provide viable, acceptable schemes to protect against constitutional violations), penalty default rules create unacceptable status quos that force the legislature to act. For example, penalty default rules force legislative action by punishing a politically powerful group who will respond by lobbying. Alternatively, the

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[34] However, see the discussion of the Court's Fourth Amendment jurisprudence in Part II.B *infra* for an example of how the Court may wield the threat of a penalty default to spur legislative action.

[35] *See, e.g.*, Ferejohn & Friedman, *supra* note 8, at 845–50 (describing various habeas corpus doctrines as varieties of information- or deliberation-forcing penalty default rules).

[36] *See infra* Part II.B.

[37] Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002) [hereinafter Elhauge, *Preference-Eliciting Rules*]; Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002) [hereinafter Elhauge, *Preference-Estimating Rules*].

[38] Elhauge, *Preference-Estimating Rules*, *supra* note 37, at 2034.

[39] Elhauge, *Preference-Eliciting Rules*, *supra* note 37, at 2171–72.

[40] Elhauge justifies the rule of lenity—the rule that ambiguous criminal statutes should be construed against the government—by arguing that prosecutors are politically powerful enough to elicit clarification from legislatures. *Id.* at 2193–206.

Court may spur a legislative response by announcing a rule that disfavors political majorities, prompting these majorities to take action to replace the default rule.

The Court has never implemented a constitutional penalty default rule in the *Hadley* sense; rather, the Court has shied away from explicitly stating that it will bar a particular practice unless the legislature acts. However, the Court has employed implicit threats of such a penalty in ways that have elicited a legislative response.[41]

Though the penalty default is not a "rule" in the way that a model default is, it is an example of decisionmaking that forces the desired interbranch dialogue. Penalty default rules can be differentiated from model default rules because they do not set forth any specific interim procedures to "placehold" while legislatures devise alternatives. Another key difference is that, unlike model default rules (which merely invite legislatures to act), penalty default rules create situations that expressly disadvantage the government. The penalty default model consequently forces legislatures to act since there is no judicially created rule to serve as the status quo.

The penalty default idea permeates the Court's Fourth Amendment wiretapping jurisprudence.[42] The Court's decisions in *Berger v. New York*, which struck down a New York statute allowing wiretapping pursuant to a judge-issued search warrant,[43] and *Katz v. United States*, which held that the FBI's electronic bugging of a telephone booth violated the Fourth Amendment,[44] both led Congress to regulate electronic surveillance out of fear that the Court would otherwise ban the practice outright.[45] In both cases, the Court prohibited the use of wiretapping under particular circumstances, signaling to Congress that precise statutory procedures were required in order for wiretapping to comply with the Fourth Amendment.[46]

A similar penalty default rule also appears in the Court's decision in *Barker v. Wingo*, in which the Court held that the Sixth Amendment required the dismissal of an indictment where the defen-

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[41] *See infra* Part II.B.

[42] *See* William J. Stuntz, *Of Seatbelts and Sentences, Supreme Court Justices and Spending Patterns—Understanding the Unraveling of American Criminal Justice*, 119 HARV. L. REV. 148, 155 (2006) (suggesting that Fourth Amendment wiretapping decisions might be understood as creating penalty default).

[43] Berger v. New York, 388 U.S. 41, 44 (1967).

[44] Katz v. United States, 389 U.S. 347, 353 (1967).

[45] For a discussion of how a dialogue between the Court and Congress led to the modern regulatory framework for electronic surveillance, see *infra* notes 129 through 133 and accompanying text.

[46] *See infra* notes 129–33 and accompanying text.

dant had not been granted a speedy trial.[47] By establishing the most undesirable state of affairs for the government—the dismissal of all charges against the defendant—the Court gave Congress a strong incentive to set forth precise timeframes for trials.[48]

Notwithstanding these examples of success, penalty default rules have limitations. One failing is that penalty default rules do not offer clear guidance as to what is constitutionally compliant. Consequently, the Court must follow up a penalty default rule by engaging in substantive rulemaking or otherwise risk permanent confusion as to what is sufficient to protect the constitutional right.[49] Even where a dialogue between the Court and Congress does ensue, such communication does not necessarily foreclose a standoff—particularly when the legislature resents having its hand forced.[50]

C. The Theorized Benefits of Default Rules

Proponents of constitutional model and penalty default rules typically argue that such rules can promote useful dialogue between the Court and political actors. In turn, such dialogue can spur legislatures to employ their districts or states as "laboratories of democracy"[51] in order to implement the constitutional standards the Court has articulated.[52]

Legal process theory reflects this conception of the benefits of default rules—one that envisions the judiciary's role as facilitating policymaking by political actors.[53] Legal process theory outlines a

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[47] Barker v. Wingo, 407 U.S. 514, 522 (1972).

[48] Congress enacted the Federal Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (1975) (codified at 18 U.S.C. §§ 3152–3156, 3161–3174 (2000)), in response to the Court's *Barker* decision. *See infra* notes 139–40 and accompanying text.

[49] Ferejohn and Friedman allude to this problem by arguing that penalty defaults cannot replace substantive rulemaking. *See* Ferejohn & Friedman, *supra* note 8, at 850 ("Default rules such as these are not meant to displace the possibility of substantive rulemaking. . . . Surely the Court would remain free when the next case arose to state that such a statute itself failed to pass constitutional muster . . . .").

[50] Ferejohn and Friedman's failure to account for congressional resentment is a key problem with their theory that the most effective penalty defaults are those which "move policy so far to one extreme or another that it falls outside the gridlock zone and motivates the parties to act." *Id.* at 858. Rather than protecting constitutional values, penalty defaults which operate far outside the realm of majoritarian preferences risk resulting in legislative attempts to limit the power of the Court—as can be seen in the model default context. *See infra* Part II.A.

[51] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[52] *See* sources cited *supra* note 8.

[53] The preeminent legal process theorists are Professors Henry Hart, Albert Sacks, and Herbert Wechsler, whose work and influences are discussed in Richard H. Fallon, Jr.,

"loose, functionalist approach"[54] which envisions an activist role for the Court in the realm of procedure rather than substance. In other words, the theory posits that the Court applies general principles to guide the political process and to ensure it works properly in light of legislatures' institutional superiority in making multivariate policy decisions. Philip Frickey describes the norms of legal process theory as "[e]mploying techniques like reasoned elaboration through purposivism, comparative institutional competence, the privileging of process to substance, and devices of avoidance, [in order] to mediate the fundamental tensions of our legal system, not resolve them by substantive theory."[55]

Legal process assumptions underpin many important theories of statutory interpretation, some of which call for default rules to break democratic gridlock, mobilize interested and affected groups, place an issue on the national agenda, incite citizens to action, and ultimately generate outcomes that incorporate majoritarian preferences. For example, Roderick Hills, Jr., has expanded on the default rule theory by arguing for an antipreemption canon of statutory interpretation that breaks federal legislative gridlock by using state laws to mobilize groups that are more likely to lobby Congress.[56] Other scholars have called for judges to choose certain default rules, absent clear statements to the contrary from Congress, as a means of forcing democratic deliberation.[57] Similarly, constitutional default rules can mobilize groups to press for legislative action and can promote dialogue about how constitutional rights should be implemented. Default rules can also lead to "democratic experimentalism," a system whereby government institutions can cooperate to solve social problems.[58] Default rules create space for legislative alternatives and

Reflections on the Hart and Wechsler Paradigm, 47 VAND. L. REV. 953 (1994). *See also* Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688 (1989) (reviewing PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM) (3d ed. 1988)); Anthony J. Sebok, *Reading* The Legal Process, 94 MICH. L. REV. 1571 (1996) (reviewing HENRY M. HART, JR., & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW) (William N. Eskridge, Jr., & Phillip P. Frickey, eds., Foundation Press 1994) (1958)).

54 Fallon, *supra* note 53, at 957.

55 Phillip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation on the Early Warren Court*, 93 CAL. L. REV. 397, 416 (2005).

56 Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 19–20 (2007).

57 *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992) (discussing benefits and disadvantages of clear-statement rules).

58 *See generally* Dorf & Sabel, *supra* note 8 (describing democratic experimentalism). Professor Stuntz also utilizes the idea of "democratic experimentalism" in arguing for a

a variety of policymaking experiments—a key goal of legal process theorists.

Consider proposals to employ default rules to spur reform of the criminal justice system. In the context of the Sixth Amendment right to counsel,[59] for instance, William Stuntz has suggested that legislatures implement expert commissions' recommendations when making policies about funding counsel for indigent defendants. Courts could "reward" states that adopt the expert commissions' funding recommendations by applying the Supreme Court's ineffective assistance of counsel doctrine weakly or not at all.[60] Professor Stuntz suggests similar policy-oriented solutions to the problems of abusive police behavior that are the subject of much of constitutional criminal procedure: The creation of citizen review boards,[61] the drafting of comprehensive antiprofiling statutes,[62] and the maintenance of extensive databases detailing instances of police misconduct[63] are all alternatives to Fourth and Fifth Amendment doctrines that could result in constitutional compliance and thus replace Court-issued prophylactic rules.[64] Where, however, political actors fail to implement such reforms, Court-made default rules would serve as the primary protection for defendants' rights.

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new paradigm of criminal procedure using tools such as default rules. Stuntz, *supra* note 8, at 785.

59 The Supreme Court held in *Strickland v. Washington* that a criminal defendant may invoke his constitutional right to effective representation by pursuing an ineffective assistance of counsel claim in court. 466 U.S. 668, 685–86 (1984). Under *Strickland*, the defendant must show that his attorney's performance was deficient and that this deficient performance prejudiced his defense. *Id.* at 687. Many argue that this standard is too deferential to defense attorneys and that the result is systematic incompetent trial representation for criminal defendants. *See, e.g.*, Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 684–85, 684 n.24 (1997) (describing critiques of *Strickland* and proposed solutions to problem of inadequate representation of indigent defendants).

60 *See* Stuntz, *supra* note 8, at 837 (suggesting appellate courts could use funding recommendations of expert commissions as default, making ineffective assistance doctrine inapplicable when recommendations are followed).

61 *See id.* at 827–28 (arguing that citizen review boards would highlight issue of police brutality in voter consciousness).

62 *See id.* at 828 (arguing that politicians will be forced to respond to violations of these statutes).

63 *See id. (*arguing that disclosure of police records reveals discrimination patterns and prompts political action).

64 Dorf and Sabel similarly suggest that their system of "explicitly experimental constitutional adjudication" might reveal that legislatively chosen policy alternatives lead to more compliance than the Court's rule, in which case the Court should be free to "declare the experiment a contingent success and allow expansion." Dorf & Sabel, *supra* note 8, at 463–64.

The exclusionary rule[65] is another target for legislative reform, given the controversy over its effectiveness as a deterrent to police and prosecutorial misbehavior.[66] Several scholars have suggested tort remedies and complicated damages regimes as substitutes for the rule,[67] and such schemes have even appeared on the congressional agenda.[68] But a broader solution might also achieve constitutional compliance. For example, a new policy targeting persistent constitutional violations might include sanctions on police departments or prosecutors' offices in addition to tort or other remedies for individual violations.[69] Where such a policy is implemented and complied with, the Court could relax application of the exclusionary remedy.

Legal process theory thus suggests that the judiciary's and legislature's comparative institutional competencies can combine to yield effective solutions that protect constitutional rights. However, what legal process theory fails to consider in its account of default rules is the political environment in which legislatures operate. When legislative sentiment disfavors the type of reform urged by the Court, how can the two branches effectively cooperate?

D. Will Legislatures Act To Protect Defendants' Rights?

In order to realize the benefits of constitutional default rules, legislatures must respond to these judicially created rules with cooperative dialogue rather than confrontational standoff. Unfortunately, legislative behavior since the Warren Court era has hardly been characterized by cooperative dialogue. The default rules put forth in *Miranda* and *Wade* were notorious failures: Immediately following the Court's decisions in both cases, Congress attempted to overrule the holdings, passing 18 U.S.C. § 3501 (which returned to the prior "voluntariness" standard in judging the admissibility of confessions) and 18 U.S.C. § 3502 (which defined the admissibility of eyewitness testimony at trial).[70] While § 3501 was ultimately held unconstitutional in

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[65] *See supra* Part II.A.

[66] *See* Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 5–22 (2001) (describing policy debate over exclusionary rule); Klein, *supra* note 17, at 1054–55 (discussing proposed alternatives to exclusionary rule).

[67] *E.g.*, Klein, *supra* note 17, at 1056–57 (describing congressional attempts to develop alternatives to exclusionary rule).

[68] *Id.* at 1056 (citing H.R. 666, 104th Cong. (1995), and S. 3, 104th Cong. (1995), as proposals to replace exclusionary rule with damages remedy).

[69] *See* Stuntz, *supra* note 8, at 828–29 (arguing for use of institutional injunctions to punish worst practices by police departments).

[70] *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 701, 82 Stat. 197, 210–11 (codified as amended at 18 U.S.C. §§ 3501–3502); Klein, *supra* note 17, at 1057 (arguing that Congress constructively passed 18 U.S.C. § 3501 to overturn decision it loathed in response to Court's invitation to take legislative action).

Dickerson v. United States,[71] and while § 3502 has remained largely unenforced,[72] few legislative alternatives to confessions have been evaluated, let alone sanctioned, by the Court.[73] In *Miranda*'s wake, therefore, it appeared that legislatures would not respond to Court-issued invitations to create procedural alternatives because legislatures have few political incentives to protect defendants' rights.

Leaving *Miranda* aside, however,[74] this Note describes a public choice theory supporting the notion that a rights-protective regime can emerge from the careful use of default rules. In the context of criminal defendants' rights, there are three categories of incentives for legislatures to respond positively to Court-issued default rules: first, the rise of new political constituencies that agitate for defendants' rights; second, the costs of the current regulatory regime; and third, the potential overlap of pro–defendants' rights constituencies and traditionally powerful groups such as law enforcement.

1. The Conventional Account of Legislative Behavior in Developing Criminal Procedure

The most common explanation for legislative behavior in shaping criminal procedure is that criminal defendants are a reviled minority with no political support.[75] Legislators (as well as judges in many states) are often elected because they are perceived as being tough on crime and on criminals.[76] As public choice theory explains, criminal suspects and defendants are not politically powerful interest groups, and the average voter self-identifies more as a potential victim than as a potential defendant.[77] As a result, legislators overwhelmingly benefit politically by regulating in favor of law enforcement and prosecutors, a situation exacerbated by the fact that these groups are a

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[71] Dickerson v. United States, 530 U.S. 428, 442 (2000).

[72] Klein, *supra* note 17, at 1055 n.111. See *infra* text accompanying note 119 for further discussion of the enactment of § 3502 as a response to *United States v. Wade*, 388 U.S. 218 (1967).

[73] Klein, *supra* note 17, at 1055.

[74] I will return to the discussion of *Miranda* in Part III.A *infra*.

[75] *See, e.g.*, Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 25–27 (1997) (arguing that public favors harsher criminal penalties even though little evidence exists that harsher penalties increase deterrence); Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1079–81 (1993) (setting out public choice theory for why legislatures refuse to protect defendants' rights).

[76] *See generally* Dripps, *supra* note 75 (examining political incentives faced by legislatures in addressing criminal procedure issues).

[77] *Id.* at 1089.

disproportionately influential lobby.[78] And, as Rachel Barkow points out, with respect to the politics of sentencing, the group that is most affected—criminal defendants—is not able to self-identify and mobilize in advance to oppose antidefendant policies.[79]

Moreover, during the Warren Court era, criminal procedure reform failed to garner public support because such reform was perceived as benefiting an unpopular racial minority. The Warren Court's approach to criminal procedure was inseparable from the civil rights movement.[80] In the subsequent decades, politicians and the media targeted their anticrime rhetoric at African Americans more than any other racial group. During this time, the public also conflated the Warren Court's jurisprudential developments in poverty law with its revolution in criminal procedure, allowing politicians to link welfare, poverty, and crime.[81] Racial prejudice underpinned public discontent over both crime and welfare, so African Americans became political scapegoats, blamed for crime, poverty, and urban disorder.[82] Because the public linked crime with race, there was no political will to protect this disfavored racial minority.

Under this standard public choice account of legislative incentives, legislatures will not attempt to reform criminal procedure in response to the Court's default rules in the experimentalist manner legal process hopefuls envisioned. Rather, politicians will decry the Court's decisions as "illegitimate" or, in extreme cases, attempt to overturn them as legislatures did in response to *Miranda*. However,

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78 William J. Stuntz, *The Pathological Politics of the Criminal Law*, 100 MICH. L. REV. 505, 533–39 (2001).

79 Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 726 (2005).

80 *See* Dennis D. Loo & Ruth-Ellen M. Grimes, *Polls, Politics, and Crime: The "Law and Order" Issue of the 1960s*, 5 W. CRIMINOLOGY REV. 50, 55–58 (2004) (using public opinion data from 1960s to show effect of media in bundling civil rights movement, Vietnam War, and crime); A. Kenneth Pye, *The Warren Court and Criminal Procedure,* 67 MICH. L. REV. 249, 256 (1968) (describing politicians' linkage of civil rights movement, crime, and protest against Vietnam); Frederick Schauer, *Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 40 n.138 (2006) ("Indeed, the public concern about crime, which did not register until 1968, came less from fear of 'traditional' crime and more as a consequence of the urban riots of 1967 and 1968.").

81 *See, e.g.*, Barry C. Feld, *Race, Politics and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 MINN. L. REV. 1447, 1495–1502 (2003) ("[I]t was no coincidence that, in 1966, Republicans made electoral gains after blaming liberals' 'soft social programs' and the Warren Court for the rise in racial radicalism, urban riots, and rising crime rates."); *id.* at 1500 (explaining how increasing crime rates, rise of welfare roles, and revolution in drug use and sexual mores left white voters "vulnerable to appeals to racial resentments, exploitation, and demagoguery"); Loo & Grimes, *supra* note 80, at 50 (arguing that media bundling of these issues resulted from moral panic engineered by conservative elite).

82 *See* Feld, *supra* note 81, at 1497–1500 (analyzing public connection between poverty, welfare dependency, and race).

forty years after the Warren Court era, the development of a different public choice narrative counsels a revised approach by the Court in protecting defendants' rights.

2. The Rise of New Political Constituencies

Criminal defendants' weakness as an interest group has not improved since the 1960s. What is beginning to change, however, is what it means to be "soft on crime." While race is still a divisive issue in the United States and continues to be closely linked with crime in the public mind, the culture wars of the 1960s have dwindled. As overall crime levels continued to sink, and as black voters attained greater political power over the four decades since the passage of the Voting Rights Act of 1965,[83] the public sympathy for criminal defendants expanded. Americans became less likely to demonize criminal defendants and more likely to critically contemplate innocence, privacy, racial discrimination, and the fairness of sentencing and punishment.[84]

This shift in public sentiment has elicited a behavioral adjustment by politicians, who are beginning to treat prisoners and ex-offenders—possibly the least politically popular interest groups—as more than just election-year scapegoats. The Prison Rape Elimination Act[85] passed easily in 2003,[86] and the *New York Times* recently reported on the interest of congressional Republicans (not, historically, prisoners' rights advocates) in legislation to help ex-offenders find housing, drug treatment, psychological counseling, job training and education, as well as their efforts to reduce mandatory minimum sentencing and penalties for possession of small amounts of crack cocaine.[87] This sea change in the politics of crime could be attributed to a number of political factors—influential religious groups' adoption of prison

[83] Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1161–62 (1998).

[84] State and federal legislation supports these claims. Professor Stuntz catalogs several "pro-defendant" efforts to address problems in the criminal justice system, including: banning racial profiling and requiring police to keep records of traffic stops, mandating the videotaping of police interrogations, providing financial and expert assistance for innocence claims based on DNA and other forensic evidence, increasing privacy protections from police surveillance, and funding indigent defense. Stuntz, *supra* note 8, at 797–800.

[85] Pub. L. No. 108-79, 117 Stat. 972 (codified at 42 U.S.C. § 15601–15609 (Supp. III 2003)).

[86] Kevin R. Corlew, *Congress Attempts To Shine a Light on a Dark Problem: An In-Depth Look at the Prison Rape Elimination Act of 2003*, 33 AM. J. CRIM. LAW 157, 158 (2006) (noting that the Act passed unanimously).

[87] *See* Chris Suellentrop, *The Right Has a Jailhouse Conversion: How Conservatives Came to Embrace Prison Reform*, N.Y. TIMES, Dec. 24, 2006, § 6 (Magazine), at 46 (describing increased conservative interest in prisoner reentry programs).

reform as an important issue and the increased political organization and mobilization of minority groups, for instance. As constituents' demands change, so do legislative incentives.

Police and prosecutors remain powerful interest groups.[88] But police and prosecutors also answer to constituencies who will no longer tolerate the appearance of racism, brutality, or corruption. In the wake of public relations disasters for the New York Police Department and Los Angeles Police Department,[89] law enforcement and legislators have begun to cooperate on initiatives such as "community policing" and "community prosecution"—models which encourage responsiveness to local needs and seek to reduce distrust of police and prosecutors.[90] And while criminal suspects and defendants do not wield as much political power as police and prosecutors, the minority communities that are affected by police and prosecutorial misconduct have become increasingly visible and influential since the Warren Court era.[91] This phenomenon suggests that newly empowered constituencies may provide incentives for legislatures to respond in rights-protective ways to opportunities for criminal procedure reform.

3. The Costs of the Current Regime

The astronomical political and monetary costs of maintaining the current criminal procedure regime paradoxically both aids and impedes reform. Legislatures are acutely aware of these costs. The pressure on politicians to minimize costs can cause them to diverge from normal patterns of criminal justice regulation. Professors Rachel

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[88] *See* Stuntz, *supra* note 78, at 546 (2001) (describing relationship between legislators, prosecutors, and police).

[89] The Rodney King and Amadou Diallo incidents contributed to the public outcry against unfettered police discretion. *See* David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1090 (1999) ("[I]ncidents like those involving Rodney King and Amadou Diallo play on everyone's worst fears regarding the dangers lurking behind everyday encounters with police officers, and thereby subtly alter all police-citizen relations."); Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1400 (2005) (discussing argument that King incident undermined public trust in constitutional law).

[90] For a description of community-based law enforcement models, see Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 344–50 (2002).

[91] For example, Professors Kahan and Meares have noted a steady growth of political power in the African American community since the 1960s:

> Black voter registration and turnout rates sky-rocked [sic] almost immediately upon passage of the [Civil Rights Act], and since then the representation of African-Americans in politics has steadily risen as well. . . . Today in the South the percentage of black city council members matches that of African-Americans in the general population. Similar progress in black political representation has taken place in the North . . . .

Kahan & Meares, *supra* note 83, at 1161–62.

Barkow and Kathleen O'Neill persuasively demonstrate that despite the incentives attached to criminal sentencing—which only reward, and do not penalize, legislators for statutorily increasing sentences—legislatures frequently delegate sentencing policymaking to independent commissions.[92] Barkow and O'Neill argue that this behavior is largely due to legislative concern over skyrocketing incarceration costs in light of limited state resources.[93] Surprisingly, politicians endorse reform that could lead to less punitive policies by outsourcing the politically unpopular job of decreasing sentences.[94] Though other factors contribute to this dynamic,[95] budget constraints can counteract the otherwise intractable politics of crime.

On the other hand, the high costs of reform also impede effective criminal procedure reform. As Professor William Stuntz explains, Court-driven criminal procedure regulation leads legislatures to avoid procedural reforms. Instead, legislatures heavily regulate areas of substantive criminal law, such as sentencing and incarceration.[96] Thus, legislative spending in these substantive areas has exponentially increased while money for constitutionally regulated activities, such as policing, has not.[97] Reallocating resources into areas traditionally regulated by judicial doctrine could achieve several worthy objectives, such as decreasing incarceration costs and relieving pressure to extend sentences. If legislatures did reallocate resources into procedural reg-

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92 *See* Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1977–78 (2006) (analyzing factors which lead politicians to delegate sentencing policy decisions).

93 *Id.* at 1986.

94 Professors Barkow and O'Neill offer a persuasive explanation for this surprising result:

> While longer terms of incarceration might make fiscal sense for many offenses and offenders, at some point the money spent on additional prison terms would be better spent on alternatives to incarceration. The political process might not allow reasoned consideration of these options, however, so a commission might be better suited to explore policies that will yield the best long-term results. Delegation in this context can therefore provide a 'means to escape from legislative excesses' and can allow more reasoned consideration of alternatives that would improve long-term social welfare and free up resources to pursue other legislative goals.

Id. (quoting DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS 224 (1999)).

95 For example, "political entrepreneurs," or politicians who spearhead innovative policy experiments, are another force which can drive seemingly counterintuitive legislative action. *See id.* at 2013 (describing political entrepreneurs as one factor giving rise to reform).

96 Stuntz, *supra* note 8, at 786–91.

97 *Id.* at 788–89.

ulation, legislative sensitivity to costs could have results that are not necessarily "anti-defendant."[98]

There are many factors that suggest a potential confluence of forces toward reform. For example, the public has come to demand fairness in criminal justice, law enforcement and prosecutors need adequate funding and flexibility, minority communities want protections for the innocent against police harassment, and legislatures care about costs. Yet current criminal procedure undermines these ends.[99] Thus, despite the prevalence of the view that legislatures are persistently anti-defendant, under the right political conditions, there is potential to motivate legislatures to rectify the problems of the criminal justice system.[100]

II
THE SUPREME COURT'S USE OF DEFAULT RULES

Despite the preceeding arguments that legislatures may respond to rights-protective default rules, the "pathological politics of the criminal law" are difficult to overcome.[101] The history of the Court's use of default rules reveals more failures than successes in generating productive legislative responses. This Part examines specific instances of these failures and successes, and shows how the Court's political acuity and judicial methodology in crafting the rules have influenced the effectiveness of default rules.

A. The Court's Use of Model Default Rules

Miranda's legacy has sullied the reputation of model default rules.[102] In response to the Court's ruling, Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968, which con-

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[98] Such results could, for example, mirror what has happened in the realm of sentencing—legislatures could establish independent expert commissions to develop the kinds of broad institutional solutions discussed in the text accompanying notes 59–69 *supra*.

[99] *See, e.g.*, William J. Stuntz, Miranda*'s Mistake*, 99 MICH. L. REV. 975, 976 (2001) *(*showing how *Miranda* doctrine generates results undesirable to liberals and conservatives).

[100] *See infra* Part III.

[101] Stuntz, *supra* note 78, at 506; *see generally* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006) (analogizing politics of crime to politics of interest-group competition and capture in administrative state).

[102] The failure of the Court's use of a model default rule in *Miranda* has been the subject of much scholarly debate. *See, e.g.*, Yale Kamisar, Miranda *Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in* Dickerson, 33 ARIZ. ST. L.J. 387, 391–401 (2001) (analyzing *Dickerson* in light of post-*Miranda* history); Klein, *supra* note 17, at 1060–77 (questioning whether exceptions to *Miranda* render it unsuccessful as penalty default); *see also* sources cited *supra* note 7.

tained provisions overruling both *Miranda* and *Wade*.[103] Congress adopted an aggressive anti-Court posture designed to appear "tough on crime" at a time when political discourse was focused on a nationwide crime increase. Legislators scoffed at the Court's invitation to design rights-protective rules for criminal defendants. The Act's legislative history reveals the legislators' belief that "Court decisions that . . . protect and liberate guilty and confirmed criminals to pursue and repeat their nefarious crimes should be reversed and overruled . . . ."[104]

The Act's passage overshadowed any contemporary discussion of the potential for interbranch dialogue. Under the political conditions of the time, the Court's invitation never really had a chance. *Miranda* and *Wade* were decided when social anxieties about crime were at their apex.[105] By the time Richard Nixon famously "ran against the Court" in 1968, conservative elites had successfully linked the issues of crime, social protest, and constitutional constraints on police and prosecutors.[106] This bundling of issues has continued to drive contemporary public perception that "liberal" criminal procedure doctrines bear a causal relationship to levels of crime.[107]

The sociopolitical context that produced legislation adverse to criminal defendants' rights supplies only half the story for why *Miranda* failed. The Court's methodology and the way in which its "invitation" was framed also contributed to the legislative hostility and subsequent failures to respond constructively. The Court made two mistakes in formulating its *Miranda* rule. First, it asked legislatures to create an "equally effective alternative" to a rule that overenforced a constitutional right.[108] Second, the Court failed to indicate clearly the *Miranda* rule's constitutional status.

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103 18 U.S.C. §§ 3501–3502 (2000).

104 Kamisar, *Can (Did) Congress "Overrule"* Miranda*?*, *supra* note 7, at 888 (quoting 114 CONG. REC. 11,200 (1968) (statement of Senator McClellan)).

105 Loo and Grimes convincingly demonstrate through polling data from the 1960s and 1970s that the category of "crime" included concerns about social disturbances arising out of Vietnam War protests and the civil rights movement. *See* Loo & Grimes, *supra* note 80, at 55–58. Loo and Grimes argue that the mass media and major political figures used "crime" as a euphemism for protest movements, stoking public anxiety through the association of "lawlessness on the streets" with race and youth. *Id.* At the time the landmark criminal procedure cases *Mapp v. Ohio*, 367 U.S. 643 (1961), *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Miranda* were decided, "concern about crime was largely invisible, not to surface until some years later when George Wallace and then Richard Nixon made it a central focus of the 1968 election." Schauer, *supra* note 80, at 39.

106 *See* sources cited *supra* note 80.

107 *See* Schauer, *supra* note 80, at 28–30 & nn.81–82 (describing public perception that constitutional constraints on police and prosecutors are connected to crime levels).

108 Miranda v. Arizona, 384 U.S. 436, 467 (1966).

Perhaps the most famous aspect of the Court's invitation in *Miranda* was its instruction that any subsequent legislative alternatives be "at least as effective" as the Court's safeguards.[109] But the Court did not recognize that there were no legislative incentives to create alternatives to a rule that was already perceived as overprotective.[110] The *Miranda* ruling has been labeled an example of constitutional "overenforcement" because it sweeps more broadly than the Fifth Amendment by excluding confessions subject to defective warnings, that may nevertheless have been voluntary.[111] The Court's invitation thus foreclosed "less effective" alternatives that nonetheless complied with the Constitution in protecting a suspect's right against self-incrimination—alternatives that a legislature might have experimented with had the Court opened a wider policy space for regulation.[112]

The second problem with *Miranda* was the Court's failure to specify the constitutional status of its default rules. In *Miranda*, the Court suggested that the proposed warnings were one, rather than the only, constitutionally acceptable solution. But in *Dickerson*, the Court issued a puzzling decision that seemed to declare *Miranda* a constitutional rule while preserving the many exceptions to the warnings that had supposedly stemmed from the rule's default status.[113] *Dickerson* was the culmination of years of doubt over whether a rule developed to implement or enforce a constitutional right was itself constitutional—if so, then Congress was limited in the degree to which it could "replace" such a rule. From Congress's perspective, a strong conception of the Court's *Marbury* power—the power "to say what

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109 *Id.*

110 *See* Dorf & Friedman, *supra* note 10, at 81–85 (discussing possible "equally effective" alternatives that would have responded to Court's invitation).

111 *E.g.*, Fallon, *supra* note 12, at 1303 (citing Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975)).

112 As Stuntz contends, "Legislators are free to regulate—but only if they want to follow the same regulatory path the Court has marked out. If they want to choose a *different* path, they're out of luck. That isn't dialogic lawmaking. It's judicial command-and-control." Stuntz, *supra* note 42, at 152.

113 *See* Dickerson v. United States, 530 U.S. 428, 431–32, 437–38 (2000) (holding that despite subsequent judicially created exceptions, *Miranda* had constitutional dimensions that could not be overruled by Congress). The *Miranda* rule has been subject to several exceptions. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 309 (1985) (holding as admissible "knowingly and voluntarily made" statements subsequent to unwarned statement); New York v. Quarles, 467 U.S. 649, 651 (1984) (holding as admissible suspect's answers given before *Miranda* warnings when those warnings are delayed for public safety consideration); Michigan v. Tucker, 417 U.S. 433, 451–52 (1974) (holding as admissible testimony of witness whose identity was revealed in unwarned statement).

the law is"[114]—precludes any opportunity to offer alternative procedures.

Miranda and its progeny pose the following problem for interbranch dialogue: As the Court has conflated the *content* of constitutional rights with judicially created *means* of enforcement,[115] those means (often in the form of default or prophylactic rules) are accorded constitutional status.[116] Because the Court is the sole arbiter of constitutional meaning under a strong conception of *Marbury v. Madison*, it is dubious whether the other branches can believe that the Court's rules are truly just defaults. This uncertainty makes legislative actors insecure in experimenting with alternative policies,[117] given the ever-present possibility that the Court will declare its own rule to be constitutionally mandated (and any legislative alternative to be invalid).

Congressional uncertainty as to the constitutional status of judicial default rules has repeatedly led to standoffs. Congress's response to *Wade* followed the same pattern as *Miranda*. Reacting to the Court's default rule, Congress enacted 18 U.S.C. § 3502 to overrule the Court's holding that counsel was required at a lineup to protect a defendant's Sixth Amendment rights.[118] Law enforcement officials, convinced § 3502 was unconstitutional, ignored the statute, entrenching the Court's original solution.[119]

The exclusionary rule's failure as a default rule and subsequent entrenchment tracks the history of *Miranda* and *Wade*. In *Weeks v. United States*, the Court held that unconstitutionally seized evidence could not be used in federal trials.[120] This controversial holding and subsequent decisions led to confusion as to whether the exclusionary rule was a judicially created rule of evidence replaceable by legislative

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114 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

115 Kermit Roosevelt convincingly demonstrates that this conflation has occurred in several areas of constitutional law. *See generally* Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005) (describing "constitutional calcification" in areas of criminal procedure, equal protection, privacy, interstate commerce, congressional enforcement powers, and free exercise of religion).

116 *See id.* at 1692–1707 (describing how Court's decisions slowly acquire status as constitutional imperatives).

117 Dorf and Sabel allude to this point in arguing policymakers will have no incentive to engage in "experimentalism" in an uncertain environment. Dorf & Sabel, *supra* note 8, at 463.

118 18 U.S.C. § 3502 (2000).

119 Klein, *supra* note 17, at 1055. Professor Klein documents a few early instances of state and local officials enacting regulations that removed the need for counsel at lineups, as well as efforts by *other* branches (e.g., the executive) to do the same. *Id*. However, the Court's invitation to Congress resulted in the aforementioned standoff.

120 Weeks v. United States, 232 U.S. 383, 398–99 (1914).

command, or whether it was a constitutionally compelled policy.[121] In *Mapp v. Ohio*, the Court extended the exclusionary rule to the states, compounding confusion by hinting that this extension was both a constitutional requirement and a judicially created default rule.[122] As in *Miranda*, the confusion following *Mapp* as to whether the exclusionary rule was constitutionally required or a replaceable default only led to legislative inaction.[123]

The legislative responses to these rules might have been more constructive had the Court been more careful—and more genuine—about the invitations it issued to Congress. The dialogue that occurred after the Court's *Bivens* holding provides a glimpse of what results productive interbranch dialogue might yield. In *Bivens*, the Court stated that the federal courts could act in the absence of a congressional statement on remedies for constitutional violations, thereby ruling that a remedy existed for constitutional torts committed by federal officials.[124] But the key to eliciting a legislative response lay in the Court's language, which suggested that the judiciary was acting only in the absence of an "explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment

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[121] Compare *Weeks*, where the Court held that using evidence seized in violation of the Constitution was "a denial of the constitutional rights of the accused," *id.* at 398, with *Wolf v. Colorado*, where the Court observed:

> Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective.

338 U.S. 25, 31 (1949).

[122] Mapp v. Ohio, 367 U.S. 643, 655 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949)). The Court stated that its decision "gives to the individual no more than that which the Constitution guarantees him," *id*. at 660, but also described its rule as a "judicially implied" safeguard, *id.* at 648. *See also* Harold J. Krent, *How to Move Beyond the Exclusionary Rule: Structuring Judicial Response to Legislative Reform Efforts*, 26 PEPP. L. REV. 855, 860–62 (1999) (describing Court's hint in *Mapp* and subsequent cases that exclusionary rule was replaceable).

[123] In its subsequent jurisprudence, the Court reaffirmed the exclusionary rule's status as a "judicially-imposed policy" by carving out several exceptions to it. *See* Krent, *supra* note 122, at 860–62 (describing creation of numerous exceptions to exclusionary rule based on its status as judicially created remedy and arguing that "[i]n an appropriate case, the Supreme Court may abandon or continue to modify the rule based not only on a change of heart but on changes in the legal landscape that minimize the need for the rule"). Though policy alternatives to the exclusionary rule have been much debated in legal academia and even in Congress, no alternative has ever been legislatively implemented. *See* Exclusionary Rule Limitation Act of 1991, S. 151, 102d Cong. (1991) (proposing to limit application of exclusionary rule in cases where there existed reasonable belief that search or seizure was in conformity with Fourth Amendment); Krent, *supra* note 122, at 855 n.2 (citing legal academic discussion of alternatives to exclusionary rule).

[124] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 391–92, 397–98 (1971).

may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress."[125] The Court's message that it would defer to Congress's view of an equally effective alternative provided an enormous incentive for Congress to regulate. Congress responded by developing remedial schemes in several areas of federal tort law, which the Court subsequently held to displace the default rule in *Bivens*.[126]

The *Booker* case also provides a potential example of a successful model default rule. *Booker* presents a model for legislatures to follow while leaving space for legislatures to develop their own sentencing schemes.[127] Though Congress has shown little initiative in response to the Court's urgent call for reform of the Federal Sentencing Guidelines, several state legislatures have responded.[128] The success of this interbranch dialogue, however, will depend in some measure on how much the Court defers to state sentencing schemes that attempt to meet *Booker*'s challenge.

B. The Court's Use of Penalty Default Rules

The previous discussion of model default rules suggests that a "penalty default" approach, in which the Court does not prescribe any particular procedure but rather threatens to impose the legislature's least-preferred outcome, may be more effective in prompting legislatures to act. Under certain conditions, such as when Congress is already prepared to act, penalty default rules may indeed be more effective than model default rules in spurring legislative action. Again, this approach is not a type of rule per se, but rather a broader method of judicial decisionmaking designed to motivate governmental actors to regulate.

Some historical examples suggest that the Court does in fact "eye" Congress in fashioning its decisions, announcing penalty default rules in anticipation of an appropriate congressional response. In the

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125 *Id.* at 397.

126 *See* Schweiker v. Chilicky, 487 U.S. 412, 423 (1988) (declaring *Bivens* inapplicable where Congress has enacted elaborate statutory remedial scheme).

127 In *Booker*, Justice Breyer issued a clear invitation to Congress to respond to the Court's remedial scheme: "Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice." Booker v. United States, 543 U.S. 220, 265 (2005).

128 *See* Linda Greenhouse, *Justices to Revisit Thorny Issue of Sentencing Guidelines in First Cases After Recess*, N.Y. TIMES, Feb. 20, 2007, at A15 (describing Congress's inaction in revisiting Federal Sentencing Guidelines and Court's grant of certiorari in two Guidelines cases); *see also* Cunningham v. California, 127 S. Ct. 856, 860 (2007) (invalidating California's sentencing scheme).

Berger and *Katz* cases, for instance, the Court hinted strongly that it would move toward banning electronic surveillance if Congress did not develop a scheme to regulate the practice.[129] But these cases arose in a political environment in which the Court knew Congress was developing wiretapping regulations. *Berger* and *Katz* were decided when the Court was prepared to revisit its previous decision that wiretapping fell outside of the Fourth Amendment[130] and when Congress was dissatisfied with the statutory status quo with respect to electronic surveillance.[131] Justice White pointed out in his *Berger* dissent that Congress was concurrently holding hearings on its existing wiretapping statutory regime, and that the Court's decision was expected to significantly affect any new legislation.[132]

Similarly, the Court granted certiorari in *Katz* knowing that the outcome of the case, along with *Berger*, would shape Congress's approach to wiretapping legislation. As Professor Orin Kerr noted, "[f]ar from being sui generis constitutional developments, the major constitutional decisions in *Berger* and *Katz* were carefully timed to influence the shape of statutory law. The Court was eyeing Congress, and decided both *Berger* and *Katz* very much with Congress in mind."[133] The success of threatening to impose a penalty default rule is evidenced by the fact that the first wiretapping bills were presented right after *Berger*, modified to reflect *Katz*, and have remained the basis for modern electronic surveillance law.[134]

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[129] *See* Stuntz, *supra* note 42, at 155 (arguing that *Katz* and *Berger* created penalty default rule). In *Berger*, the Court held New York's wiretapping statute unconstitutional, going so far as to challenge the government's position that electronic eavesdropping was necessary in order to combat organized crime. *See* Berger v. New York, 388 U.S. 41, 60–61 (1967) ("[W]e have found no empirical statistics on the use of electronic devices (bugging) in the fight against organized crime."). The seemingly sweeping scope of the decision, and the Court's repeated warnings that electronic wiretapping posed a new and "great danger to the privacy of the individual," signaled that the practice of wiretapping was at risk in the absence of heavy regulation of its use. *Id.* at 62. Following *Berger*, the Court in *Katz* invalidated the use of warrantless electronic surveillance by the federal government. Katz v. United States, 389 U.S. 347 (1967). The sum of the two decisions was an environment in which Congress had to act in order to preserve wiretapping as a tool in the law enforcement arsenal.

[130] Olmstead v. United States, 277 U.S. 438, 466 (1928) (holding Fourth Amendment did not prohibit using secretly recorded phone conversation as evidence).

[131] *See* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 839–50 (2004) (describing history of wiretapping regulation by Congress and Court that culminated in *Berger* and *Katz* decisions).

[132] *Berger*, 388 U.S. at 112 (White, J., dissenting) (describing introduction of legislative bills and Congressional hearings to regulate wiretapping).

[133] Kerr, *supra* note 131, at 849.

[134] *Id.* at 850.

The political climate at the time of the *Berger* and *Katz* decisions facilitated the Court's application of a penalty default rule. Unlike in *Miranda*, the Court was fully aware that Congress was prepared to regulate the issues at hand and was consequently able to influence Congress without provoking a similar backlash. *Berger* and *Katz* were decided only one year after *Miranda*, in the same social context of rising anxiety about crime. In responding to *Berger* and *Katz*, therefore, Congress's motivation was to preserve a vital law enforcement tool rather than to protect suspects' rights.[135] Nonetheless, the legislative aim of bolstering law enforcement overlapped with a key advance in protecting suspects from state power. These cases thus reinforce the notion that default rules can motivate legislative action—even at a time when criminal defendants were being demonized.

A similar explanation might account for *Barker*, in which the Court held that a defendant is entitled to release as a remedy for the violation of his Sixth Amendment right to a speedy trial.[136] *Barker* articulated a broad Sixth Amendment right that Congress further developed two years later in the Federal Speedy Trial Act, which established time limits for a defendant's detention without trial.[137] Significantly, the Court explicitly rejected the parties' arguments that it should adopt a model default rule like the rules some more creative courts and legislatures had adopted in response to the problem.[138] Instead, the Court ruled that the "only possible remedy" was dismissal of all charges against the defendant.[139] This penalty default rule, which raised the possibility of dissimilar lower court standards governing whether defendants had been denied a speedy trial and were entitled to release, proved a more effective trigger for Congress to adopt regulation than the adoption of a model default rule.

The penalty default approach thus stands as an alternative to the model default rule—one that signals to the legislature that the Court will step in where policymakers have not, while still giving the legislature time and space to regulate. The benefit of this alternative judicial methodology is that it avoids the costs of handing down a rule that either does not work (but is, nevertheless, constitutionally

135 Dripps, *supra* note 75, at 1082–83.

136 Barker v. Wingo, 407 U.S. 514, 522 (1972).

137 Federal Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (1975) (codified at 18 U.S.C. §§ 3152–3156, 3161–3174 (2000)); *see also supra* note 48 and accompanying text.

138 *Barker*, 407 U.S. at 523–27 (describing arguments of parties and amici for adoption of prophylactic measures, including, inter alia, requiring trial within specified time period, restricting consideration of right to speedy trial to those defendants who have demanded it, and subtracting days of unjustified delay from defendants' sentences).

139 *Id.* at 522.

entrenched) or that sparks a legislative standoff with the Court. The difficulty with such an approach is that it requires the Court to take Congress's pulse and to time its decisionmaking to political realities. Judicial awareness of such political realities, however, may facilitate the kind of radical reform that the Warren Court envisioned while circumventing the long-term anti-Court backlash.

III
LESSONS LEARNED: WHEN DO CONSTITUTIONAL DEFAULT RULES WORK?

The preceding narratives illustrate some propositions about when and why constitutional default rules are effective in eliciting legislative responses. This Part argues that there are two vital conditions that determine whether a default rule will work: the Court's methodology in formulating the rule and the political context in which the rule is handed down. I conclude that the key elements of a successful default rule approach are deference to legislative solutions, clear guidelines for legislatures to follow, and political acuity on the part of the Court.

A. The Judicial Methodology of Default Rules

The primary question to ask about default rules is how, as a matter of judicial methodology and reasoning, can judges craft rules that encourage legislatures to act? Case law analysis suggests two necessary elements: articulable standards as to what kind of rule is acceptable to the Court, and judicial modesty in the form of deference to the vast array of policy options that legislative experimentation can produce.

1. Substantive Rulemaking and the Provision of Incentives

A comparison of model defaults and penalty defaults strongly suggests that both substantive rulemaking—in the form of articulable standards to guide the legislature—and a strong incentive for the legislature to act are necessary to prompt a legislative response. While *Miranda* is the prime example of a failed model default, *Bivens* provides one example of a model default that Congress could, and to some degree did, follow—because its parameters were clear.[140]

In the penalty default context, moreover, some guidance to the legislature may still be necessary in order to ensure a substantive rulemaking response. In *Berger* and *Katz*, the Court engaged in an arguably quasi-legislative project to set out clear guidelines for legisla-

[140] *See supra* text accompanying notes 124–26.

tures to follow in crafting wiretapping statutes.[141] The rulemaking undertaken by the Court, however, gave Congress a fairly wide berth in crafting the statute. In some sense, the Court's rulings were closer to a set of "standards" than a set of "rules"—giving legislative policymakers flexibility to experiment with a number of possible regulatory schemes. Thus, a "pure" penalty default of the kind understood in the contracts context[142] is not necessarily appropriate; rather, the Court must still provide some form of constitutional metric against which solutions can be measured. A kind of penalty-model default hybrid might be appropriate—one which combines the penalty with measurable standards rather than specific mandates.[143] When combined with clear standards for judging the constitutionality of legislative alternatives (as well as with the legislature's good faith), an incentive to substitute empirically supported policies for the Court's doctrine could spark innovation and overcome the ossification that has developed in criminal procedure.

2. Deference and Constitutional Clarity

Perhaps *Miranda*'s most important lesson is that both deference to legislative alternatives and clear constitutional standards against which alternatives will be judged are crucial to incentivizing legislative experimentation. *Miranda* exhibited neither of these key features. By requiring alternatives to be as effective as the Court's overprotective rule, the Court offered little to no deference, limiting the possible alternatives legislatures could adopt.[144] Judicial deference to legislative solutions that meet a constitutional minimum is likely to yield better results. For example, *Bivens* succeeded where *Miranda* did not by suggesting that Congress's judgment mattered in deciding the effectiveness of alternatives to the Court's rule and in avoiding the perception that the Court's own rule had the kind of constitutional force that rendered it irreplaceable. In so doing, the Court opened regulatory space for Congress to develop its own remedial solution, which Congress did. The Court has reinforced the congressional role

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141 *See* Kerr, *supra* note 131, at 848 (stating that Court in *Berger* took opportunity to detail which provisions of New York statute were constitutional and which were not).

142 *See supra* text accompanying notes 32–33.

143 Recall some of the solutions discussed in the text accompanying notes 59–69 *supra*, particularly the idea that funding recommendations offered by independent expert commissions might replace certain doctrines.

144 *See* Dorf & Friedman, *supra* note 10, at 81–86 (arguing that videotaping of interrogations after suspect has been told of right to remain silent and where counsel is not permitted to attend offers "equally effective" alternative); *see also* Stuntz, *supra* note 42, at 152 ("[T]here are only two alternatives to *Miranda*: make the required warnings more stringent, or give suspects a lawyer in the police station whether they ask for one or not.").

in shared constitutional interpretation by deferring to Congress's statutory remedy—declaring the *Bivens* alternative constitutional even where the relief could not make the plaintiff "whole."[145]

The Court will have the opportunity to test the effectiveness of deference to statutory alternatives in eliciting legislative experimentation as it reviews legislative responses to *Booker*. If it disallows any scheme that departs dramatically from the *Booker* model, the Court will stifle innovation, and all sentencing schemes will essentially converge to one. Such a result would not fulfill the default rule's goal of achieving constitutionally compliant legislative experimentation.

A second problem with *Miranda* was that the Court offered no standards by which to judge the effectiveness of legislative alternatives to the *Miranda* warning. The law was further complicated through decades of ensuing Fifth Amendment jurisprudence which created numerous exceptions to *Miranda*.[146] Given the uncertainty generated by the Court's ongoing qualifications of its own rule, it is hard to imagine what kinds of effective legislative alternatives could have been developed, or even how the effectiveness of such alternatives would have been measured. The legal murkiness of *Miranda* thus rendered both courts and policymakers unable to make necessary judgments about the empirical benchmarks of effectiveness.

Even a decision that omits vague "invitations" might send fewer mixed signals about the binding nature of a Court-issued rule. Simply knowing that a judicially crafted rule is only a default, legislatures will be encouraged to act. Furthermore, the perception that the Court's rulemaking has legitimacy is a factor in whether legislatures respond. Arguably, the Court can demonstrate legitimacy by more closely tying its default rules to the substantive constitutional rights at stake.

The exclusionary rule is a penalty default rule that could still prompt interbranch dialogue. Though the history of the exclusionary rule has mirrored that of *Miranda*, no *Dickerson*-style decision has yet issued from the Court confirming the rule's constitutional status. On the contrary, at least one decision has cast doubt on the continuing vitality of the rule in light of recent developments in police training and in tort remedies for police behavior,[147] suggesting that the Court

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145 *See* Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 752 (1992) ("[T]he Court has actually deferred to Congress's judgment that a statutory remedy is adequate, even in cases where the plaintiff could not be made 'whole' due to statutory limitations.").

146 *See supra* note 113.

147 In *Hudson v. Michigan*, 126 S. Ct. 2159 (2006), Justice Scalia suggested that the need for the exclusionary rule had been undermined by the development of 42 U.S.C. § 1983, the federal statute allowing for redress against state officials, *Bivens* tort remedies for constitutional violations, and by the rise of professionalism in police forces, including

may be receptive to policy alternatives. By articulating the standards against which the efficacy of a constitutional alternative could be measured and signaling that it will grant the appropriate deference, the Court can encourage experimentation with alternatives using existing empirical data about the exclusionary rule's effectiveness.[148]

3. The Ripeness of the Political Situation and the Implications of a Political Court

The most uncomfortable conclusion of this examination of factors that influence legislative response may be the degree to which external political conditions are relevant to the effectiveness of default rules. Whereas *Miranda* was a failure of political vision as well as judicial methodology, the wiretapping cases were astutely timed to bring Congress on board in implementing the Fourth Amendment's protections. *Miranda* was perceived as benefiting only guilty defendants; *Berger* and *Katz*, on the other hand, were seen as necessary for developing a regulatory system for electronic surveillance that would benefit both suspects and law enforcement. The two situations offer an interesting natural experiment (given that they occurred in roughly the same period of time) in how assessing political circumstances can affect judicial methodology.

These dissimilar outcomes imply that default rules work only when they allow experimentation within a broad range of legislative preferences and are handed down under a fairly narrow set of political conditions. These conditions include but are not limited to the possibility of overlap between defendants' rights and law enforcement needs, pressure for reform from a variety of constituencies (e.g., minorities and powerful interest groups such as police and prosecutors), new empirical data about the effectiveness of the Court's rule compared to the effectiveness of alternatives, the activism of political entrepreneurs in spearheading reform, and even more basic political calculations such as which party controls Congress.

The influence of these political factors may disturb those who believe that the Court must stand as a bulwark against the tyranny of the majority, particularly with respect to minorities such as criminal defendants. But such influence is less unsettling when viewed in the context of developing criminal procedure reforms, given a political

increased internal discipline. *Hudson* at 2167–68. His argument about the sufficiency of "extant deterrences" against Fourth Amendment violations suggests that the Court may be willing to revisit the exclusionary rule altogether in the right context (e.g., experimentation with an alternative policy regime). *See id.* at 2168.

148 *See generally* Krent, *supra* note 122 (analyzing proposals to reform exclusionary rule through lens of empirical evidence).

landscape that has changed dramatically since the default rules were enacted. Political dynamics are mutable; constitutional doctrine is less so. Default rules, properly employed, can be a tool for mediating between constitutional values and shifting democratic preferences. The current political environment may be one in which the increased use of empirical data and rigorous policy analysis plays a central role in redesigning our criminal justice system.[149]

Legal process theory may not account for a Court that is so responsive to political circumstances. But any theory that envisions such an active role for legislatures necessarily must account for the limits of political possibility. Under particular political conditions, the Court can employ default rules as a tool to achieve a legislative response that respects the Constitution—the legal process theorists' ultimate goal.

CONCLUSION

This Note has attempted to flesh out a theory of the constitutional default rule by describing its hypothetical benefits for interbranch dialogue and examining its use by the Court in the context of criminal procedure. The startling conclusion is that a politically aware Court can usefully employ the default rule as a way of involving legislatures in implementing and protecting constitutional rights. As the inequities of the criminal justice system continue to perpetuate themselves, new and creative methods for reform can be envisioned that draw on the expertise of both courts and legislatures, respond to advances in technology and information processes, and serve the constantly shifting needs of the polity. Modern times call for modern rules, and the default rule still may have a role to play in a new criminal procedure revolution.

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[149] This is a major premise of Professor Stuntz's argument in *The Political Constitution of Criminal Justice*, and an important point Professor Barkow raises with respect to sentencing reform. *See* Stuntz, *supra* note 8, at 836–39 (arguing that requirement of data collection is important element to criminal justice system reform agenda); Barkow, *supra* note 79, at 719–20 (advocating "strong connections" between sentencing commissions and legislators and agency reliance on "persuasive policy arguments" that address costs of sentencing policies).