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Elizabeth Fajans

Brooklyn Law School, elizabeth.fajans@brooklaw.edu

Mary R. Falk

Brooklyn Law School, mollie.falk@brooklaw.edu

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Shooting from the Lip: *United States v. Dickerson*, Role [Im]morality, and the Ethics of Legal Rhetoric

Elizabeth Fajans* and Mary R. Falk**

Lawyers engage in distinctive language behavior, brandishing a specialized rhetoric of advocacy. Like some other “role-differentiated” lawyer behavior,¹ this rhetoric has features that are undesirable from a “universalist” moral perspective. Legal rhetoric is often over-bearing, even hostile.² It employs misdirection and omission, distorts opposing views, ridicules or vilifies opponents, and uses these and other verbal strategies to make arguments that are not convincing even to the speaker. This aggressive and deceptive behavior is plainly inconsistent with the universal moral imperative of respect for all persons.³

Yet, the matter is more complicated: like other forms of “role differentiated” behavior in which lawyers engage, their wild-west rhetoric is susceptible of strong moral justification as well as condemnation. Justifications for otherwise morally criticizable behavior by lawyers traditionally rely on the lawyer’s role in the adversary system, maintaining that justice (if not always truth) is best served by a high-noon duel of well-

* Elizabeth Fajans, Associate Professor of Legal Writing, Brooklyn Law School. Rutgers University, Ph.D.; Sarah Lawrence College, B.A.

** Mary R. Falk, Associate Professor of Legal Writing, Brooklyn Law School. New York University School of Law, J.D.; Sarah Lawrence College, B.A.

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¹ “Role-differentiated” behavior is the result of reasoning that “places weight upon the role that the person occupies and locates concerns about how one ought to behave within a context of what is required, expected, or otherwise appropriate of persons occupying that role.” Richard Wasserstrom, *Roles and Morality*, in *THE GOOD LAWYER* 25, 25-26 (David Luban ed., 1984).

² One example of hostile and disrespectful – even downright violent – language turned up unbidden during the writing of this section. The New York Times reported that a judge cited an attorney for his “Rambo lawyering” and his efforts to “intimidate and harass” his opponent by threatening in a letter to “conduct the legal equivalent of a proctology exam” on the opponent’s finances and billing practices. Benjamin Weiser, *A Judge Moves to Strike a Blow for Legal Decorum*, N.Y. TIMES, June 1, 1999, at B5.

³ See *infra* notes 12-14 and accompanying text. We believe that some legal rhetoric is in fact unethical. Nonetheless, to assert that it “plainly” violates widely-accepted moral strictures is to engage in the over-certainty on complex issues that characterizes too much legal rhetoric.

matched opponents shooting from the lip. Thus, condemnation and justification of legal rhetoric seem equally tenable positions.

Yet, the matter is more complicated still. The adversary-system justification of otherwise morally criticizable role-differentiated lawyer behavior presupposes the prototype advocacy situation in which life, liberty, or some other invaluable good depends on zealous representation. Role-differentiated legal rhetoric seems most justified, therefore, in a summation in a capital or other major felony trial, or in a trial memorandum or appellate brief in some similar matter of real consequence. But lawyers are not just litigators: they are counselors, mediators, judges, scholars, and teachers as well. Yet, despite these "role-differentiations," the rhetorical strategies of advocacy are used in letters, judicial opinions, law reviews, and classrooms: no matter what the context, lawyers often talk the same talk.⁴

In this article, we look at the ways judges, advocates, and scholars employ the "disrespectful" rhetorical strategies of advocacy.⁵ After sketching some background theory on role-differentiated morality and the ethics of advocacy in Part IA, we describe in Part IB some features of legal rhetoric that seem to offend universalist notions of morality – e.g., abuse of classical rhetoric's strategies of *logos*, *ethos*, and *pathos*, as exhibited in *ipse dixit* argument, misuse of precedent, use of "false implicature"⁶ to mislead, arguing what one does not believe, misreading opposing views, and belittling those who hold such views. In Part II, we examine a microcosm of legal rhetoric – the judicial, advocacy, and scholarly prose that has been engendered by one issue in criminal procedure. Finally we examine the possible moral, institutional, and practical justifications for the law's disrespectful rhetoric and consider

⁴ See Gerald Wetlauffer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1550-51 (1990) ("[T]here is . . . a discipline-specific rhetoric of law . . . that . . . shapes our advocacy, our judicial opinions, our scholarship, and our teaching").

⁵ Our focus here is on written rhetoric – judicial opinions, appellate briefs, and law review articles. Our sense is that, given the constraints on written language (e.g., its durability and potential for dissemination), the rhetoric of court room and conference room is even more disrespectful. An extreme example arose during the trial of a man who poured lighter fluid over his wife and then set her on fire. The judge "burst into song in open court crooning, 'You light up my wife,' to the tune of 'You Light Up My Life.'" Deborah Epstein, *Redefining the State's Response to Domestic Violence: Past Victories and Future Challenges*, 1 GEO. J. GENDER & L. 127, 141 (1999) (citing SUPREME COURT OF THE STATE OF FLORIDA, REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION 121 (1990)).

⁶ The term "implicature" is borrowed from linguistic pragmatics. Implicature is the mechanism by which participants in a conversation understand that which is not stated. For example, when Speaker A asks, "Would you like some coffee?," and speaker B replies, "Does the Pope say Mass?" implicature allows Speaker A to understand Speaker B's response as "yes." False implicature is the intentional exploitation of implicature by a speaker or writer to suggest a proposition that is not true. See *infra* notes 75-78 and accompanying text.

whether a radical change in language behavior is, realistic or not, the only solution consistent with the duty of respect.

We conclude that the negative potential of the law's rhetoric of disrespect is troubling enough to require radical change. The deceit, insincerity, hyperbole, and scorn that characterize much legal rhetoric are especially problematic because of the law's rhetoricity – the law is in large part affirmation and declamation.⁷ Thus, if the law's dishonest and disrespectful rhetoric causes it to fall into disrepute, it has no other practice with which to redeem itself. Moreover, the rhetorical excesses of judges are especially dangerous, because judicial rhetoric is consequential – disposing of life, liberty, property, and reputation – and almost always immutable. Dissenters and commentators may expose the weak arguments and mean spirits of a judicial opinion, but short of reversal the court's words will not only stand but resonate in future controversies.

Recourse by judges and scholars to the role-differentiated rhetoric of advocacy is also undesirable because legal rhetoric encourages oversimplification and over-certainty in complex situations and promises exemption from moral agency. This recourse is obviously undesirable in judicial decision-making, but it is hardly less infelicitous in scholarship. Although a scholar's combativeness and over-certainty may do little real harm to other persons – except when exercised too energetically on the work of an untenured colleague – they nonetheless limit the writer's intellectual and moral horizon and, thus, that of the profession.

In addition, there are serious costs incurred when judges make arguments that do not motivate their own belief – for example, advancing precedent or statute as the ground for decisions when their real reasons are grounded in justice between the parties or economics, or advancing justice between the parties as the ground for decisions that are in fact rooted in social policy. This lack of sincerity is disrespectful, first, in that the reader is asked to stand on ground the judge does not share. Further, it hardly encourages the reader's respect for, or loyalty to, the legal system. Moreover, this lack of forthrightness incurs further cost – when we are denied the judge's real reasons, we have no idea of the judge's true character and have no real way of predicting future decisions.

We come to these conclusions after a look at the rhetoric that has arisen around an issue that was pending in the Supreme Court as we wrote this article: the status of the Supreme Court's decision in *Miranda v. Arizona*.⁸

⁷ Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, in *THE ETHICS OF LAWYERS* 3, 16 (David Luban ed., 1984).

⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that unless the legislature devises other fully effective means to inform defendants in criminal cases about their Fifth Amendment right to silence and to assure the continuous opportunity to exercise it, defendants must be

We chose this issue because it generated legal rhetoric at its disrespectful worst and its respectful best in the judicial, advocacy, and scholarly contexts. Indeed, the writing of this article was prompted by the roughness with which readers were treated by the Fourth Circuit's decision in *United States v. Dickerson*,⁹ on which certiorari had been granted, and which the Supreme Court eventually reversed. Although the fate of *Dickerson*, and thus of *Miranda*, was unresolved during most of the writing of this article, as rhetoricians we were less interested in the outcome of the debate than in the verbal wars waged over *Miranda* by judges, advocates, and scholars. Our purpose was not to second-guess the Supreme Court but rather to articulate ethical norms by which the rhetoric of the profession – including that of the Court in *Dickerson* – can be measured. In this respect, we are pleased to note that Justice Rehnquist's majority opinion is measured and respectful in tone and relatively candid in argument. The worst excesses of the Fourth Circuit's opinion have been removed to the dissent, surely a safer place for such conduct so long as it continues to be a part of the legal culture.

I. BACKGROUND

A. Ethics

Our critique of legal rhetoric is informed in substantial part by Richard Wasserstrom's critique of the "role-differentiated" conduct of lawyers and the work of Robert Audi on the use of reasons in advocacy. Between them, Wasserstrom and Audi call into question two conventional ideas about the

advised, before any custodial interrogation can begin, of the right to remain silent, the fact that any statement may be used in evidence against them, and the right to the presence of an attorney, retained or appointed).

⁹ 166 F.3d 667 (4th Cir. 1999) *rev'd*, *Dickerson v. United States*, 120 S. Ct. 2326 (2000) [hereinafter *Dickerson II*] (holding that *Miranda* was overruled in 1968 by 18 U.S.C. § 3501). Section 3501 purported to restore the pre-*Miranda* test for the admissibility of confessions in federal court: voluntariness as determined by judicial consideration of the totality of the circumstances surrounding the making of the confession. The Fourth Circuit's decision was reversed by a 7-2 decision of the Supreme Court – Justices Scalia and Thomas were the lone dissenters. *See Dickerson v. United States*, 120 S. Ct. 2326 (2000) [hereinafter *Dickerson III*]. In an opinion written by Chief Justice Rehnquist, the Court held that "*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves." *Id.* at 2328. The Court's refusal to overrule *Miranda* rested less on approbation than on the fact that *Miranda* "warnings have become part of our national culture." *Id.* at 2336. The dissent accused the majority of refusing to acknowledge that *Miranda* was a mistake and of taking upon itself the right to impose on Congress and the States constraints not required by the Constitution, in short, of "convert[ing] *Miranda* from a milestone of judicial overreaching into the very Cheops' Pyramid . . . of judicial arrogance." *Id.* at 2348 (Scalia, J., dissenting).

ethics of advocacy. First, Wasserstrom challenges the view that the lawyer's role as her client's zealous representative permits the lawyer to be indifferent to the morality of the client's goals and to the means used to effectuate those goals. Second, Audi criticizes the view that advocates may with moral justification adduce weak reasons made to seem strong by rhetorical skill and adduce reasons, weak or strong, that do not motivate their own belief. Like Wasserstrom, Audi approaches the ethics of lawyers from a universalist and foundationalist perspective.

The work of Richard Wasserstrom and Robert Audi on roles and advocacy raises difficult questions about the morality of traditional legal rhetoric. Both writers suggest that any exemption from universal moral obligation conferred by the lawyer's role is both narrow and problematic. Indeed, Wasserstrom and Audi seem inclined to believe that only where the stakes are life or liberty may the demands of a lawyer's role override those of universal moral agency.

Applying this critique of the practice of law (Wasserstrom) and of advocacy (Audi) to the rhetorical practices of lawyers, one might conclude that this characteristically aggressive and deceptive role-differentiated language behavior is acceptable only in persuasive writing for the court, and only in situations of great consequence. Regardless of one's position on this issue, however, it is not hard to conclude that disrespectful rhetoric is as frequent as it is inappropriate in judicial opinions and legal scholarship, a contention we try to substantiate in Part II of this article. The balance of Part I.A summarizes Wasserstrom's and Audi's ideas on the ethics of roles and advocacy.

1. Role-differentiated amorality

The attorney-client relationship, requiring that the attorney "prefer in a variety of ways the interests of the client . . . over those of individuals generally,"¹⁰ gives rise to "role-differentiated behavior" in which it is "both appropriate and desirable . . . to put to one side considerations of various sorts – and especially various moral considerations – that would otherwise be relevant if not decisive."¹¹ Wasserstrom sees a tension between this role amorality sanctioned by professional ethics and the "universalistic" dimension of morality.¹² Morality is concerned with "the welfare and happiness" of individuals and with their autonomy, that is, with "the real opportunity to fashion a life that he or she will find genuinely satisfying."¹³ Morality also has to do with "the respect that is due to all persons because they are persons,

¹⁰ Wasserstrom, *supra* note 7, at 7.

¹¹ *Id.* at 5.

¹² Wasserstrom, *supra* note 1, at 28.

¹³ *Id.*

and the resulting wrongness in viewing or using members of the moral community solely as means to some further end, as things to be used as one might utilize artifacts or other objects."¹⁴ "It is this universalistic dimension," Wasserstrom says, "that produces the tension with roles and with their ostensibly different, more local, and particularistic way of inviting persons to reason about what they should and should not do, and why."¹⁵

Wasserstrom considers, but is ultimately unconvinced by, the traditional justifications offered for the lawyer's sanctioned unconcern with the morality of her client's goals and the means used to realize them. He considers two basic arguments that support "the plausibility and appropriateness of role-restricted moral reasoning" in the legal profession and are "largely compatible with the more universalistic demands of morality . . ."¹⁶ The first is a utilitarian argument, which holds that given single-minded pursuits of clients' goals,

the legal system will end up doing more justice to more persons than would be the case under any less stringent and focused mode of moral deliberation . . . [W]hatever desirable moral outcomes appear to be blocked by the existence of and appeal to the role in question are in fact made more frequent and more likely by the role than by its absence.¹⁷

A second basic justification for role-defined moral reasoning is grounded in the expectation that the lawyer-client agreement will be honored. "[I]f a prospective client and a lawyer have entered into an attorney-client relationship,"¹⁸ even if representation involves morally objectionable means or ends, "it is morally wrong to defeat the client's expectations about the vigor and single-mindedness of the lawyer's actions on the client's behalf,"¹⁹ especially where "a client reasonably expects that the lawyer will pursue his or her interests because the institution is already in place that creates and defines the role-restricted behavior appropriate for lawyers."²⁰

Wasserstrom finds these justifications plausible, but partial. In particular, "arguments that are based simply upon the existence of roles and the creation of de facto expectations . . . are certainly not decisive arguments against changing the nature of the roles . . . [T]hat things have been done in a certain way can never by itself constitute an adequate justification for the rightness of continuing permanently to do them in the same way."²¹ Wasserstrom concludes that "almost none of the arguments supported by appeals to roles

¹⁴ *Id.*

¹⁵ Wasserstrom, *supra* note 1, at 29.

¹⁶ *Id.* at 32.

¹⁷ *Id.* at 30.

¹⁸ *Id.* at 31.

¹⁹ *Id.*

²⁰ *Id.* at 32.

²¹ *Id.* at 34-35.

justify favoring some interests over others no matter what”²² In particular, he believes that the strongest justifications for role-differentiated amorality are inappropriately generalized from the special case of the criminal defense attorney.²³ He explains,

[b]ecause a deprivation of liberty is so serious, because the prosecutorial resources of the state are so vast, and because, perhaps, of a serious skepticism about the rightness of punishment even where wrongdoing has occurred, it is easy to accept the view that it makes sense to charge the defense counsel with the job of making the best possible case for the accused – without regard, so to speak, for the merits.²⁴

For Wasserstrom, these special needs of a criminal defendant, coupled with the defense attorney’s role in an adversarial proceeding, may justify amoral

²² *Id.* at 34.

²³ Wasserstrom, *supra* note 7, at 14.

²⁴ *Id.* Wasserstrom’s view is similar to that of the ABA Model Rules of Professional Conduct. Although Rule 3.1 requires attorneys to have a non-frivolous basis for asserting or controverting an issue, the rule contains an exception for the criminal defense bar, who “may nevertheless so defend . . . as to require that every element of the case be established.” Whether the criminal defense bar is privileged to breach moral strictures by which other lawyers are bound is a subject of debate among legal ethicists. See, e.g., Monroe H. Freedman, Symposium on Professional Ethics, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) (arguing that the maintenance of the adversary system, the presumption of innocence, and the obligation of lawyer/client confidentiality at times justify conduct that frustrates the search for truth); Harry I. Subin, *The Criminal Defense Lawyer’s ‘Different Mission’: Reflections on the ‘Right’ to Present a False Case*, GEO. J. LEGAL ETHICS 125 (1987) (arguing that a criminal lawyer should not be allowed to put forward a defense the lawyer knows is false).

For their part, the lay public and popular media are outraged by defense tactics that strain credulity and treat complainants or other witnesses disrespectfully. This is especially true where the crime charged is a heinous one. A recent example is the outrage over defense tactics in the case of police officer Justin Volpe, accused of the horrendous assault of Abner Louima, who was beaten and sodomized with a broken stick in the bathroom of a police station. Debra Baker, *Shredding the Truth*, ABA J., Oct. 1999, at 40. In his opening statement, Volpe’s attorney told the jurors that Louima’s injuries were not “consistent with the nonconsensual insertion of an object into his rectum.” *Id.* at 41. The insinuation that Louima’s injuries were the result of consensual gay sex created public furor. The press and much of the bar felt Volpe’s defense attorney had crossed the line by raising a defense so apparently frivolous and disrespectful of the victim. *Id.* The attorney said he was just doing his job. For some, this incident illustrates the need for a revision of ethical rules so as to draw the line between zealous advocacy and misrepresentation. *Id.*

It is impossible not to share the public indignation in cases like these, but there is a serious and principled argument against reining in the defense bar: outrage at the zealous defense of those accused of outrageous crimes assumes the defendants’ guilt. Thus, unless defense counsel’s strategy involves appeal to racism, homophobia (the Volpe case may have crossed that line) or other base feelings, due process and the presumption of innocence appear to require that the defense bar be permitted to offend.

role-differentiated tactics by the criminal defense bar. This special case does not justify, however, "a comparable perspective on the part of lawyers generally."²⁵ Outside of the criminal defense context, "the role-differentiated amorality of the lawyer is almost certainly excessive."²⁶

Yet, it is not only, or even primarily, what he sees as the thin, over-generalized justifications for role-differentiated lawyer conduct that render such conduct problematic for Wasserstrom. Even assuming much stronger institutional justifications, role-differentiated unconcern for morality is questionable, even undesirable, for several other reasons. First, traditional institutional arguments assume that our institutions are just and efficient. "To the degree to which institutional rules and practices are unjust, unwise, and undesirable, to that same degree is the case for the role-differentiated behavior of the lawyer, weakened, if not destroyed."²⁷ Second, lawyers take on less than admirable character traits by engaging in role-differentiated behavior – "competitive rather than cooperative; aggressive rather than accommodating; ruthless rather than compassionate; pragmatic rather than principled."²⁸ Third, role-differentiated amorality may be even more problematic for lawyers than for other professionals because of the nature of the legal profession itself. The lawyer "directly says and affirms things,"²⁹ "tries to explain, persuade, and convince others that the client's cause should prevail."³⁰ Lawyers talk about justice, yet their words are for sale; "[t]he verbal, role-differentiated behavior of the lawyer *qua* advocate puts the lawyer's integrity into question in a way that distinguishes the lawyer from other professionals."³¹ The lawyer's conventional role-differentiated amorality is therefore problematic even if strong justifications for it exist.

2. *The ethical use of reasons in advocacy*

Robert Audi addresses some ethical concerns that arise out of one aspect of the lawyer's role – advocacy, conceived narrowly as "the affirmative presentation of a position represented as sound and offered for adoption by an audience."³² Audi's thesis is that "advocacy needs an ethic of reasons, and not just of external behavior,"³³ because "morality (as Kant saw) concerns not

²⁵ Wasserstrom, *supra* note 7, at 14.

²⁶ *Id.*

²⁷ *Id.* at 15.

²⁸ *Id.*

²⁹ *Id.* at 16.

³⁰ *Id.*

³¹ *Id.*

³² Robert Audi, *The Ethics of Advocacy*, 1 LEGAL THEORY 251, 252 (1995).

³³ *Id.* at 251.

only overt behavior, but also what we inwardly do . . .”³⁴ Advocacy is “subject to stronger moral constraints than expressive conduct in general,”³⁵ because it is an attempt to influence other human beings. The goal of an ethics of advocacy is to integrate “the role-specific criteria for responsible advocacy . . . with more general moral considerations, including the requirements often conceived under the heading respect for persons.”³⁶ Audi argues that advocates should ideally “1) have, 2) be genuinely motivated by, and 3) offer, or at least be willing to offer, good reasons.”³⁷

Audi’s exploration of the moral constraints on advocacy entails two important distinctions: the distinction between “threshold” principles and “desirability” principles and the distinction between “subscriptive” and “representative” advocacy. Threshold principles are minimal standards below which a moral advocate may not go through the use of rhetorical dirty tricks.³⁸ Desirability principles set a higher standard; advocates may exploit the grey area beneath these standards and above the threshold principles, but they risk criticism for doing so.³⁹ “The central idea underlying the distinction between threshold and desirability principles is this: Although it is morally permissible to do what one has a right to do, one can still be criticizable for doing it.”⁴⁰

Equally crucial to Audi’s discussion is the distinction between subscriptive and representative advocacy.

Representative advocacy is the kind appropriate for standing in for others, as a lobbyist does; subscriptive advocacy is the kind appropriate to proposing a public policy, as a concerned citizen does Actual motivation or belief is not crucial to distinguishing representative from subscriptive advocacy: The lobbyist could accept the cause represented, and the citizen could be lying. Thus, representative and subscriptive advocacy are understood in terms of the motivation and thrust appropriately attributable to them as carried out by the advocate, rather than in terms of the advocate’s actual convictions

“[S]ubscribe” is a psychological term, “subscriptive” a behavioral term.⁴¹

A lawyer arguing a client’s cause is, of course, engaging in “representative” advocacy. Such advocacy is conventionally assumed to be “impersonal, in the

³⁴ *Id.* at 252.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 263.

³⁸ *Id.* at 257.

³⁹ *Id.*

⁴⁰ *Id.* Audi notes that this distinction is similar to the distinction, more familiar to lawyers, between duty and aspiration. He also notes an important distinction – failure to meet aspirational standards is not necessarily grounds for moral criticism, but failure to observe desirability principles is always morally criticizable. *Id.* at 257 n.6.

⁴¹ *Id.* at 255.

sense that one speaks from that point of view and not necessarily from conviction."⁴²

The threshold constraints on both subscriptive and representative advocacy derive from the fundamental moral requirements that we do no harm to others and that we speak the truth.⁴³ As might be expected, the constraints on representative advocacy are somewhat less stringent than those on subscriptive advocacy. In general, a representative advocate may argue all but the most morally outrageous causes, like tyranny, for example. Moreover,

[o]ne may advocate an action that supports a cause which is on balance morally wrong, provided there is an overriding moral reason for doing so – e.g., in defending, as free expression, the legalization of public speeches by racist groups (note that this rules out non-moral reasons, such as prudential ones, as sufficient warrant) One may also advocate certain prima facie immoral actions in defending a client one knows to be guilty, at least where what one advocates is, or is essential to, just consideration of the case, as opposed to being aimed at the client's acquittal regardless of justice. For the basis of the advocacy here is a moral right to be effectively represented before the law.⁴⁴

Even representative advocates are constrained, however, by the threshold "veracity" principle, which forbids lying and gross distortions. Even though representative advocates do not purport to speak in their own voice, they can still be guilty of falsehood when they purport to recount facts. Although "certain uses of rhetoric or psychological manipulation to highlight evidence and gain attention are permissible, even if often undesirable . . . , outright lying and gross distortion of facts are prima facie . . . criticizable."⁴⁵

Audi's "desirability" principles include the "evidential" principle, which requires advocates to offer good, not specious reasons, and the related "proportionality" principle, which requires advocates "to weight reasons they offer for their position, in accord with their evidential force – e.g., not to exaggerate the force of (and so disproportionately weight) the reasons."⁴⁶ A "good" reason "counts toward the truth of that position to a degree such that,

⁴² *Id.* Audi notes here the "principle of professional detachment under which a lawyer is not to be regarded as endorsing the client's political, economic, social, or moral views." *Id.* at 255 n.5 (quoting Charles Wolfram, *A Lawyer's Duty to Represent Clients, Repugnant or Otherwise*, in *THE GOOD LAWYER* 215 (David Luban ed., 1984)). Although a lawyer's efforts on behalf of a client are unequivocally representative, the arguments in a scholarly article are just as plainly subscriptive. The rhetoric of judicial opinions is more difficult to categorize. Judges both "stand in" for the law (representative advocacy) and propose public policy (subscriptive advocacy). This dual (or hybrid?) nature of judicial rhetoric is perhaps at the root of its ethical ambiguity.

⁴³ *Id.* at 258.

⁴⁴ *Id.* at 259.

⁴⁵ *Id.* at 259-60.

⁴⁶ *Id.* at 263.

if one had nothing else to go on, one would be minimally reasonable in accepting the position on that basis."⁴⁷

Violations of the evidential and proportionality principles – such as misleading, giving bad reasons, giving no reasons, presenting weak reasons as strong – entail moral consequences.

[Such tactics] are a kind of manipulation which one should avoid using, even when speaking in someone else's voice. Even if the cause is just, the manipulative means used to promote it . . . lend themselves to promoting evil. They are instruments of persuasion which, if unalloyed with evidence, affront the dignity of the audience.⁴⁸

But as important as the evidential principle is, there is, according to Audi, a still stronger desirability principle – the “motivational” principle, which holds that “if one is not motivated by a reason one gives, then using it (evidentially) in advocating laws or policies is, apart from special circumstances, *prima facie* reprehensible or at least undesirable.”⁴⁹ Audi provides five reasons why it is wrong for an advocate to give non-motivating reasons. First, respect for persons demands that we do not ask someone else to “stand on a ground we do not share.”⁵⁰ Second, Audi proposes a Kantian consideration: “the moral status of one's motivating reason(s) affects that of action rooted therein.”⁵¹ Third, since advocacy (at least *subscriptive* advocacy) is ordinarily both expressive of one's character and predictive of future behavior, forthrightness is not served unless the motivational principle is respected.⁵² Fourth,

[e]ven if both advocate and audience take a non-motivating reason offered by [the advocate] to be in the abstract good, at least one of them is not motivated by it, and it is, in this respect, a weak social glue The . . . fragile agreement that often results in such cases is not a reliable basis for social cooperation.⁵³

Finally, “if we have no preference for offering good reasons that motivate us over those that do not, then our advocacy is not as fully in the service of . . . truth as it might be.”⁵⁴

The motivational principle is more applicable to *subscriptive* than to *representative* advocacy, because *representative* advocacy “carries a weaker

⁴⁷ *Id.*

⁴⁸ *Id.* at 264.

⁴⁹ *Id.* at 261.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 262.

⁵³ *Id.*

⁵⁴ *Id.* at 263.

presumption that one is moved by the reasons one gives.”⁵⁵ Where representative advocacy is concerned, the very considerations that mandate the motivational principle in subscriptive advocacy may on occasion generate “overrides” for representative advocacy. Nonetheless, the motivational principle has considerable application to representative advocacy; indeed, it is “a constraint that operates except in special circumstances . . .”⁵⁶ Even in representative advocacy, the audience presumes “that I am in any case not offering reasons I do *not* take to be good – which would be an insult to them. On their assumption, my giving non-motivating reasons will at least be misleading as to my character and possibly my future conduct.”⁵⁷

The motivational principle applies with special force where

what is at stake is of such significance [e.g. liberty] that there seems to be substantial reason for advocates to avoid adducing reasons that do not move them On reflection, at least, we want the reasons people give to us for major actions – say, for passing restrictive laws and policies – to be such that they themselves are moved in the way they want us to be. There is a deficiency in respect implied by asking someone to agree to something, especially to give up a liberty, on a ground one at best abstractly appreciates and does not oneself stand on.⁵⁸

Finally,

the motivational principle has more force in some domains of advocacy than in others. Legislators are heavily bound by it: Not only should the people be treated with candor, but the reasons legislators give should both express their character and provide a basis of reliable prediction of future behavior However, lawyers representing their clients are understood to follow special conventions of zealous representation⁵⁹

In addition to the *prima facie* “desirability” of offering good and “motivating” reasons, Audi also identifies specific desirability principles applicable to the role responsibilities of advocates. Subscriptive advocates should be consistent, e.g., “one should try to avoid advocating as legislator something one would reject as citizen.”⁶⁰ Of course, such “role consistency . . . may be impossible [for a representative advocate] to achieve,” yet both subscriptive and representative advocates should observe the principle of “role

⁵⁵ *Id.* at 265.

⁵⁶ *Id.* at 267.

⁵⁷ *Id.*

⁵⁸ *Id.* at 267-68.

⁵⁹ *Id.* at 269. Following Audi’s reasoning, judges would appear to be as heavily bound by the motivational principle as legislators – if not even more heavily bound, since judges, unlike legislators, do not ordinarily serve at the people’s pleasure.

⁶⁰ *Id.* at 270.

hierarchy,"⁶¹ deciding at a minimum which of their roles should prevail in case of conflict. The moral basis for this *prima facie* obligation is the need for consistency and for "moral integration." With regard to the latter, Audi explains that

[i]t is both prudentially unwise and morally undesirable to be valuationally fragmented A morally sound person has both a sense of moral priorities that is not exhausted by any particular social role and a way of ordering *prima facie* duties in relation to this sense.⁶²

For Audi, the only role that can ever be "automatically morally dominant" is that of moral agent. "Role ethics, as we might call it, is secondary to the ethics of agency: the general ethical principles that apply to us all simply as persons."⁶³ Thus, although role responsibilities create *prima facie* duties and constraints for advocates, general moral responsibilities "should govern one's resolution of role conflicts affecting advocacy."⁶⁴

In conclusion, it is worth noting that, like Wasserstrom, Audi sees criminal defense as a distinct form of advocacy. Audi discusses at length the application of his "evidential" and "motivational" principles to the criminal defense lawyer. He suggests that the advocate's *prima facie* duty to "offer only good, motivating reasons" may be overridden by "the accused's rights to a fair trial with competent representation"⁶⁵ With respect to the motivational principle in particular, he also suggests that the stakes in a criminal trial may provide an overriding factor.

B. Background: Rhetoric

Broadly defined, "rhetoric is the art or the discipline that deals with the use of discourse, either spoken or written, to inform or persuade or motivate an audience"⁶⁶ Rhetoricians customarily narrow their concern, however, to the discourse of persuasion, a focus implicit in such definitions of rhetoric as "a means of so ordering discourse as to produce an effect on the listener or reader,"⁶⁷ or "the use of language as a symbolic means of inducing cooperation in beings that by nature respond to symbols."⁶⁸ Rhetoric in this narrow sense is the advocate's medium of expression.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 271.

⁶⁵ *Id.* at 273.

⁶⁶ CLASSICAL RHETORIC FOR THE MODERN STUDENT 1 (Edward P.J. Corbett & Robert J. Connors eds., 4th ed. 1999) [hereinafter CORBETT].

⁶⁷ *Id.* (quoting Marie Hochmuth Nichols).

⁶⁸ *Id.* (quoting Kenneth Burke).

Classical rhetoric identified three modes of persuasion: rational appeal (*logos*), ethical appeal (*ethos*), and emotional appeal (*pathos*). *Logos* appeals to the audience's rational faculties by providing it with sound deductive or inductive arguments. It is buttressed by *ethos*, the character of the speaker as evinced in the discourse itself. Even a convincing argument might prove futile if the audience does not trust and esteem the speaker and believe in his or her benevolence, candor, and intelligence. Finally, persuasion might require *pathos*. Oftentimes the only way to sway an audience is to arouse its emotions, to make it care about the outcome of an issue.

Some rhetoricians, like Aristotle himself, would like the discipline to confine its persuasive methods to *logos* alone, believing that good reasons provide the only pure grounds for decision-making. Robert Audi might second this preference. His critique of advocacy is primarily a critique of reasoning, and his conclusion is that advocacy "needs an ethic of reasons."⁶⁹ To this, Wasserstrom might add that the rhetoric of law also needs an ethic of *ethos* and *pathos*: because an advocate's words are for sale, there is special cause to distrust the persona created in legal discourse and the emotional appeals made. The role-differentiated behavior of lawyers puts their integrity into greater question than that of other rhetoricians.

Because the rhetoric of law is so much a rhetoric of advocacy, it will only have credibility if it also has an ethic.⁷⁰ The following section tries to outline an ethic of legal rhetoric by describing some of the practices in each mode of persuasion that violate the duty of respect generally and Audi's threshold and desirability principles in particular, and for which the exigencies of role provide no sufficient excuse.

1. *Logos (or an ethic of reasons)*

Explanation is the primary way lawyers justify positions and decisions, persuade audiences, and guide the administration of justice. Thus, as a preliminary matter, an ethic of legal reason would require syllogistic or enthymematic⁷¹ arguments to exhibit truthful premises and valid reasoning.

⁶⁹ See *supra* notes 32-35 and accompanying text.

⁷⁰ We are not the first writers to perceive the ethical dimension of legal rhetoric. Richard Weisberg's *POETHICS* (1992) makes a notable contribution. James Boyd White has also considered, at least implicitly, the ethics of legal rhetoric, although to us at least, his faith in the law as an on-going self-correcting democratic conversation is overly optimistic. See James Boyd White, *Judicial Criticism*, 20 GA. L. REV. 835, 867 (1986).

⁷¹ The enthymeme is "the rhetorical equivalent of the syllogism" and more closely resembles customary reasoning. It can be described as an "abbreviated syllogism – that is, an argumentative statement that contains a conclusion and one of the premises, the other premise being implied." CORBETT, *supra* note 66, at 53. When analyzing an enthymeme, one should carefully articulate the implied premise since the weaknesses of the enthymeme may be hidden

An argument may be misleading if it is based on false, implicit, or partial premises, or on premises additional to or other than those offered. Offering untruthful premises violates the first of Audi's threshold principles: Do not lie. In legal rhetoric, it is a lie, for example, to rely upon authority that does not stand for the proposition it is cited for⁷² or is not good law.⁷³

Gross distortion and giving false impressions may also violate Audi's threshold veracity principle because definitions of "lie" include statements "intended or serving to convey a false impression."⁷⁴ These violations are encountered perhaps even more frequently than outright lies in legal rhetoric because accepted standards of professional responsibility prohibit making false statements, but not giving false impressions.⁷⁵ Thus, lawyers usually avoid making demonstrably untrue statements, but are more relaxed about misleading their readers by implying what they know to be false.

To understand the rhetorical ploy of false inference, one must understand first, the operation of inference, the means by which listeners understand what speakers only imply. Central to this understanding are philosopher of language H. P. Grice's theories of the Cooperative Principle and "Implicature." Conversation, Grice says, is a cooperative endeavor that succeeds because language users observe certain rules, rules Grice labels "conversational maxims." The maxims are Quantity (the statement will be as informative as required), Quality (the statement will be truthful and based on sufficient evidence), Relation (the statement will be relevant), and Manner (the statement will be clear and orderly).⁷⁶ When a statement seems to violate one of these rules, its audience assumes the speaker has a reason for the apparent violation and tries to infer that reason, to piece out the implicature, the missing term that makes the statement consistent with the maxims and therefore meaningful.

Assume, for example, that a sheriff pulls a driver over for speeding and finds the driver's license has expired. The sheriff says, "I'm not going to

there, that is, the implied premise may be invalid. *Id.* at 54.

⁷² See Ursula Bentele's discussion of Justice Rehnquist's revisionist misreadings of precedent in *Chief Justice Rehnquist, the Eighth Amendment, and the Role of Precedent*, 28 AM. CRIM. L. REV. 267, 286-95 (1991).

⁷³ For example, in *Division of Employment v. Smith*, 494 U.S. 872 (1990), Justice Scalia cited *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), for the proposition that an individual's religious beliefs do not excuse compliance with an otherwise valid law. Scalia failed to mention, however, that *Gobitis* was nullified by *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

⁷⁴ THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1109 (2d ed. 1987).

⁷⁵ For example, Rules 3.3 and 4.1 of the ABA Model Rules of Professional Conduct forbid the knowing making of "a false statement of material fact or law."

⁷⁶ H.P. Grice, *Logic and Conversation*, in 3 SYNTAX AND SEMANTICS 41, 45-46 (Peter Cole & Jerry L. Morgan eds., 1975).

impound your car, but you are going to have to appear in court." The driver responds, "Perhaps your son needs some new shoes." The driver's response seems to violate the maxim of relation – it does not appear to be directly relevant to the question asked. But a listener can construct the implicature: The driver will grease the sheriff's palm if the court appearance could be avoided.

Grice's analysis of conversational implicature illuminates our understanding of false implicature, or false inference.

False inference is possible only because listeners and readers assume that Grice's principles are being observed. Readers who assume, who trust, that a writer observes Grice's maxims are open to inference and also vulnerable to false inference. Trust, then, is a condition of both implicature and of false implicature.⁷⁷

Violations of the trust upon which the cooperative principle depends are unethical, particularly violations of the maxim of quality (do not say what is false or that for which you lack evidence – conduct that is a *per se* moral offense) and the maxim of relation (relevance).

We are able to infer correctly and imply with confidence because we provide the suppressed premise or missing term that makes syllogisms of consecutive statements, for instance. We should, then, judge exploitations of Grice's maxim under Relation as unethical in any context because, as rational beings, we are always vulnerable to false syllogism.⁷⁸

An example of false implicature in the legal arena comes from a witness who responds to the question, "Did you see Mr. Thomas shoot the officer?" with "I was there, wasn't I?" The statement may be true but the implication that "being there" is "seeing" the shooting may be false.

The ethical consequences of false implicature are sometimes mitigated when the rhetorical situation is likely to reveal an implicature as false, as respondent's brief may in the appellate context or scholarly critique in the marketplace of ideas. In those situations, false implicature may be a violation not of Audi's threshold principles but of Audi's desirability principles, which govern morally permissible but criticizable behavior.

[I]n judging the morality of a particular rhetorical means, we must do so within a framework that focuses on the reader's presumed vulnerability to false inference. Questions about what the reader can be presumed to know, whether the reader has access to information, and what expectations are fostered by external factors and by the immediate context in which the implicature appears

⁷⁷ Arthur E. Walzer, *The Ethics of False Implicature in Technical and Professional Writing Courses*, 19 J. TECH. WRITING & COMM. 149, 151, 153 (1989).

⁷⁸ *Id.* at 155.

will bear on our judgment of the reader's susceptibility and responsibility and of the writer's culpability.⁷⁹

Yet, in the law, a reader may be vulnerable and a writer culpable even if the rhetorical situation reveals an implicature as false. For example, lies and false implicature in a judicial opinion, even if unmasked in a concurrence or dissent, nonetheless bind the parties and the future. Rhetorical practices merely undesirable in a litigator or scholar would thus appear to be inexcusable on the bench.

If outright lying and false implicature violate Audi's threshold principles, other rhetorical devices violate Audi's desirability principles. Central to Audi's desirability principles are the evidential principle, which requires that lawyers give reasons for their positions and that the reasons given are good (*i.e.*, provide a minimally reasonable basis for accepting the position), and the proportionality principle, which requires that reasons be properly weighted (their force not exaggerated). In classical rhetoric, violations of these principles are violations of *logos* – they are ploys sufficiently manipulative that they may promote evil even if the cause is just.

One violation of the evidential principle is the failure to provide reasons at all. In legal rhetoric, *ipse dixit* statements, positions asserted without support, but so forcefully as to discourage questioning or critique, are particularly common examples of unsupported premises.⁸⁰

Faithfulness to the evidential and proportionality principles also requires that we refrain from offering unsupported, implicit, or partial premises, or premises resting on bases additional to or other than those offered since, in logic, granting the premises often requires one to accept the conclusion. In order to assess the soundness of an argument, in order not to be led astray by a covert switch in grounds, the bases upon which premises rest need to be identified, the reasons and evidence supporting those premises evaluated, and the inferences drawn from the premises checked. Take, for example, the premise "capital punishment deters crime." This premise seems to have an empirical basis, for which we would expect statistical support. Sometimes, however, expectations are thwarted, and an empirical premise is used to make a normative argument. "Because capital punishment deters crime, it is good." This assumes without proving not only the empirical truth of the deterrence theory but the normative judgment that crime reduction and punishment benefit society more than mercy and compassion. Both require support.

⁷⁹ *Id.* at 155-56.

⁸⁰ Holmes' dissent in *Lochner v. New York*, 198 U.S. 45 (1905), contains a famous *ipse dixit* declaration: "This case is decided upon an economic theory which a large part of the country does not entertain." *Id.* at 75 (Holmes, J., dissenting). The assertion is made so flatly that disagreement is moot.

This is especially true with enthymematic reasoning. One of the essential differences between a syllogism and an enthymeme is that "a syllogism leads to a necessary conclusion from universally true premises but the enthymeme leads to a tentative conclusion from probable premises. In dealing with contingent human affairs, we cannot always discover or confirm the truth."⁸¹ We act on the basis of the merely probable or the probably right,⁸² in the law as well as in life.

Thus, misleading arguments stem not only from unsound premises, but from inductive logical fallacies, like hasty conclusions,⁸³ false analogies,⁸⁴ or false dichotomies.⁸⁵ One logical fallacy to which law is particularly vulnerable is the normative fallacy: although the binding nature of enacted law and the doctrine of *stare decisis* are often the sole justification in legal argument, the sheer existence of a law or condition does not always justify the law or condition, especially when reliance on authority avoids difficult issues and has questionable results.⁸⁶ Yet another common fallacy in legal argument is the old chestnut known as "begging the question" – the premise assumes the conclusion, rendering argument redundant.⁸⁷ Finally, if authors mischaracterize a position in order to knock it down, they have created strawman arguments. Such arguments fail to defeat the true claim.

Even if an argument flows logically from or to a sound premise – and, thus, provides a "good" reason – it is not necessarily an ethical argument. Of

⁸¹ CORBETT, *supra* note 66, at 53.

⁸² Consider the enthymeme: "John will fail his exams because he has not studied." The truth of the minor premise – John has not studied – can be confirmed. The unstated premise is only probable, however: One who does not study will fail. This is not universally true, though its probability is likely and therefore persuasive. CORBETT, *supra* note 66, at 54.

⁸³ See, e.g., *Romer v. Evans*, 116 S. Ct. 1620, 1634 (1996) (Scalia, J., dissenting) (stating that "[b]ecause [homosexuals] reside in disproportionate numbers in certain communities . . . and care about homosexual rights ardently . . . , they possess political power much greater than their numbers").

⁸⁴ See, e.g., *Kelly v. Gwinnell*, 476 A.2d 1219 (N.J. 1984). The New Jersey Supreme Court, in imposing on social hosts liability for injuries caused by drunk drivers, falsely analogized social hosts to liquor licensees and ignored the fact that, unlike bartenders, hosts often do not serve guests and cannot assess intoxication. *Id.* at 1224.

⁸⁵ See, e.g., *id.* (imposing liability on social hosts to compensate victims of drunk drivers but neglecting to mention that victims already had a remedy against the intoxicated driver).

⁸⁶ See, e.g., *V.C. v. M.J.B.*, 725 A.2d 21 (N.J. Super. Ct. App. Div. 1999) (purportedly applying the "best interests" test when a "psychological parent" seeks custody, but concluding without comment that deference must be given to the statute's narrow definition of parent).

⁸⁷ See *Sutton v. United Airlines*, 130 F.3d 893, 903 (10th Cir. 1997) (plaintiffs cannot have it both ways: they are either disabled under the Americans with Disabilities Act because their uncorrected vision restricts the major life activity of seeing and thus renders them unqualified as pilots, or they are qualified for that position because their vision is correctable and does not interfere with a major life activity).

equal, if not prime, importance is that speakers give the real reasons for their conclusions, i.e., adhere to Audi's motivational principle. Under the motivational principle, it is morally undesirable to offer reasons that do not carry the conviction of the speaker, because motivating reasons show respect for persons, effect the actions rooted in them, are expressive of character (rhetoric's *ethos*), are predictive of future behavior, provide a basis for social cooperation, and serve truth.⁸⁸ Thus, lawyers should be candid about the real reasons for their positions. They should not make arguments, for example, that are motivated by normative (social and moral) principles but defended only on grounds of authority. When public justification does not mirror private conviction, an argument loses ethiccity and credibility.

Legal realist Judge Robert A. Leflar wrote about this phenomenon in the context of judicial opinions: "Often, neither formal logic nor interpretations of prior precedent constitute real reasons either for moving the law in new directions or for refusing to move it. The real reasons are apt to be socio-economic or even political."⁸⁹ If a court fails to give its real reasons, there is a good chance that not only will lawyers and other judges misinterpret the meaning and scope of the decision – only to be rudely surprised by later decisions that seem contrary to the court's stated justifications – but courts will inevitably suffer a loss of integrity and credibility.⁹⁰ Thus, opinions should be assessed for their honesty in this respect.⁹¹

⁸⁸ See *supra* notes 49-54 and accompanying text.

⁸⁹ Robert A. Leflar, *Quality in Judicial Opinions*, 3 PACE L.R. 579, 581 (1983).

⁹⁰ Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721, 741 (1979).

⁹¹ An interesting example of an opinion that seemingly violates Audi's motivational principle is *Braschi v. Stahl*, 543 N.E.2d 49 (N.Y. 1989). To protect the adult life partner of the deceased tenant of record from eviction from a rent-controlled apartment, the court redefined "family" to include those "whose relationship is long-term and characterized by an emotional and financial commitment and interdependence." *Braschi*, 543 N.E.2d at 54. The court said such a definition was justified by the reality of contemporary family life. *Id.* In other words, it offered a social policy justification for its decision. To lawyers, *Braschi* was significant because of the impact its redefinition of family could have on other areas of law: intestacy, insurance, and adoption law, to name but a few. Yet, as the inevitable cases came up before the New York Court of Appeals, it consistently refused to redefine family in any context other than rent control. See, e.g., *In re Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) (holding that the lesbian ex-life-partner of the biological mother had no standing to seek visitation with a child jointly raised, because Alison D. was not a "parent" within the meaning of § 70 of New York's Domestic Relations Law). Such a phenomenon suggests that the court was not in fact prepared to accept new social configurations of family and did not give the real reasons for its decision in *Braschi*. It is interesting to speculate why. One significant omission in the *Braschi* decision is any mention of the fact the tenant of record died of AIDS (see Philip S. Gustis, *New York Court Defines Family to Include Homosexual Couples*, N.Y. Times, July 7, 1989, at A1) and that eviction might render homeless his life partner, a man quite possibly at risk of AIDS himself. Given this possibility, one could speculate that compassion motivated the *Braschi* result rather than social policy, but that the court was uncomfortable resting its decision upon

2. *Ethos*

The ethical appeal gains importance when an argument deals with an issue about which certainty is unlikely and opinion divided. In this situation, an audience's position might be influenced by its assessment of the speaker's character, or "persona," as it is revealed in discourse. Classical rhetoricians tried in particular to exhibit good judgment, moral character, and benevolence.⁹² Good sense is manifest in discourse when a person demonstrates a good grasp of the subject matter, logical reasoning, appropriate perspective, and good taste. High moral character requires exhibiting respect for communal values, disdain for unscrupulous tactics, and unwavering personal integrity. Good will is demonstrated by showing open-mindedness and a sincere concern for the audience's well-being.⁹³

Creating a persona is complicated, because it is revealed in every characterization, as James Boyd White points out in his discussion of the persona of the court.

In rhetorical terms, the court gives itself an *ethos*, or character, and does the same both for the parties to a case and for the larger audience it addresses – the lawyers, the public, and the other agencies in government. It creates by performance its own character and role and establishes a community with others. . . . It is here that we can find its values most fully defined and realized.⁹⁴

The persona of the court, like that of any author, is revealed in the tone of voice the author adopts and the attitudes the author assumes toward materials and sources, the content of the text, and the parties involved.⁹⁵

such grounds. The court's less than candid reasoning made it impossible to predict its future actions, resulting in a flood of pointless litigation and disappointed hopes. Even well-intentioned violations of the motivational principle, then, entail bad consequences. When judges write "dishonest" opinions, predictability suffers, as in *Braschi*. In addition, truth suffers, as does the cohesion between court and counsel, governing and governed.

⁹² CORBETT, *supra* note 66, at 73.

⁹³ *Id.*

⁹⁴ White, *supra* note 70, at 846.

⁹⁵ Robert L. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J. L. & HUMAN. 201 (1990). Robert L. Ferguson describes the judicial persona as revealed in opinions as having four principal traits: first, a monologic voice, *id.* at 207 (a single, seemingly disinterested voice that appears "as if forced to its inevitable conclusion by the logic of the situation and the duties of office"); second, an interrogative mode, *id.* at 208-10 (the power to frame the question that is to be answered and thus to render it rhetorical in scope); third, a declarative tone, *id.* at 213 (resisting mystery and complexity by using "hyperbole, certitude, assertion, simplification, and abstraction"); and finally, a rhetoric of inevitability, *id.* at 214 (the association of the judge's view with the correct course in history).

The judge Ferguson describes is akin to James Boyd White's description of the "boss"

The difficulty in maintaining a consistently admirable and attractive persona makes exploitation of *ethos* difficult. Inauthenticity can be revealed by a single lapse, jeopardizing the entire effect of the ethical appeal. Hidden agendas, biases, unfounded assumptions, elitism have a way of rising to the surface. Notes of peevishness, pettiness, malevolence, vulgarity, arrogance are sounded by the use of nit-picking strategies, pejorative language, stereotypical depiction, exaggeration, inappropriate jocularity, sarcasm, and imperiousness. Judicial humor, for example, undercuts a court's *ethos* when it is misplaced. A dissonant display of bad taste and bad judgment occurred in *Davis v. United States*, where a sailor was savagely beaten to death after a game of pool. Inexplicably finding this an occasion for humor, Justice O'Connor begins "Pool brought trouble – not to River City, but to the Charleston Naval Base."⁹⁶

3. *Pathos*

Emotional appeal plays a role in the persuasive process because of the vital impact it has on our intellectual convictions and our will to act. There is nothing reprehensible about this fusion unless the appeal prompts behavior or arouses feelings that a reasonable person would later regret.

Classical rhetoric singles out two types of appeal that are apt to induce shame: *Ad populem* and *ad hominem* arguments, both of which attempt to divert the audience from the issue at hand by exciting emotions and anesthetizing rational faculties. Such tactics show a disrespect for persons that is offensive to a universalist morality. An argument *ad populem* invokes irrational fears and biases, as illustrated by the prejudicial remarks of the defense in the trial of Bernhard Goetz, who shot four black teenagers on a New York subway. Defense counsel played on racial fears, describing the complainants as the "gang of four," as "predators" on society, and as "vultures and savages."⁹⁷ *Ad hominem* arguments are arguments directed at a person

judge, who declares "the meaning of an authoritative text" in a voice itself "authoritative, unquestioning, and unquestionable." White, *supra* note 70, at 855-56. Yet, White also recognizes another judicial persona – a judge who justifies a decision by expounding on the text and respecting the readers' intelligence and discernment. With this type of judge, "the individual and the community alike [engage] in a continual process of education, of intellectual and moral self-improvement . . ." *Id.* at 867.

⁹⁶ 512 U.S. 452, 454 (1994).

⁹⁷ GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE 206 (1990). Not even the more permissive ethical standards arguably appropriate to criminal defense can encompass conduct, like racist rhetoric, that breaches the threshold principle "Do no harm." In contrast, appeals to pathos would seem ethical when they speak to our higher feelings. For example, Human Rights Watch petitioned a British court not to release General Augusto Pinochet on grounds of unfitness to stand trial, arguing *inter alia* "Of particular concern is whether the evidence shows

rather than at the issue. Intellectual competitiveness renders legal scholars prone to the *ad hominem* trap, even though *ad hominem* argument rarely enhances an author's *ethos*.⁹⁸

II. THE FATE OF *MIRANDA*: A RHETORICAL MICROCOSM

A. Judicial Rhetoric: *United States v. Dickerson*

The majority opinion of the Fourth Circuit Court of Appeals in *United States v. Dickerson*⁹⁹ is judicial rhetoric at its most disrespectful. Arguments grounded in *logos*, *pathos*, and *ethos* alike too often lack candor and deal roughly with opposing views and their proponents. Indeed, with respect to defense, prosecution, dissent, and audience at large, the opinion manifests the "contempt, mockery, disdain, [and] detraction"¹⁰⁰ that Kant urges us to avoid. The court repeatedly violates Audi's evidential, proportional, and motivational principles and comes very close to violating his threshold "veracity" principle. These ethical shortcomings are all the more inexcusable because the advocacy of judicial opinions is at least partially subscriptive advocacy.¹⁰¹ In sum, the inappropriate use of the role-differentiated rhetoric of the adversary system in *Dickerson* is not only disrespectful, but, ultimately, productive of disrespect.

Analyzing the rhetoric of the majority opinion in *Dickerson* puts us, uncomfortably, in two places at once: outside legal rhetoric but, inevitably, inside it as well. We are tempted to argue (as we both believe) that the Fourth Circuit is dead wrong,¹⁰² to argue that *Miranda*'s constitutional status is demonstrated not only textually, but also by the Supreme Court's continued application of *Miranda* to controversies arising out of state prosecutions and

not merely that Pinochet is a sick, old man – a fate to which many of Pinochet's victims would have gladly aspired – but, as British law requires, that he is incapable of understanding the proceedings against him and of assisting in his own defense." *Court Order Sought on Pinochet Medical Judgment: Decision Must Not be Rushed or Secret*, Human Rights Watch Press Release, Jan. 24, 2000, <http://www.hrw.org/press/2000/01/pino0124.htm> (emphasis added).

⁹⁸ See, for example, Martha Nussbaum's "*ad feminem*" attack on Judith Butler in *The Professor of Parody*, THE NEW REPUBLIC, Feb. 22, 1999, at 37.

⁹⁹ 166 F.3d 667 (4th Cir.), *rev'd*, *Dickerson v. United States*, 120 S. Ct. 2326 (2000) [hereinafter *Dickerson II*].

¹⁰⁰ ODORA O'NEILL, CONSTRUCTION OF REASON: EXPLORATIONS OF KANT'S PRACTICAL PHILOSOPHY 115 (1991).

¹⁰¹ See *supra* notes 41-45 and accompanying text.

¹⁰² The temptation is all the keener because one of us for many years briefed and argued appeals for indigents convicted of crimes. The rhetoric of role often long outlasts the role. Thus, although we have aimed for respectful rhetoric, we apologize for having probably committed some of the very abuses we decry.

to federal habeas corpus proceedings.¹⁰³ The further temptation is to argue in no uncertain terms, using the traditional legal rhetorical strategies. We try to be mindful in what follows that our enterprise is not to convince the reader that the wrong decision was made but, rather, to see whether the decision was wrongly made.

The disrespectful rhetoric of *Dickerson* is all the more disturbing because of its major target. Whether *Miranda* is constitutional, sub-constitutional, or non-constitutional; whether it has had a good, bad, or unknowable effect on law enforcement, criminal justice, or crime rates – one thing seems certain: the Warren court's decision is explicitly grounded in an ethic of universal respect. Discussing the development of the privilege against self-incrimination, Chief Justice Warren writes that all the policies supporting the privilege "point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government – state or federal – must accord to the dignity and integrity of its citizens."¹⁰⁴ Moreover, the rhetoric of *Miranda* is itself informed by this principle. The opinion is characterized by careful explanation and respect for the views of others. Ironically, it is the Court's respect for the views and autonomy of others (suggesting that Congress and the states might find still better ways to protect the guarantee against compelled self-incrimination) that invited much of the Fourth Circuit's argument in *Dickerson*.

1. Statement of the case

On the merits, *Dickerson* was a decision waiting to happen: it was just a matter of time until a federal court with a conservative cast of mind¹⁰⁵ ruled that *Miranda v. Arizona*¹⁰⁶ is dead, having been nullified by 18 U.S.C. § 3501,¹⁰⁷ enacted by Congress in 1968. Although that statute itself was widely

¹⁰³ See, e.g., *Withrow v. Williams*, 507 U.S. 680 (1993) (federal habeas); *New York v. Quarles*, 467 U.S. 649 (1984) (state case). Indeed, *Miranda* itself is a state case, and it is difficult to imagine on what basis other than constitutional interpretation the Court would presume to pass on the rights of criminal defendants prosecuted under state law.

¹⁰⁴ *Miranda*, 384 U.S. at 460.

¹⁰⁵ The United States Court of Appeals for the Fourth Circuit is such a court. The *New York Times* calls it, "the country's most self-confident, activist, conservative court." Roger Parloff, *Miranda on the Hot Seat*, N.Y. TIMES MAG., Sept. 26, 1999, at 84, 85.

¹⁰⁶ 384 U.S. 436 (1966).

¹⁰⁷ Section 3501 provides in pertinent part as follows.

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issues as to voluntariness

(b) The trial judge in determining the issue of voluntariness shall take into consideration

considered – most notably by Federal prosecutors – to be a dead letter, an unconstitutional abrogation of Supreme Court precedent, dedicated amici had long been urging the federal courts to perform *sua sponte* judicial review of § 3501.¹⁰⁸ It was this challenge that the Fourth Circuit took up in *Dickerson*, ruling, as urged, that the rules set out in *Miranda* are not required by the Constitution, and that therefore § 3501 is constitutional and in full force, because the statute does no more than overrule judicially created rules of evidence and procedure.¹⁰⁹

Dickerson is factually and procedurally complex. By the Fourth Circuit's account, the robber of an Alexandria, Virginia, bank was driven from the scene in a car registered to Dickerson. Taken into custody, Dickerson told the FBI Agents that he drove a distant relative named Jimmy Rochester to and from a location near the bank. Rochester was arrested and confessed, implicating Dickerson as his driver. A search of Dickerson's apartment and car produced substantial incriminating evidence, including a handgun and leather bag like those used in the robberies, masks, dye-stained money and a "bait bill" from the robberies, and solvent used to clean dye-stained money.¹¹⁰

Indicted on several counts of bank robbery, Dickerson moved to suppress his confession on the ground that he was not timely given his *Miranda* warnings and to suppress items of evidence on the ground that they were, variously, the result of the *Miranda* violation and of a defective search warrant. After a hearing, the District Court suppressed Dickerson's confession on *Miranda* grounds, believing Dickerson's account and

all the circumstances surrounding the giving of the confession, including

(1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment,

(2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession,

(3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him,

(4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

¹⁰⁸ Paul G. Cassell has been particularly central to this struggle. Cassell is a former law clerk of Antonin Scalia (when Justice Scalia was a Federal Appeals Court Judge) and a former prosecutor in the Fourth Circuit. He has written numerous articles calling for the overruling of *Miranda*. He frequently works with two conservative public interest groups, the Washington Legal Foundation and the Safe Streets Coalition, and has written amicus briefs urging this *Miranda* agenda, notably those in *Dickerson*. See Parloff, *supra* note 105. When the Department of Justice declined to brief and argue *Dickerson* in the Supreme Court, Cassell was invited by the Court to argue in favor of § 3501.

¹⁰⁹ *Dickerson II*, 166 F.3d at 672.

¹¹⁰ *Id.* at 674.

disbelieving that of the FBI agent who questioned him. The District Court declined to suppress evidence obtained as a result of the confession (his co-defendant's statement implicating Dickerson), however, holding that although Dickerson's confession was obtained in violation of *Miranda*, it was voluntary within the meaning of the Due Process Clause of the Fifth Amendment, and therefore its fruits were admissible. It also declined to suppress evidence found in the trunk of Dickerson's car.¹¹¹ But the court did suppress evidence found at Dickerson's apartment, finding that the warrant was, *inter alia*, insufficiently particular in describing the items to be seized.

The government thereupon asked the District Court to reconsider its suppression order, seeking to introduce further (though not newly discovered) evidence concerning the timing of the *Miranda* warnings and asking in the alternative that Dickerson's statement be admitted under 18 U.S.C. § 3501, which by its terms admits into evidence in Federal Court confessions deemed "voluntary" albeit in violation of *Miranda*.¹¹²

The District Court declined to reconsider its previous order,¹¹³ and the government appealed to the Fourth Circuit, arguing both that the District Court should have reopened the *Miranda* hearing and that the suppression of tangible evidence on Fourth Amendment grounds was erroneous. On this appeal, the government did not brief or argue the § 3501 issue, but an amicus brief was filed by the Washington Legal Foundation and Safe Streets Coalition urging the Fourth Circuit to hold *sua sponte* that Dickerson's confession was voluntary within the meaning of § 3501.

¹¹¹ *Id.* at 676.

¹¹² *Id.*

¹¹³ *United States v. Dickerson*, 971 F. Supp. 1023 (E.D. Va. 1997) [hereinafter *Dickerson* ¶]. The District Court's opinion did not address the § 3501 issue, possibly because the government declined to argue that point. The court was openly critical of the government's attempts to re-open the suppression hearing. The judge criticized the prosecution's preparation, observing at the hearing that "this is one of those deals where they threw the case at [the AUSA] at 4:00 on the day before [the hearing]." *Id.* at 1023, 1024 n.2. Moreover, the court concluded that at least some of the evidence that the prosecution sought to add to its case in fact corroborated Dickerson's testimony and not that of the FBI agent. Finally, the court was no more receptive to the government's rhetoric than to its affidavits, as follows:

The government begins its plea for reconsideration by asserting that "at stake here is not only our ability to bring Dickerson to book for multiple armed robberies but also quite possibly an agent's career." More correctly, what is at stake here is the liberty of a citizen who is presumed to be innocent and whose constitutionally protected rights were breached by the government. At the end of the day, and regardless of the outcome of the trial of this case, Agent Lawler will not spend the next several years in prison – Dickerson may.

Id. at 1025 n.4.

Deciding that it had the power to review the denial of reconsideration¹¹⁴ and that the standard of review was "abuse of discretion,"¹¹⁵ the Fourth Circuit concluded that the hearing judge did not abuse his discretion when he refused to allow the government to supplement its *Miranda* case.¹¹⁶ The appellate court nonetheless reversed the order suppressing Dickerson's confession, ruling that it had the power to consider the *Miranda* / § 3501 issue *sua sponte*; that § 3501 is constitutional and supersedes *Miranda*;¹¹⁷ and that, since § 3501 requires only a finding of traditional "voluntariness," and the district court had already held the confession to be voluntary, no remand for application of the statute was required.¹¹⁸ The Fourth Circuit also reversed the order of the District Court suppressing tangible evidence on Fourth Amendment grounds.

2. Rhetorical analysis

The majority opinion in *Dickerson* is long: twenty-four pages in the Federal Reporter. The structure of the opinion itself makes plain that despite the half dozen or so issues presented, *Dickerson* has one and only one real point: § 3501 controls. Thus, the opinion begins not with the usual introduction of parties and issues, but with a paragraph in which the court summarizes its § 3501/*Miranda* argument. It continues with a longer summary of the § 3501 argument in Section I. In Section IIIB, the court provides a lengthy analysis of the issue.

a. Opening paragraph

The opening paragraph is set out in full below because it introduces not only the court's conclusion that § 3501 supersedes *Miranda*, but also introduces several of the court's most disrespectful rhetorical strategies: false implicature, omission, insincerity, hyperbole verging on deceit, and sneering sarcasm directed at the holders of opposing views.

In response to the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966), the Congress of the United States enacted 18 U.S.C.A. § 3501 (West 1985), with the clear intent of restoring voluntariness as the test for admitting confessions in federal court. Although duly enacted by the United States Congress and signed into law by the President of the United States, the United States Department of Justice has steadfastly

¹¹⁴ *Id.* at 678 n.10.

¹¹⁵ *Id.* at 678.

¹¹⁶ *Id.* at 680.

¹¹⁷ *Id.* at 692.

¹¹⁸ *Id.* at 692-93.

refused to enforce the provision.¹¹⁹ In fact, after initially “taking the Fifth” on the statute’s constitutionality, the Department of Justice has now asserted, without explanation, that the provision is unconstitutional. With the issue squarely presented, we hold that Congress, pursuant to its power to establish the rules of evidence and procedure in the federal courts, acted well within its authority in enacting § 3501. As a consequence, § 3501, rather than *Miranda*, governs the admissibility of confessions in federal court. Accordingly, the district court erred in suppressing Dickerson’s voluntary confession on the grounds that it was obtained in technical violation of *Miranda*.¹²⁰

If readers are to be convinced that the court’s holding that § 3501 supersedes *Miranda* is correct, they must be convinced of two things: that it is appropriate for the court to decide the issue *sua sponte* and that *Miranda* is not grounded in the Constitution. These issues are the very heart of the matter – but in the opening paragraph they are, respectively, misrepresented and omitted.

First, the reader is led to assume, incorrectly, that the § 3501/*Miranda* issue was raised on appeal by the government. The court’s statement “the Department of Justice has now asserted . . . that [§ 3501] is unconstitutional,”¹²¹ followed by its assurance that “the issue [is] squarely presented”¹²² is an instance of false implicature exploiting the reader’s expectation that utterances will be rationally related to each other. In fact, the government’s assertion was not made in the course of the proceedings in *Dickerson*, not, indeed, in the course of any proceeding before the court.¹²³ “With the issue squarely presented” is thus a non-sequitur with respect to whatever assertions the government may have made. And since neither side raised § 3501 before the Fourth Circuit, it is simply not true that the issue was “squarely presented.”

Second, the substantive question at the heart of the § 3501/*Miranda* question – the constitutional status of *Miranda* – is simply absent from the opening paragraph. The question as framed by the court is no more than a shadow cast by the real question. Indeed, the shadow question is not even explicitly framed – the reader must reconstruct it from the court’s conclusion “that Congress, pursuant to its power to establish the rules of evidence and procedure in the federal courts, acted well within its authority in enacting

¹¹⁹ The dangling modifier in this sentence would bother some readers.

¹²⁰ *Dickerson II*, 166 F.3d at 671.

¹²¹ *Id.*

¹²² *Id.*

¹²³ In fact, it was made in a letter from Attorney General Janet Reno to Congress dated September 10, 1997. *Id.* at 672.

§ 3501."¹²⁴ The court's conclusion contains an enthymeme that, elaborated, holds as follows.

<i>Major Premise:</i>	Congress may establish the rules of evidence and procedure in the federal courts.
<i>Implied Premise:</i>	Section 3501 is a rule of evidence or procedure.
<i>Conclusion:</i>	Congress acted within its authority in enacting § 3501.

Yet this "proof" demonstrates nothing. The real *Miranda* / § 3501 question concerns what Congress may *not* do. The major premise is more properly: "Congress may not overturn decisions of the Supreme Court interpreting the Constitution." But in the opening paragraph of *Dickerson*, the Constitution is just negative space – present only in the government's purportedly unexplained assertion of § 3501's "unconstitutionality" and in the derisive expression "taking the Fifth."¹²⁵ Although in the body of the opinion, the *Dickerson* majority does eventually, albeit less than candidly, discuss at length both the appropriateness of its *sua sponte* decision and the constitutional status of *Miranda*, its misleading and evasive opening may nonetheless deceive a busy or novice reader.

The hyperbole that is the stylistic signature of *Dickerson* (and present in quite a few other judicial opinions) is already much in evidence in the opening paragraph. Congress has not just the "intent" of restoring pre-*Miranda* law, it has the "clear intent."¹²⁶ The statute was not only "enacted," it was "duly" enacted.¹²⁷ The Department of Justice has "steadfastly" refused to apply § 3501. The issue is "squarely" presented.¹²⁸ Congress acted "well" within its authority.¹²⁹ In contrast to all this magnification, the *Miranda* violation found by the District Court is reduced in scale to a mere "technical" violation.¹³⁰

In addition to misleading, concealing, and exaggerating – rhetorical excesses going to *logos* – the opening paragraph of *Dickerson* makes an appeal going to *pathos* as well. The court argues *ad hominem*, impugning the probity and competence of the Department of Justice. First, the reader is led

¹²⁴ *Id.* at 671.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* Justice Scalia's dissent in *Dickerson III* is similarly hyperbolic: "the decision in *Miranda*, if read as an explication of what the Constitution requires is preposterous," *Dickerson III*, 120 S. Ct. 2339; the elimination of compulsion "cannot conceivably require the right to have counsel present," *id.*; the court "flagrantly offends fundamental principles of separation of powers" *Id.* at 2342.

¹³⁰ *Dickerson II*, 166 F.3d at 671.

to question the motivation and competence of lawyers who refuse to enforce a statute that is all that a federal statute should be – “[D]uly enacted by the United States Congress and signed into law by the President of the United States.” But there is worse: the government has been “taking the Fifth” on § 3501. In other words, like the criminal defendants it should be prosecuting, the Department of Justice is hiding its guilty secret behind that great obstruction to law and order, the Constitution.

The locution “taking the Fifth” thus reveals the Court’s contempt not only for the prosecution, but also for the privilege at the heart of the *Miranda*/§ 3501 debate. The guarantee against compelled self-incrimination contained in the Fifth Amendment is mentioned very rarely in *Dickerson* – and its first and most prominent mention is here, in a sarcastic epithet more appropriate in a police precinct or tabloid newspaper than in a judicial opinion and, therefore, a breach of the court’s *ethos*. The rhetorical strategy backfires, however, allowing the reader to glimpse another reason, perhaps the “real” reason, for the court’s decision: a political agenda that privileges law enforcement over individual rights. The court’s ostensible reason for concluding that § 3501 supersedes *Miranda* – Congress’s “power to establish the rules of evidence and procedure in the federal courts” – though given much lip service, may not in fact motivate the court’s own belief. These violations of Audi’s motivational, evidential, and proportional principles will become clearer still in the rest of the opinion.

b. Section I

Insincerity, misdirection, omission, gross exaggeration, contempt – the opening paragraph of *Dickerson* provides a sampling of the majority’s rhetorical excesses.¹³¹ Section I of the opinion, which summarizes the history of § 3501 and the court’s analysis of the *Miranda* / § 3501 issue, continues these strategies. Much of it is reprinted here, with line numbers to facilitate reference; citations are omitted.

5 In ruling on the admissibility of *Dickerson*’s confession, the district court failed to consider § 3501, which provides, in pertinent part, that “a confession . . . shall be admissible in evidence if it is voluntarily given.” 18 U.S.C.A. § 3501(a). Based upon the statutory language, it is evident that Congress enacted § 3501 with the express purpose of legislatively overruling *Miranda* and restoring voluntariness as the test for admitting confessions in federal court.

¹³¹ Compare this with the exaggeration and contempt of the Supreme Court dissent. “Today’s judgment converts *Miranda* from a milestone of judicial overreaching into the very Cheops’ Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance.” *Dickerson III*, 120 S. Ct. at 2348 (Scalia, J., dissenting). Although this is spirited dissent, to some (ourselves included) its assertion of intellectual superiority is offensive.

Thus, if Congress possessed the authority to enact § 3501, Dickerson's voluntary confession is admissible as substantive evidence in the Government's case-in-chief.

10 Congress enacted § 3501 as a part of the Omnibus Crime control Act of 1968, just two years after the Supreme Court decided *Miranda*. Although the Supreme Court has referred to § 3501 as "the statute governing the admissibility of confessions in federal prosecutions," the Court has never considered whether the statute overruled *Miranda*. Indeed, although several lower courts have found
15 that § 3501, rather than *Miranda*, governs the admissibility of confessions in federal court, no Administration since the provision's enactment has pressed the point. In fact, after initially declining to take a position on the applicability of § 3501, the current Administration has now asserted, without explanation, that the provision is unconstitutional.

20 Recently, Justice Scalia expressed his concern with the Department of Justice's failure to enforce § 3501. In addition to "caus[ing] the federal judiciary to confront a host of '*Miranda*' issues that might be entirely irrelevant under federal law," Justice Scalia noted that the Department of Justice's failure to invoke the provision "may have produced – during an era of intense national
25 concern about the problem of run-away crime – the acquittal and the nonprosecution of many dangerous felons." This is just such a case. Dickerson voluntarily confessed to participating in a series of armed bank robberies. Without his confession it is possible, if not probable, that he will be acquitted. Despite that fact, the Department of Justice, elevating politics over law,
30 prohibited the U.S. Attorney's Office from arguing that Dickerson's confession is admissible under the mandate of § 3501.

Fortunately, we are a court of law and not politics. Thus, the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it. Here, the district court has suppressed a confession that,
35 on its face, is admissible under the mandate of § 3501, *i.e.*, the confession was voluntary under the Due Process Clause, but obtained in technical violation of *Miranda*. Thus, the question of whether § 3501 governs the admissibility of confessions in federal court is squarely before us today.

In its historical precis (lines 10-26), the court cites Justice Scalia's concern, expressed in a 1994 concurrence, over the non-enforcement of § 3501. His suggestion that non-enforcement "may have produced – during an era of intense national concern about the problem of run-away crime – the acquittal and the non-prosecution of many dangerous felons"¹³² appeals to the audience's fear of violent crime (an *ad popule*m argument from *pathos*).¹³³

¹³² Davis v. United States, 512 U.S. 452, 465 (1994) (Scalia, J., concurring).

¹³³ Although the Court's reaffirmance of *Miranda*'s constitutionality may be arguable, it is not so patently wrong as to merit Justice Scalia's doomsday *ad populum* argument in his dissent. "[T]o justify today's agreed-upon result, the Court must adopt a significant new, if not

The Fourth Circuit exploits this fear, noting (lines 26-28) "This is just such a case. Dickerson voluntarily confessed to participating in a series of armed bank robberies. *Without his confession it is possible, if not probable, that he will be acquitted.*"¹³⁴

Like most *ad populeum* arguments, this one contains a considerable overstatement: Dickerson is indeed *not* "just such a case." There appears to be a great deal of evidence of guilt other than Dickerson's confession, if indeed his statement can be fairly characterized as such.¹³⁵ A bank robber was seen leaving the scene of the crime as a passenger in Dickerson's car. Tangible evidence was found in Dickerson's apartment and car – a gun and leather bag described by eye-witnesses, marked money, and the fluid used to clean marked money. The actual robber confessed, implicating Dickerson.¹³⁶ Finally, should Dickerson try to explain away the evidence, his statement can be used to impeach his credibility.¹³⁷

Accusing the Department of Justice of condoning the non-prosecution of violent felons (an *ad hominem* argument), the court inadvertently allows the reader to glimpse motivating reasons for its decision that are only obliquely

entirely comprehensible, principle of constitutional law . . . [namely] that this Court has the power, not merely to apply the Constitution but to expand it That is an immense and frightening antidemocratic power, and it does not exist." *Dickerson III*, 120 S. Ct. at 2337 (Scalia, J., dissenting). In contrast, Rehnquist seeks to quell any anxiety that reaffirmance might produce.

The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary . . . may nonetheless be excluded and a guilty defendant go free as a result. But experience suggests that the totality-of-circumstances test which § 3501 seeks to revive is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner

Id. at 2336.

¹³⁴ *Dickerson II*, 166 F.3d at 672 (emphasis added). When the court writes "it is possible, if not probable, that he will be acquitted," *id.*, it is exploiting semantic ambiguity. "Possible, if not probable" has two distinct, lexical meanings: "not just possible, but probable" and "possible, even though not probable." The latter would appear correct in light of the evidence, but the court's hyperbole "just such a case" presses the reader in the direction of the first meaning.

¹³⁵ Dickerson "confessed" to transporting a relative with a criminal record to and from the vicinity of a bank. Appellee's Petition for Rehearing and Petition for Rehearing En Banc at 2-3, *Dickerson II*, 166 F.3d 667 (4th Cir. 1999) (No. 97-4750), *rev'd*, *Dickerson III*, 120 S. Ct. 2326 (2000) [hereinafter Appellee's Petition for Rehearing]. It is not clear what, if anything, he said about other bank robberies. The statement of facts in Dickerson's brief in opposition to en banc review seems to suggest that Dickerson's only statement concerned driving his disreputable relative on one occasion.

¹³⁶ *Dickerson II*, 166 F.3d at 673-74.

¹³⁷ See *Harris v. New York*, 401 U.S. 222, 224-25 (1971) (holding that a statement taken in violation of *Miranda* may be used to impeach a testifying defendant's credibility if the statement is found to be voluntary).

acknowledged (lines 29-34). As in the epithet "taking the Fifth," the Court's hyperbolic abuse of *pathos* here suggests that the politics of law and order, not the ordained roles of judiciary and legislature, is what really drives *Dickerson*.

In the same passage (lines 29-34), the court attempts to secure the ethical high ground for itself, accusing the Department of Justice of "elevating politics over law" in its refusal to argue § 3501, adding, "[F]ortunately, we are a court of law and not politics. Thus, the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it." The court's attempt to argue its own stalwart ("cannot prevent us") independence ("court of law and not politics") rings hollow. First, it sets up a false dichotomy: there *are*, of course, no courts of politics.¹³⁸ Second, in light of the court's explicit concern with securing convictions, it appears that the court does indeed have its own political agenda and is merely engaging in the disingenuous, if standard, rhetorical ploy of calling those with opposing views "political."

Portraying itself as the impartial champion of the rule of law, the Fourth Circuit is creating a persona, making an argument from *ethos* that is no less inappropriate for being a convention of the judicial opinion.¹³⁹ Some may object to this critique of the court's rhetoric by arguing that no harm is done, or even some good, by the apolitical pose: first, it is the rare person who believes that judges do not take their political convictions to the bench with them;¹⁴⁰ second, the fiction gives non-majoritarian decision-making the appearance of legitimacy; third, as a practical matter, the pretense of impartiality may indeed operate as a constraint on partiality.

Yet, on balance, the mantle of impartiality nonetheless seems to us a disturbing rhetorical strategy better done without. Claiming complete

¹³⁸ Justice Scalia creates a false "them-us" dichotomy at the outset of his dissent in *Dickerson III*.

Those to whom judicial decisions are an unconnected series of judgments that produce either favored or disfavored results will doubtless greet today's decision as a paragon of moderation, since it declines to overrule *Miranda v. Arizona* Those who understand the judicial process will appreciate that today's decision is not a reaffirmation of *Miranda*, but a radical revision of the most significant element of *Miranda* (as of all cases): the rationale that gives it a permanent place in our jurisprudence.

Id. at 2337 (Scalia, J., dissenting). Like the Fourth Circuit's rhetorical ploy, Justice Scalia's attempt to monopolize the ethical high ground fails: no member of the legal community believes that judicial decisions are "unconnected."

¹³⁹ See Ferguson, *supra* note 95.

¹⁴⁰ Journalists routinely discuss the political predilections of judges. For example, The New York Times has reported that the Fourth Circuit is known as a "model of conservative pursuits." Neil A. Lewis, *A Court Becomes a Model of Conservative Pursuits*, N.Y. TIMES, May 24, 1999, at A1, A22. "It's gotten to the point that if there is a 2-to-1 liberal panel decision, you can predict with almost 'perfect' certainty it will go before the full court and be reversed. Liberal panel decisions are not allowed to survive." *Id.*

neutrality, even to an audience who knows it to be untrue, almost always entails undesirable consequences in addition to the disrespect inherent in untruthfulness. As Wasserstrom suggests, the law's dependence on language imposes a higher standard for its use and graver consequence for transgressions. When judges utter an obvious untruth, their integrity and thus, their authority become suspect, even when the untruth is a conventional one. Having attempted to gain the reader's good opinion, the Fourth Circuit summarizes its *Miranda* /§ 3501 argument, over-simplifying and distorting.

Determining whether Congress possesses the authority to enact § 3501 is *relatively straightforward*. Congress has the power to overrule judicially created rules of evidence and procedure that are not required by the Constitution. Thus, whether Congress has the authority to enact § 3501 turns on whether the rule set forth by the Supreme Court in *Miranda* is required by the Constitution. *Clearly it is not. At no point* did the Supreme Court in *Miranda* refer to the warnings as constitutional rights. Indeed, the Court acknowledged that the Constitution did not require the warnings, disclaimed any intent to create a "constitutional straightjacket," referred to the warnings as "procedural safe-guards," and invited Congress and the States "to develop their own safeguards for [protecting] the privilege." Since deciding *Miranda*, the Supreme Court has *consistently* referred to the *Miranda* warnings as "prophylactic," and "not themselves rights protected by the Constitution." *We have little difficulty* concluding, therefore, that § 3501, enacted at the invitation of the Supreme Court and pursuant to Congress's *unquestioned* power to establish the rules of procedure and evidence in the federal courts . . . , is governed by § 3501, rather than the judicially created rule of *Miranda*.¹⁴¹

Nothing could be clearer than the court's argument here. The text has perfect surface cohesion, proceeding in the promised "straightforward" fashion: a model of linearity.

<i>Major Premise:</i>	"Congress has the power to overrule judicially created rules of evidence and procedure that are not required by the Constitution."
<i>Minor Premise:</i>	"[T]he rule set forth by the Supreme Court in <i>Miranda</i> is [clearly not] required by the Constitution."
<i>Conclusion:</i>	"Therefore . . . § 3501, enacted . . . pursuant to Congress' unquestioned power to establish the rules of procedure and evidence . . . is constitutional . . . [and] the admissibility of confessions in federal court is governed by § 3501, rather than . . . <i>Miranda</i> ."

¹⁴¹ *Dickerson II*, 166 F.3d at 672 (citations omitted).

The problem with this proof is the articulation of the minor premise, the ambiguity of "rule." The "rule" of *Miranda* can mean either the larger "ruling" or the specific "rules." The Supreme Court laid out ruling and rules there as follows.

[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained, or appointed.¹⁴²

The distinction is critical; the general rule requiring "fully effective" procedural safeguards is grounded in the Fifth Amendment, but the specific rules, the *Miranda* warnings themselves, are not. The Fourth Circuit demonstrates no more than that the traditional *Miranda* warnings are just one example of "fully" effective safeguards.

In rhetorical terms, the court has built its argument around a half-truth. It is true that the warnings in themselves are not "rights," but it is equally true that the Constitution, as interpreted by the interpreter of last resort in *Miranda*, requires some "fully effective" means of informing suspects of their rights.¹⁴³ Arguments that use half-truths as premises are particularly dangerous, because they appear so plausible: premises and logic seem sound, but the conclusion may as easily be wrong as right. Such arguments have a sinister totalitarian pedigree.

In Gricean terms, arguments from half-truths are false implicatures under the maxim of quantity. Readers assume that sufficient information is being provided by the writer, neither too much or too little. This credulousness is exploited where, as here, information is selectively and incompletely provided.

¹⁴² *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

¹⁴³ The Supreme Court points out the Fourth Circuit's mistake, but it does so in a mild and civil fashion that contrasts with the lower court's bombast.

The Court of Appeals relied in part on our statement that the *Miranda* decision in no way "creates a 'constitutional straightjacket.'" See [*Dickerson II*], 166 F.3d at 672 (quoting *Miranda*, 384 U.S. at 467, 86 S. Ct. 1602). However, a review of our opinion in *Miranda* clarifies that this disclaimer was intended to indicate that the Constitution does not require police to administer the particular *Miranda* warnings, not that the Constitution does not require a procedure that is effective in securing Fifth Amendment rights.

Dickerson III, 120 S. Ct. at 2334 n.6 (internal citations).

In ethical terms, the court violates Audi's evidential and proportional principles when it supports its decision with the non-constitutionality of the *Miranda* warnings themselves. Improperly weighting a weak reason, the court fails to provide a "good" reason.

In its zeal to buttress its weak argument with a string of quotes from the Supreme Court, however, the Fourth Circuit sets a bomb ticking in its argument. Having cited the Supreme Court's invitation to Congress and the states "to develop their own safeguards for [protecting] the privilege" (line 10-11), the Fourth Circuit is led to characterize § 3501 as "enacted at the invitation of the Supreme Court" (line 14). Yet, in the very first sentence of its opinion, the circuit court had already, and accurately, characterized § 3501 as an attempt by Congress to overrule *Miranda* and "restor[e]" the former "voluntariness" enquiry.¹⁴⁴ Indeed, in Section III B, the court will spend three pages establishing that, in enacting § 3501, Congress intended to "reverse" *Miranda* and return to a "case-by-case determination of whether a confession was voluntary."¹⁴⁵ The Supreme Court is surely not in the habit of "inviting" Congress to "reverse" the Court by reestablishing precisely the ruling that the Court itself has struck down. The contradiction causes the *Miranda* / § 3501 argument to self-destruct.

c. Section III B

The rhetorical excesses of the opening paragraph and Section I recur in Section III B – where the Fourth Circuit elaborates on its *Miranda* / § 3501 analysis – and three more are added: misuse of precedent, the willful distortion of dissenting views, and the refusal to entertain questions.

Before beginning its analysis, the court leads the reader on a digression into *Miranda* scholarship that perhaps tells the reader more than the court intends. "Interestingly," the court begins, "much of the scholarly literature on *Miranda* deals not with whether Congress has the legislative authority to overrule the presumption created in *Miranda*, but whether it should."¹⁴⁶ The court then cites articles on both sides of the debate over *Miranda*'s effect on conviction rates, including three articles by Paul G. Cassell, attorney for amici curiae in *Dickerson*. The court then pronounces: "This debate, however, is one we need not enter. Whether Congress should overrule *Miranda* tells us nothing about whether it could. More importantly, it is not our role to answer that question.

¹⁴⁴ *Dickerson II*, 166 F.3d at 671.

¹⁴⁵ *Id.* at 684-87.

¹⁴⁶ *Id.* at 687. A careful reader's rule of thumb holds that when a judge precedes a proposition with "interestingly," the judge's reason for stating the proposition is often far more interesting than the proposition itself.

It is the province of the judiciary to determine what the law is, not what it should be."¹⁴⁷

Despite this boiler-plate disclaimer, the court appears to believe that *Miranda* allows felons to escape conviction and that it *should* be overruled. At the conclusion of its analysis, the court seems to breathe a sigh of relief: "No longer will criminals who have voluntarily confessed their crimes be released on mere technicalities."¹⁴⁸ Here, as in its earlier charge that the government was "taking the Fifth," the court reveals that separation of powers is not the motivating reason behind its decision; the characterization of those rules of law with which the court does not agree as "mere technicalities,"¹⁴⁹ like the expression "taking the fifth," is part of the law and order rhetoric that accompanies a conservative political agenda.

There are substantial costs associated with both the pretense of impartiality and the concealment of a court's real reasons. First, as Audi points out, an advocate who gives a non-motivating reason asks the audience to "stand on ground [the advocate does] not share."¹⁵⁰ The lack of respect inherent in such expectation is magnified when the advocate is a judge and the audience is bound by conclusions supported with non-motivating reasons. Second, it is difficult to predict the future behavior of advocates who do not provide their real reasons – a substantial consideration when judicial opinions are concerned.¹⁵¹ Finally, simple respect for truth would appear to require that judges prefer motivating to non-motivating reasons.¹⁵²

Even if the court does consider the overruling of *Miranda* to be a good thing, it may be objected here that it is illogical and unfair to tax it with insincerity and consequently with violating Audi's motivational principle – the court's ostensible reason, Congress' power to overrule *Miranda*, is also its real reason. Even if it is a reason, however, the contrived and over-simplified nature of the legal argument, and its mockery of the fifth amendment, suggests that the court is making an argument that does not entirely motivate its own belief that § 3501 is good law. Although the court elaborates in section III B on its argument that the "rule" of *Miranda* is not grounded in the Constitution, it still proves no more than that the specific procedures set out in *Miranda* are

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 692.

¹⁴⁹ *See, e.g., id.* The phrase "technical violation of *Miranda*" is always used in *Dickerson* to describe the failure to provide *Miranda* warnings. The phrase is repeated so often that it becomes a kind of mantra. Yet viewed with less partiality, apparent "technicalities" reveal themselves to be, like the *Miranda* warnings, complicated answers to complicated problems.

¹⁵⁰ Audi, *supra* note 32, at 261.

¹⁵¹ *See id.* at 262.

¹⁵² *See id.*

not required by the Constitution. It is difficult to believe that such a weak reason can be a motivating reason.

In an attempt to persuade the reader that it is a good reason, the court uses Supreme Court precedent lavishly, but disingenuously, hiding the forest in the trees. The quotations are all accurate, but one fact is left unnoted. All but one of the cases cited to demonstrate the a-constitutionality of *Miranda* are cases in which the Supreme Court applied *Miranda* to either a State criminal court proceeding or a federal habeas corpus petition,¹⁵³ where the Supreme Court may only decide issues arising out of the Constitution.¹⁵⁴ The court never addresses this issue.

In Section III B, the court employs two final rhetorical abuses: the distortion beyond recognition of dissenting views and the refusal to entertain questions. The dissenter's § 3501 / *Miranda* contention is brief and simple. He argues, first, that it is inappropriate to decide an issue of such significance *sua sponte*, on the sole basis of "about two pages from amici that the majority agrees with."¹⁵⁵ The dissenter then continues:

The majority holds that § 3501 governs the admissibility of confessions in federal court because *Miranda* is not a constitutional rule. I don't know whether it is or not, but before I had to decide, I would want thoughtful lawyers on both sides to answer one question for me. If *Miranda* is not a constitutional rule, why does the Supreme Court continue to apply it in prosecutions arising in state courts? *See*, e.g., *Stansbury v. California*, 511 U.S. 318, 114 S.Ct. [1899], [114] L.E.2d 293 (1994) (per curium); *see also*, *Mu Min v. Virginia*, 500 U.S. 415, 422, 111 S.Ct. 1899, 114 L.E.2d 493 (1991) (noting that with respect to cases tried in state court, the Supreme Court's "authority is limited to enforcing the commands of the United States Constitution"). This question illustrates that

¹⁵³ The only exception is *Davis v. United States*, 512 U.S. 452 (1994), which concerned a court martial.

¹⁵⁴ *See* *Chandler v. Florida*, 449 U.S. 560, 569-70 (1981) (state cases); 18 U.S.C. § 2254(a) (2000) (habeas corpus only for claims that person is in custody "in violation of the Constitution or laws" of the United States).

The court also uses precedent in less than candid fashion to support its assertion that the Supreme Court disapproves of irrebuttable presumptions in criminal cases and thus of *Miranda*'s presumption of involuntariness. The court cites to *Sandstrom v. Montana*, 442 U.S. 510 (1979), with a "cf." signal and the parenthetical "recognizing the harmful effects created by the use of mandatory conclusive presumptions in criminal cases." Although "cf." conventionally signals an analogy to the stated preposition, there is no principled analogy to *Sandstrom*. In *Sandstrom* the court determined that the common jury instruction that "we are presumed to intend the ordinary consequences of our actions" created a conclusive presumption that conflicts with the presumption of innocence and therefore violates a defendant's right to Due Process. To cite *Sandstrom* to support the overruling of *Miranda*'s presumption that unwarned confessions are coerced, as the Fourth Circuit does, is to create a false implicature, exploiting the reader's expectation that cited authority will be relevant.

¹⁵⁵ *Dickerson II*, 166 F.3d at 697 (Michael, J., dissenting in part).

the § 3501 issue is so sweeping that we should not be delving into it on our own. In this case, we should follow our usual practice of deciding only the issues raised by parties.¹⁵⁶

The rhetorical candor here is remarkable even for a dissenter. While, as in *Dickerson*, the authors of majority opinions seek to foreclose doubt, dissenters traditionally seek to foster it. But it is rare for a judge to so openly entertain doubt, saying "I don't know," even in dissent, and to ask a question without answering it.

The majority's response to the dissent displays judicial rhetoric at its worst, mischaracterizing opposing views and refusing to allow any challenge to its own reasoning.¹⁵⁷ At the end of Section III, B, the majority writes:

We are reassured in our conclusion by the fact that our dissenting colleague, after examining all of the relevant authority at his disposal, has been unable to conclude differently. At best, the dissent can but pose a rhetorical question concerning the constitutionality of § 3501. Apparently, all of the relevant authority of which the dissent is aware supports the conclusion we reach today. As a consequence, we have no difficulty holding that the admissibility of confessions in federal court is governed by § 3501, rather than the judicially created rule of *Miranda*.¹⁵⁸

This is a material distortion of the dissenter's view, as the dissenter himself points out in a footnote.

The majority misses my point when it erroneously suggests that I have examined all of the relevant authority and cannot conclude that *Miranda* renders § 3501 unconstitutional. My point is that we should not be examining the question at all, much less deciding it. For the record, however, not everyone

¹⁵⁶ *Id.*

¹⁵⁷ Justice Scalia similarly mischaracterizes the views of his colleagues in the majority. The Court would not agree with Scalia's statement that it disregarded "[C]ongressional action that concededly does not violate the Constitution" *Dickerson III*, 120 S. Ct. at 2342. The construction of the latter sentence (deliberately?) conceals the identity of the conceding party, but the most likely party, the majority, would surely not concede that § 3501 was a legitimate exercise of power since the statute contradicted the Court's interpretation of the Fifth Amendment. Ironically, Justice Rehnquist has been taken to task for using "[c]oncededly" where no concession has been made. See Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor, with an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1, 47 (1982).

Scalia also engages in willful misreading of *Miranda*. He writes, for example, "What is most remarkable about *Miranda* . . . is its palpable hostility toward the act of confession," *Dickerson III*, 120 S. Ct. at 2339 (Scalia, J., dissenting), and "[p]reventing foolish (rather than compelled) confessions is . . . the only conceivable basis" for the rules suggested in *Miranda*. *Id.* Such gross misreading approaches *ad hominem* argument, seeming to impugn the motives of the Warren Court.

¹⁵⁸ *Dickerson II*, 166 F.3d at 692.

agrees with the majority. See 1 Charles Alan Wright, *Federal Practice and Procedure* § 76 (2d. ed.) (“Unless the [Supreme] Court overrules *Miranda*, or holds that the 1968 statute [§ 3501] has successfully accomplished this, lower courts must follow the decision rather than the statute.”); I. Wayne R. LaFare & Jerold H. Israel, *Criminal Procedure* § 6.5(e) (1984) (§ 3501 “is unconstitutional to the extent that it purports to repeal *Miranda*.”)¹⁵⁹

But worse than the majority’s characterization of the dissenter’s doubt as assent is its refusal to respond to the question he raises. This refusal is disrespectfully dismissive in its manner of refusing – by deeming the question irrelevant, unworthy of an answer.

In the end, the dissent poses only the following rhetorical question: “If *Miranda* is not a constitutional rule, why does the Supreme Court continue to apply it in prosecutions arising in state courts.” Post at 697. As noted above, the Supreme Court has stated in unmistakable terms that the rule set forth in *Miranda* is not required by the Constitution. See ante at 688-90. In fact, in one of the Supreme Court’s most recent applications of *Miranda* to a state court prosecution the Supreme Court specifically stated that “*Miranda*’s safeguards are not constitutional in character.” *Withrow v. Williams*, 507 U.S. 680, 690-91, 113 S.Ct. 1745, 123 L.E.2d 407 (1993). Thus, although the dissent raises an interesting academic question, the answer to why the Supreme Court applies *Miranda* in prosecutions arising in state courts has no bearing on our conclusion that *Miranda*’s conclusive presumption is not required by the Constitution.¹⁶⁰

The refusal to entertain questions is disrespectful, but to deny the relevance of the question itself is a still more disrespectful strategy. Moreover, it is ironic that the majority chooses to dismiss the question here by calling it “rhetorical.” Although it is not unusual for courts to deny their own rhetoricity,¹⁶¹ it is incongruous for a court that itself uses manipulative language practices to employ “rhetorical” as a derogatory term. Moreover, the court’s evasion of the question here is disrespectful in its lack of candor. The court’s refusal to answer cannot be motivated by a belief that the dissent’s question concerning the application of *Miranda* to the states is irrelevant. On the contrary, the real reason why the court cannot entertain the question is that the only possible answers are unacceptable. There are only two possible explanations for the Court’s continued application of *Miranda* in state cases: 1) the *Miranda* rule is required by the Constitution, or 2) for 35 years, the

¹⁵⁹ *Id.* at 697, n.* (Michael, J., dissenting).

¹⁶⁰ *Id.* at 691, n.21.

¹⁶¹ See Wetlaufer, *supra* note 4, at 1555, 1590. It also appears from the context that the *Dickerson II* court is using “rhetorical question” to mean a question that *deserves* no answer. See *Dickerson II*, 166 F.3d at 691 n.21. In fact, a “rhetorical question” is a question that *needs* no answer, “something phrased as a question only for dramatic effect and not to seek an answer, such as *who cares?* (= nobody cares).” OXFORD AMERICAN DICTIONARY 581 (1980).

Supreme Court has been doing something it has no power to do: imposing non-constitutional rules of evidence and procedure on the state courts.¹⁶²

The second answer is the only one consonant with the constitutionality of § 3501, but to utter it would be lèse majesty. No matter how disrespectful the court permits itself to be toward counsel and dissent, it must present at least the appearance of respect for its hierarchical superior, the Supreme Court. Ironically, this respect deprives the *Dickerson* court of the only principled argument for the constitutionality of § 3501, and the very conclusion Justice Scalia would reach:¹⁶³ *Miranda* was a mistake.¹⁶⁴

In sum, the rhetoric of the majority opinion in *United States v. Dickerson* combines an intermittently exaggerated respect for the Supreme Court with disrespect for the rest of its audience – parties, counsel, dissenter, the general reader. As we have seen, this disrespect takes many forms. And although *Dickerson* is undoubtedly an extreme example of judicial rhetoric, it is far from an anomaly.¹⁶⁵ It is the rare judicial opinion that does not overstate the strength of its own reasoning, misstate opposing views, and provide reasons that do not motivate the court's own belief. Many engage as well in the even more disrespectful practices noted here – false implicature, misuse of precedent, evasion of hard questions, and vilifying those who hold opposing views.

This is the reality of much judicial prose: a rhetoric that too often seeks to subdue rather than to educate. And our courts are highly unlikely to adopt a more ethical, more cooperative rhetoric anytime soon. Nonetheless, it is troubling to contemplate the possible effects of disrespectful judicial rhetoric – compliance without respect, oversimplification, institutionalized deception. One can be forgiven for wondering whether, in the end, a legal education and

¹⁶² See Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 498 (1999).

¹⁶³ *Dickerson III*, 120 S. Ct. at 2337 (Scalia, J., dissenting).

¹⁶⁴ Our colleague, Susan Herman, suggested that this institutional constraint might override motivational, evidential, and proportionality principles – that is, it might be ethical to give weak and non-motivating reasons when advancing one's real reasons would violate hierarchical norms.

¹⁶⁵ See, e.g., *Minersville School District v. Gobitis*, 310 U.S. 586 (1940); *Parker v. Levy*, 417 U.S. 733 (1973); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989); *Division of Employment v. Smith*, 494 U.S. 872 (1990). These opinions all reflect a conservative cast of mind, and we are mindful of J.B. White's question whether defenders of individual rights sometimes sink to the rhetorical lows that bedevil the cases cited above. White points to some of the excesses of Justice Douglas, singling out *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Henry v. United States*, 361 U.S. 98 (1959). And we have noticed that even those courts that generally use rhetoric ethically occasionally engage in disingenuous practices. See, e.g., *Kelly v. Gwinnell*, 476 A.3d 1219 (N.J. 1984).

the rhetorical excesses it can foster are not the worst preparation for a judicial career.

B. The Rhetoric of Appellate Advocacy: Briefs in Support of and in Opposition to Petition for Rehearing En Banc in United States v. Dickerson

Because in *United States v. Dickerson* a panel of the Fourth Circuit decided an issue raised only by amici, an examination of the rhetoric of appellate advocacy in the context of the *Miranda* /§ 3501 debate requires that we look primarily at the briefs of counsel and amici in support of and in opposition to rehearing en banc rather than at the briefs on appeal.¹⁶⁶ When we look at the briefs in support of and in opposition to rehearing, we find that the unusual situation in *Dickerson* makes for some illuminating rhetorical practices and singular role behavior.

The role of appellate counsel logically entails a rhetoric of representative advocacy, while a rhetoric of subscriptive advocacy would seem more appropriate for amici curiae, since in principle these “friends” of court disinterestedly advocate the public good.¹⁶⁷ In the *Dickerson* briefs, roles and rhetoric can be observed both in conflict and in concert.

First, we have amicus curiae, the Washington Legal Foundation (WLF), nominally a subscriptive advocate, who assumes the representative role of prosecution. Its credibility and ethicity are ultimately diminished by its disrespectful, take-no-prisoners rhetoric.

Next, we have the United States Attorney and the Department of Justice (DOJ), whose role calls for representative advocacy, but whose expressed belief in the constitutional status of *Miranda* makes them subscriptive advocates cautiously arguing the same proposition as counsel for *Dickerson*. This role confusion seems at first glance to weaken the persuasiveness of the government’s arguments. Further reflection suggests, however, that its thoughtful and measured argument enhances both persuasiveness and ethical credibility.

Finally, on *Dickerson*’s side, we have his counsel’s brief and those of two amici, the American Civil Liberties Union (ACLU) and the National Association of Criminal Defense Lawyers (NACDL). Counsel for *Dickerson* weds his role as defense attorney with uncompromising representative rhetoric that avoids disrespectful excesses. The rhetoric of amici ACLU and NACDL is more representative than subscriptive, largely indistinguishable from that

¹⁶⁶ The amicus briefs of the Washington Legal Foundation and the Safe Streets Coalition (WLF/SSC) on appeal and in *United States v. Leong*, 116 F.3d 1474 (4th Cir. 1997), will also be briefly examined since they prompted the Fourth Circuit’s decision in *Dickerson*.

¹⁶⁷ In practice, however, the rhetoric of amicus briefs tends toward the representative, and is largely indistinguishable from that of counsel for the parties.

of counsel for defendant-appellant Dickerson, but in traditional terms these are model briefs – crisp, yet dignified, with none of the mud-slinging and rabble-rousing that mar the opposition brief of amicus WLF. Nonetheless, we came away from a study of all five briefs with a subversive sense that the most persuasive is the most subscriptive and least adversarial – that of the prosecution compelled by circumstance to argue out-of-role.

1. Amicus brief of the WLF in opposition to rehearing

The brief of the WLF, like the majority decision in *Dickerson*, is tainted by rhetorical excesses that violate Audi's threshold and desirability principles. First, there is an outright untruth stemming from a violation of the maxim of quality (the statement will be truthful and based on sufficient evidence). On the question of whether the continued application of *Miranda* to the states is an indication it is a constitutional rule, the WLF says it "may represent no more than the application of the Court's judicially-created, but not constitutionally mandated, remedial scheme in the absence of legislatively devised alternatives."¹⁶⁸ Because the Supreme Court has no power to impose any "remedial scheme" on state courts in the absence of a constitutional mandate, this is not a viable argument.¹⁶⁹

Then there are *ipse dixit* arguments. The WLF commends the Fourth Circuit for holding that the requirement that a court "consider several *Miranda* factors, as well as some additional ones" means § 3501 goes beyond merely restoring the pre-*Miranda* voluntariness standard.¹⁷⁰ Yet requiring courts to consider giving *Miranda* warnings or creating factors for after-the-fact assessment of voluntariness does not on its face establish procedures as "fully as effective as . . . [*Miranda* warnings] in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it,"¹⁷¹ a caveat to permissible alternatives that the Warren Court adds and that the

¹⁶⁸ Brief of the Washington Legal Foundation in Opposition to Petition for Rehearing at 10-11, *Dickerson II*, 166 F.3d 667 (4th Cir. 1999) (No. 97-4750), *rev'd*, *Dickerson III*, 120 S. Ct. 2326 (2000) [hereinafter Brief of the WLF in Opposition to Rehearing]. Why the Court has applied *Miranda* in state cases and federal habeas cases for 35 years if it is not constitutionally mandated is the question at the heart of the *Miranda* / §3501 debate. It has, as noted in Part IIA, only two possible answers: 1) *Miranda* is indeed constitutionally mandated or 2) the Court has been mistakenly doing something it has no power to do. See *supra* note 162 and accompanying text. Because the WLF cannot accuse the Court of blundering, amicus equivocates. Faced with the same dilemma, the Fourth Circuit called the question "rhetorical." *Dickerson II*, 166 F.3d at 691 n.21; see also *supra* note 161.

¹⁶⁹ See e.g., *Stansbury v. California*, 511 U.S. 318 (1994).

¹⁷⁰ Brief of the WLF in Opposition to Rehearing at 11 n.6, *Dickerson II*, (No. 97-4750).

¹⁷¹ *Miranda*, 384 U.S. at 490.

Fourth Circuit and the WLF ignore.¹⁷² Despite amici's *ipse dixit* contention that Section 3501 does more than restore the pre-Miranda voluntariness test, there is no evidence that it does so.¹⁷³

There are strawman arguments based on a misstatement of opposing views. The WLF condemns the DOJ for asking the court to rehear a case in order to apply different law than the panel did when the Department knows that the law it wants the court to apply is "incorrect."¹⁷⁴ The Department would not concede this, however. Rather it thinks that there is another "equally well-established" line of cases that might govern the problem.¹⁷⁵

In addition, there are a host of disrespectful language practices that breach an ethic of *ethos* and *pathos*. There are peevish, incredulous *ad hominem* attacks on the Department of Justice similar to those made in the Fourth Circuit's opinion. On the Department's refusal to pursue the Section 3501 issue, amici say, "this unique and unwarranted posture of the Department of Justice is itself reason enough for the Court to exercise its discretion to deny

¹⁷² Like the blurb in an advertisement for a film, the Fourth Circuit and the WLF quote selectively and out-of-context.

¹⁷³ In fact, the WLF/SSC seem aware of this in their earlier brief in *Leong*. There they concede "Section 3501 cannot be read in splendid isolation . . . [I]t must be examined against the backdrop of all federal law that bears on the subject . . . Taken together, these remedies along with section 3501 form a constitutional alternative to the *Miranda* exclusionary rule." Brief of Amici Curiae Washington Legal Foundation and Safe Streets Coalition in Response to Supplemental Briefs of the Parties and Amicus National Ass'n of Criminal Defense Lawyers at 21-22, *United States v. Leong*, 116 F.3d 1474 (4th Cir. 1997) (unpublished table decision) [hereinafter Brief of Amici Curiae WLF/SSC].

¹⁷⁴ Brief of the WLF in Opposition to Rehearing at 16, *Dickerson II* (No. 97-4750).

¹⁷⁵ There are also strawman arguments in an earlier brief of the WLF/SSC in *Leong*. There, the WLF/SSC assert that "[i]n order to warrant disregarding Section 3501 in this case, the argument the Department of Justice would have to make is that the lower courts have a duty to follow a non-constitutional Supreme Court holding instead of an Act of Congress superseding that holding." Brief of Amici Curiae WLF/SSC at 3, *Leong* (No. 96-4876). But that is not the argument the Department of Justice would make. It would and did instead argue that it had a duty to follow a Supreme Court holding on a constitutional requirement.

Other strawman arguments in *Leong* are coupled with overstatement and condescension. "The centerpiece of the Department's brief is the claim that the Supreme Court has already decided the constitutionality of § 3501, and the brief diligently marshals every bit of supporting court *dicta*." *Id.* at 7-8. But the Department of Justice does not claim the Supreme Court has decided the issue. In fact, in *Dickerson*, it says instead that lower courts should not apply § 3501 to admit confessions that *Miranda* would exclude because the Supreme Court has said "[w]e reaffirm that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Brief for the United States in Support of Partial Hearing En Banc at 12, *Dickerson II*, 166 F.3d 667 (4th Cir. 1999) (No. 97-4750), *rev'd*, *Dickerson III*, 120 S. Ct. 2326 (2000) [hereinafter Brief for the United States in Support of Partial Hearing].

en banc rehearing.”¹⁷⁶ Unique? Seven administrations have adopted this position. “Reason enough to deny en banc rehearing”? This assumes it is more important to punish the Department for its “defiance” than to give plenary consideration to a novel issue of surpassing importance to an individual and to the community. The WLF’s vengefulness breaches its ethical persona.

Indeed, the WLF’s advocacy consistently violates Wasserstrom’s notion of “the respect due all persons . . . , and the resulting wrongness in viewing or using members of the moral community solely as means to some further end, as things to be used as one might utilize artifacts or other objects.”¹⁷⁷ For the WLF, Dickerson is only a means to an end, which is to bring the § 3501 issue first before the Fourth Circuit and then before the Supreme Court. This is, to some degree, an ethical failing shared by all amicus briefs – the friends of the court often have little interest in the fate of the individual parties. But the WLF takes this a step further, advocating a decontextualized form of appellate review based entirely on argument by amici. Its discussion of the equity of deciding an issue raised only by amicus curiae does not enhance its image, however.¹⁷⁸

[T]he *Dickerson* Court was expressly made aware of, and had available to it, the Foundation’s voluminous briefs on Section 3501 filed in both *Leong* and *United States v. Sullivan*, the predecessor cases to *Dickerson*. While Dickerson did not brief Section 3501 in this Court, he had ample opportunity to address it in his brief as appellee, and/or in oral argument, and he could have sought permission to file a supplemental, post-argument brief once he saw the extent of the panel’s interest in the issue.¹⁷⁹

Although defense counsel might with hindsight be faulted for failing to brief a potentially harmful issue, even though it was not put into contention by the government, the WLF’s statement makes us equally aware of the legitimacy of the defendant’s concern that the court proceeded with only one-sided briefing from amici for the United States in other cases and this one.

¹⁷⁶ Brief of WLF in Opposition to Petition for Rehearing at 3, *Dickerson II* (No. 97-4750).

¹⁷⁷ Wasserstrom, *supra* note 1, at 28.

¹⁷⁸ Counsel for Dickerson argued,

[t]his case has raised an issue of tremendous import, yet Mr. Dickerson was given little, if any, real chance to weigh in on the matter. Regardless of the holding in this case, notions of fundamental fairness and due process dictate that the party whose interests are most adversely affected by the Court’s actions should be given the full opportunity to brief and argue the issue.

Appellee’s Petition for Rehearing at 10 n.9, *Dickerson II*, (No. 97-4750).

¹⁷⁹ Brief of WLF in Opposition to Petition for Rehearing at 16 n.9, *Dickerson II*, (No. 97-4750) (citations omitted).

The WLF can also be downright insulting, calling the Department's petition for a rehearing "coy,"¹⁸⁰ though it is unclear what conceivable justification it has for describing the government's position – even if it has vacillated – as "coquettish." As if this were not enough, the WLF/SSC also have a history of hyperbole and disdain. In *Leong*, they argue the DOJ is "unable to answer" arguments that *Miranda's* exclusionary rule is not constitutional and instead enlists "a red herring: the lower court's duty to follow the Supreme Court's constitutional holdings."¹⁸¹ This argument is not just inapposite, the WLF/SSC says, it is "wholly inapposite."¹⁸² The DOJ's failure to discuss *United States v. Alvarez-Sanchez*, a case not involving a custodial confession, is criticized not just for being absent from the defendant's brief, but for being "notably absent."¹⁸³ In an argument *ad hominem*, the DOJ, in refusing to argue for § 3501,

seems not to have the kind of legal judgment that is properly the province of the Executive Branch, but rather a political judgment that (for some inscrutable and unarticulated reason) § 3501 should not have been passed by Congress The Court should not sanction the Department's maneuvers to avoid its duty to faithfully execute the law.¹⁸⁴

Yet, the WLF/SSC has its own political agenda that leaks out in their amicus brief in support of the United States in *Dickerson*. They admit the "explosion of violent crime" compels measures that will "diminish the misuse of our justice system by criminal defendants" and that will prevent "the release of dangerous criminals" because of "technical *Miranda* claims."¹⁸⁵ Moreover, the WLF/SSC argue "*Dickerson* would *in no way* have been unfairly prejudiced by the district court's consideration of § 3501," especially because "[p]rejudice concerns are, in any event, simply inapplicable because *Dickerson* (and the United States) both had affirmative duties to direct the district court's attention to the statute"¹⁸⁶

There is room in advocacy for indignation over perceived miscarriages of justice. But obfuscation, mockery, incredulity, and condescension aimed at professionals with sincere differences of opinion are bad taste, bad rhetoric, and bad ethics. Moreover, even if such practices can be condoned as

¹⁸⁰ *Id.* at 17. "Coy" has nasty and sexist connotations.

¹⁸¹ Brief of Amici Curiae WLF/SSC at 3, *Leong* (No. 96-4876).

¹⁸² *Id.*

¹⁸³ *Id.* at 8.

¹⁸⁴ *Id.* at 30.

¹⁸⁵ Brief of the Washington Legal Foundation and the Safe Streets Coalition as Amici Curiae in Support of the Appellant United States at 2, *Dickerson II*, 166 F.3d 667 (4th Cir. 1999) (No. 97-4750), *rev'd*, *Dickerson III*, 120 S. Ct. 2326 (2000) [hereinafter Brief of Amici Curiae WLF/SSC].

¹⁸⁶ *Id.* at 10 (emphasis added).

expressions of zealous advocacy likely to be neutralized by equally zealous opposing rhetoric, one serious consequence remains. The rhetoric of the winning side is all too often perpetuated in the court's opinion.¹⁸⁷

In *Dickerson*, the Fourth Circuit incorporates into its opinion some of the dubious rhetorical practices of the WLF/SSC in their brief on appeal from the district court. Indeed some of the logical fallacies the Court committed in its decision were first made by the WLF/SSC in their brief. The amici were the first to admit that § 3501 was enacted specifically to overrule the rules promulgated in *Miranda* and to restore the voluntariness standard,¹⁸⁸ admitting § 3501 "establishes a 'lenient' standard of admissibility."¹⁸⁹ Then, perhaps fearing that rules as effective as *Miranda* warnings are indeed constitutionally required, they equivocate – making the *ipse dixit* argument that § 3501 is as effective. This equivocation causes their argument on procedural safeguards to self-destruct, as the court's arguments on this issue did.¹⁹⁰ The circuit court also echoed in *Dickerson* many of the disrespectful language practices of the WLF, mocking all parties on the *Miranda* side of the *Miranda*/§ 3501 debate but singling out the DOJ. However distasteful this is in an advocate, the consequential nature of judicial rhetoric and public perception of judicial integrity suggest the rightness of a higher standard of decorum.

2. *Prosecution's brief in partial support of rehearing*

The prosecution in *Dickerson* manifests a very different view than the WLF of the moral and professional responsibilities of an appellate advocate. The WLF finds it extraordinary that the Department disregards its traditional duty to defend an Act of Congress against a constitutional challenge whenever a "reasonable argument can be made in its defense."¹⁹¹ The Department of Justice, however, has a view akin to that advanced by Audi, who argues

¹⁸⁷ Indeed, Justice Scalia's sneering litany of the majority's "word games" (in trying to equate "constitutional underpinning" "constitutional origin" and "constitutionally based" with "constitutional"), *Dickerson III*, 120 S.Ct. at 2348 (Scalia, J., dissenting), is modeled on his former clerk's amici brief which offers a similar sarcastic litany: "The Department maintains that . . . *Miranda* rules are based on 'constitutional premises'; 'rests on a constitutional foundation'; or has 'constitutional footings' or 'moorings.' These phrases have no fixed meaning and of little assistance in answering . . . whether *Miranda*'s exclusionary rule can be modified by Congress." Brief of WLF in Opposition to Rehearing at 7, n.3, *Dickerson II* (No. 97-4158) (citations omitted).

¹⁸⁸ Brief of the WLF/Safe Streets, *Dickerson* at 5.

¹⁸⁹ *Id.* at 6.

¹⁹⁰ See *supra* notes 133-34 and accompanying text.

¹⁹¹ Brief of WLF in Opposition to Rehearing at 19, *Dickerson II* (No. 97-4750); see also *id.* at 20.

it is essential we not take our moral obligations to extend only to acting within our rights or to be defined wholly by our social roles. Morality is more demanding than that. It gives primacy to our character as agents; it provides ideals as well as restrictions, and it prevents us from submerging our moral autonomy in our professional roles.¹⁹²

The Department takes the moral high road in refusing to pursue an argument that is consistent with its traditional role, because that argument seems to be contrary to its understanding of the Constitution. Interestingly, the Department of Justice does not defend its position using the unbridled rhetoric of representative advocacy. Instead it is openly subscribe, prefacing its arguments with "we believe," where traditional appellate advocacy would simply assert. Moreover, it is remarkably candid about the ambiguity of authority.¹⁹³

For example, although arguing "[t]he *Miranda* decision was itself clearly based on the Constitution, for it held that '[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement . . . can be truly the product of . . . free choice,'" ¹⁹⁴ the DOJ also admits the Supreme Court has "retreated from that aspect of its reasoning."¹⁹⁵ The DOJ concedes that "[r]ead in isolation, there is language in *Tucker* and its progeny that might be read to support [a] conclusion" that "*Miranda* is a 'judicially created rule' that could be supplanted by legislation."¹⁹⁶ Yet, it suggests that the Court review the whole "body of Supreme Court jurisprudence on this issue"¹⁹⁷ because "an equally well-established line of Supreme Court cases . . . directly requires the conclusion that *Miranda* has a constitutional basis."¹⁹⁸ The Department of Justice points to *Miranda*'s consistent application to the states and on federal habeas review to put *Tucker et al* in perspective.

This candor is atypical of advocacy rhetoric. For example, although the DOJ concedes that *Tucker* establishes *Miranda*'s rules as not *per se* constitutional, amici for the ACLU, more typically and more traditionally, find ways of discussing *Tucker* and its progeny in much more affirmative terms, as follows.

¹⁹² Audi, *supra* note 32, at 281.

¹⁹³ Justice Rehnquist's opinion for the majority in *Dickerson* adopts this candor when it admits "there is language in some of our opinions that supports the view taken by [the Fourth Circuit]. *Dickerson III*, 120 S. Ct. at 2333.

¹⁹⁴ Brief for the United States in Support of Partial Rehearing at 8, *Dickerson* (No. 97-4750).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 9.

¹⁹⁷ *Id.* at 6.

¹⁹⁸ *Id.*

To be sure, the Supreme Court held in *Tucker* and *Elstad* that failure to give warnings will not support exclusion of "fruits" derived from a confession. But both *Elstad* and *Tucker* recognized . . . that failure to give warning requires exclusion of even voluntary statements The tainted fruit holding of *Elstad* and *Tucker* therefore cannot support the panel's sweeping conclusion that *Miranda*'s warning requirement . . . was nevertheless without constitutional foundation.¹⁹⁹

We can only speculate as to why the prosecution uses the traditional rhetoric of advocacy only intermittently. It is possible that the U.S. Attorney is not in agreement with the Department of Justice's *Miranda* policy, and its compelled obedience is reflected in argument lacking the traditional indicia of zealous appellate advocacy. The prosecution's rhetoric of advocacy may have suffered when it crossed boundary lines and assumed an unfamiliar role that required it to temper statements to accord with past postures or related department policies.²⁰⁰ As Audi remarked, "[i]t is both prudentially unwise and morally undesirable to be valuationally fragmented."²⁰¹ It is equally possible, however, that the seriousness of the issue influenced the DOJ's decision to use language more respectfully. Perhaps a measured response is the government's proper response. Given its responsibility to effective law enforcement and a general respect for individual rights, in the long run, the Department of Justice's departure from traditional advocacy may be both ethical and persuasive.

3. *Defense and amici briefs in support of rehearing*

Because counsel for Dickerson and the defense amici, ACLU and NACDL, are primarily concerned with preventing unwarranted restriction of liberty, some rhetorical flourish in their briefs is justified.²⁰² They, thus, all open with a focus on the big picture. For example, the defense opens with a direct reference to Congress's attempt to overrule *Miranda*, an attempt it characterizes as an abuse of power. It quotes extensively language in *Miranda* indicating that the Court was applying the Fifth Amendment's privilege against self-incrimination in the context of custodial interrogation and was engaged, therefore, in constitutional decisionmaking when it constructed a

¹⁹⁹ Brief of the American Civil Liberties Union as Amicus Curiae in Support of Rehearing at 8-9, *Dickerson II*, 166 F.3d 667 (4th Cir. 1999) (No. 97-4750), *rev'd*, *Dickerson III*, 120 S. Ct. 2326 (2000) [hereinafter Brief of Amicus Curiae ACLU].

²⁰⁰ The WLF refers to some departmental inconsistency in its amicus brief in opposition to rehearing. Brief of the WLF in Opposition to Rehearing at 20 n.13, *Dickerson II* (No. 97-4750).

²⁰¹ Audi, *supra* note 32, at 270.

²⁰² It can, of course, be objected that they are also advocating the suppression of evidence, arguably a morally criticizable undertaking in that it can hardly be said to serve truth.

rule protecting it.²⁰³ Similarly, the ACLU opens by characterizing the *Miranda* warnings as essential if the Fifth Amendment's protection against compelled self-incrimination is to be meaningful, describing that Fifth Amendment right as "essential to the preservation of our accusatorial system of criminal justice."²⁰⁴ It closes by reminding the court that a 1988 American Bar Association study concluded that the warning requirement "does not have a significant impact on law enforcement's ability to solve crime or to prosecute criminals successfully."²⁰⁵ The ACLU adds that *Miranda* has been "remarkably successful in the 30 years since it was announced . . . [It] has created guidance for the police while at the same time ensuring that suspects are informed of their constitutional rights prior to questioning."²⁰⁶ This emphasis on the importance of *Miranda* and its careful balancing of the interests reminds the readers what is at stake. As the NACDL says: "The panel's decision deprives citizens of this Circuit of the constitutional safeguards afforded all other citizens of this country."²⁰⁷ Although this conclusion is *ad popule*m, it is not unethical rhetoric because it does not appeal to feelings one would be ashamed of acting upon.

The WLF also ends with an *ad popule*m argument, arguing that § 3501 protects the public from the "windfall" *Miranda* gives to dangerous felons. But Audi and Wasserstrom would distinguish between these two *ad popule*m arguments. There is a difference between *ad popule*m arguments mustered to protect civil rights when the government bears down on an individual and *ad populum* arguments that exploit fear and self interest to minimize those rights.

Unlike the WLF, which uses the defendant as a means to an end,²⁰⁸ the defense tries to remind the court that justice to Dickerson is an end in itself. Dickerson's counsel reminds the court that fundamental fairness requires giving defendant a "full opportunity to brief and argue the issue."²⁰⁹

²⁰³ Appellee's Petition for Rehearing at 4, *Dickerson II* (No. 97-4750).

²⁰⁴ Brief of Amicus Curiae ACLU at 1, *Dickerson II* (No. 97-4750); see also Brief of Amicus Curiae of the National Ass'n of Criminal Defense Lawyers in Support of Defendant-Appellee's Petition for Rehearing or Rehearing En Banc at 3, *Dickerson II*, 166 F.3d 667 (4th Cir. 1999) (No. 97-4750), *rev'd*, *Dickerson III*, 120 S. Ct. 2326 (2000) [hereinafter Brief of Amicus Curiae NACDL] (stating that "the Fifth Amendment preserves . . . principles of humanity[,] civil liberty" and privilege fulfilled only when the accused is fully apprised of his rights); Appellee Petition for Rehearing at 5, *Dickerson II* (No. 97-4750) (stating that *Miranda* "go[es] to the roots of our concepts of American criminal jurisprudence [and] the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime").

²⁰⁵ Brief of Amicus Curiae ACLU at 13-14, *Dickerson II* (No. 97-4750) (citing American Bar Association, *Criminal Justice in Crisis*, 27, 33-34 (1988)).

²⁰⁶ *Id.* at 13-14.

²⁰⁷ Brief of Amicus Curiae NACDL at 2, *Dickerson II* (No. 97-4750).

²⁰⁸ See *infra* note 177 and accompanying text.

²⁰⁹ Appellee's Petition for Rehearing at 11 n.4, *Dickerson II* (No. 97-4750).

Additionally, he asks the court to refrain from deciding issues not raised by a party entitled to raise them when failure to consider the issues is not plain error. Thus, the defense attorney tries to contextualize the doctrinal issue and establish its import for the defendant.

Like the WLF, the defense and its amici occasionally overstate their arguments, using bold, unequivocal language. The NACDL, for example, says the cases the WLF rely upon "actually reaffirm *Miranda*: *Harris*, *Tucker*, and *Elstad* merely refuse to extend the holding of *Miranda*, and *Quarles* creates only a narrow exception for exigent circumstances. Thus . . . the cases offer no support for the conclusion that *Miranda* is not constitutionally compelled."²¹⁰ Yet, generally, hyperbolic certainty is avoided and arguments are made affirmatively but fairly. For example, whereas the WLF cites *Harris* for the proposition that "self-incriminating statements" given while in custody are admissible even though "the *Miranda* rules were not complied with,"²¹¹ NACDL amicus carefully qualifies those holdings, noting that, in *Harris*, the statements made in violation of *Miranda* were deemed admissible for impeachment purposes, not as evidence of guilt, and thus, that "*Harris* reaffirms the core holding of *Miranda*, which 'barred the prosecution from making its case with statements of an accused . . . prior to . . . waiving counsel.'"²¹² While the law is framed favorably by the defense and its amici, the cases and their context are fully given and cogently distinguished or circumscribed.

Moreover, these legal arguments are made with conviction but without excess – there are no *ad hominem* violations. Neither the attorney for the defense nor amici counsel for the ACLU and NACDL refer to opposing counsel, and they mention the Fourth Circuit panel only to summarize its decision or suggest an error.²¹³ Sarcasm and mockery are not employed – only the occasional exaggeration undermines the ethical persona the attorneys create in their briefs.

These attorneys benefit from role consistency in Audi's sense. Defending the Fifth Amendment's guarantee against compelled self-incrimination, they also defend the respect for the integrity and dignity of all persons in which that guarantee is grounded. In so doing, they merge their professional roles as defense counsel and lobbyist with the role of moral agent. This enables them to comply with Audi's motivational and proportionality principles and to adhere to an ethic of *logos*, *ethos*, and *pathos*. They give both their legal

²¹⁰ Brief of Amicus Curiae NACDL at 11, *Dickerson II* (No. 97-4750).

²¹¹ Brief of WLF in Opposition to Rehearing at 5-6, *Dickerson II* (No. 97-4750).

²¹² Brief of Amicus Curiae NACDL at 11, *Dickerson II* (No. 97-4750).

²¹³ Brief of Amicus Curiae NACDL at 6, 9, 11, 14, 15, *Dickerson II* (No. 97-4750); Appellee's Petition for Rehearing at 4, 7 n.2, 8, 9, 10, *Dickerson II* (No. 97-4750).

and their policy arguments, and clearly articulate their premises and their reasoning.

An examination of these five briefs suggests that many characteristics common to advocacy rhetoric are not only unethical, but – to a critical and sensitive reader – ineffective. It is worth considering whether, as a profession, we may need to refine our notions of persuasiveness to improve both our image and our lawyering.²¹⁴

C. *The Rhetoric of Legal Scholarship*

The rhetoric of advocacy permeates legal scholarship. This may be a consequence of what has traditionally been its primary purpose, which is to analyze a legal problem and to prove the superiority of one of perhaps several solutions. Or it may be because legal scholars are trained to be advocates and become scholars without training in scholarly method or rhetoric. Whatever the reason, legal scholars adopt a rhetoric similar to that of advocate and judge.

[T]he legal scholar adopts a voice that is objective, neutral, impersonal, authoritative, judgmental, and certain. It is a disembodied voice that implicitly denies any contingency upon the cultural or personal circumstances of the author

In keeping with our objective and acontextual stance, we treat other people's texts as if they too were objective and acontextual. And in pursuing our purpose of finding the one right answer to our questions, we tend to approach other people's texts . . . as if they had one and only one true meaning. Thus, our rhetoric on the subject of texts is usually, at least implicitly, a rhetoric of exclusivity, of judgment and closure, and of one objective and ascertainable meaning

[T]he rhetoric of legal scholarship is also distinguished by the style of its argument and proof. Our arguments are highly rational. They are made in the spirit . . . of deductive, syllogistic logic. They aspire to the linearity of a geometric proof We use them to control our reader at every point and essentially to compel her assent. Thus, we seek to prove, to a high level of certainty, that ours is the one right – or in any event the best – answer.²¹⁵

²¹⁴ There is some empirical research suggesting that traditional techniques of persuasion in appellate briefs do not, in fact, persuade judges. See James F. Stratman, *Investigating Persuasive Processes in Legal Discourse in Real Time: Cognitive Biases and Rhetorical Strategy in Appeal Court Briefs*, 23 DISCOURSE PROCESSES 1 (1994).

²¹⁵ Wetlaufer, *supra* note 4, at 1568-71.

Yet, this adversarial stance may not be particularly well-suited to "the disinterested pursuit of truth."²¹⁶ Although specious arguments "will doubtless be exposed and refuted in the end, [a] discipline would be better served if it could devote all of its energies to open, intellectually honest debate, rather than having to divert precious time to ferreting out the misrepresentations and other dishonest tactics employed . . . to win the debate by any means possible."²¹⁷

United States v. Dickerson has not yet generated a body of scholarship upon which an analysis of scholarly rhetoric can be based. Yet, there is sufficient commentary on issues related to *Miranda* to make some general observations about how the language of legal scholarship echoes the rhetoric of advocacy. We focus here on an article by Paul G. Cassell,²¹⁸ on a short reply to Cassell's article by supporters of *Miranda*,²¹⁹ on an article deploring police over-reaction to *Miranda*,²²⁰ and on an article outlining the dangers of interrogation outside of *Miranda*.²²¹

Cassell's article is about the deleterious effect *Miranda* has on law enforcement generally, and on how it fails to protect victims and innocent suspects. He advances three propositions. First, he attempts to prove statistically that coerced false confessions are so rare they do not justify placing restrictions on police interrogation. Second, he argues that the *Miranda* warnings and waiver requirements hinder the police from obtaining confessions that could exonerate innocent suspects who gave false confessions and that could protect society from crimes committed by felons set free by *Miranda*. Finally, he proposes that the court substitute videotapes of confessions for *Miranda* warnings since videotaping can secure confessions while diminishing the chances of coercion.

In making these arguments, Cassell uses a number of rhetorical strategies that violate Audi's threshold and desirability principles. Cassell's first argument is based on a problematic premise, namely that the number of false confessions obtained through police coercion is so low that it does not justify

²¹⁶ *Id.* at 1594-95.

²¹⁷ Nicholas Dixon, *The Adversary Method in Law and Philosophy*, 30 THE PHILOSOPHICAL FORUM 13, 22 (1999). The problem is not limited to legal scholarship; Dixon argues that the dirty tricks of adversarial debate have no place in philosophy.

²¹⁸ Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions, and from Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998). Professor Cassell wrote the pro § 3501 briefs in *Dickerson II*; his scholarship is cited in *Dickerson II*. See *supra* note 108.

²¹⁹ See Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557 (1998).

²²⁰ See Fred E. Inbau, *Over-Reaction – The Mischief of Miranda v. Arizona*, 73 J. CRIM. LAW & CRIMINOLOGY, 797 (1982).

²²¹ See Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV 109 (1998).

Miranda-like restrictions on interrogation. There are both normative and empirical problems with this premise.

To begin with the empirical problem, Leo and Ofshe argue that Cassell's method of quantifying false confessions "has no credible empirical foundation."²²² They point out that it is impossible to estimate the number of police-induced false confessions because interrogations are not recorded in their entirety. Moreover, no record is made of the number of interrogations conducted, the number of confessions that result from interrogation, or the number of confessions sooner or later revealed to be false. Thus the numbers Cassell comes up with are speculative.

Indeed, Leo and Ofshe believe Cassell deliberately misreads their own study when he says that he will assume that Leo and Ofshe are correct that twenty-nine persons were wrongfully convicted from false confessions in the last quarter century. Leo and Ofshe never said there were only twenty-nine wrongful convictions resulting from false confessions.

Cassell's decision to treat either our sixty case examples or the twenty-nine convictions as though they constitute what we believe to be the entire relevant population of false confessions resulting in wrongful convictions from 1973 to 1996 is both fallacious and ideology-serving. We were able to investigate only a small fraction of the disputed police interrogations that occurred in this twenty-three year interval. Cassell's implication that only twenty-nine wrongful convictions from false confessions occurred during this time period is therefore misleading. As we made clear in our article, our descriptive statistics summarize variation in the case outcomes of the set of false confessions we studied. We have no idea what proportion of the false confessions occurring during this twenty-three year period we have discovered.²²³

To misread a study and then refute it based on that misreading is to raise strawman arguments and avoid the issue.

Cassell's numbers are even less reliable and their premises less valid, Leo and Ofshe observe, because he arbitrarily shrinks the pool of false confessors only to those wrongfully convicted. In reality,

the harms that the criminal justice system inflicts on false confessors are not limited to wrongful incarceration post-conviction, but also include wrongful (and sometimes lengthy) pre-trial deprivation of liberty, the stigma associated with criminal charges, the irrevocable loss of reputation, the stresses of standing trial and the sometimes bankrupting financial burdens of defending oneself in costly and drawn out proceedings against the state.²²⁴

²²² Leo & Ofshe, *supra* note 219, at 558.

²²³ *Id.* at 565. Indeed Leo's study was on "routine interrogation practices, not false confessions." *Id.* at 565.

²²⁴ *Id.* at 564.

Cassell's speculative and arbitrary statistical manipulation is particularly dangerous when directed at an audience unfamiliar with statistical interpretation and vulnerable to false implicature. Such readers can be easily misled into believing that an argument has a solid scientific foundation when no such foundation exists.²²⁵

More to the point, and despite Cassell's contention that the risks of *Miranda* are "an empirical or 'numbers' issue that cannot be resolved . . . by theoretical reasoning,"²²⁶ these quantifications are entirely irrelevant under one theory of constitutional interpretation because the public policy interests and constitutional rights implicated are largely indifferent to quantification of occurrence.²²⁷ The issue is the unconstitutionality of coercion, not the number of coerced false confessions, or even the number of coerced true confessions. Thus, many readers would be unimpressed by Cassell's attempt to gain the reader's good opinion by articulating his willingness to "shoulder the burden of quantification" when he thinks that burden "is properly assigned"²²⁸ to *Miranda*'s supporters. Proponents of *Miranda* would reject his innuendo that they bear the burden of empirical analysis or that they are evasive because they use "anecdotal example[s]."²²⁹ They would not find it "curious" that "false confession literature never provides even a ballpark estimate of the frequency of false confessions"²³⁰ because they would regard those estimates as both impossible to obtain and as irrelevant.

²²⁵ Consider the difficulty in assessing the truth of the following passage from Cassell: An alternative, second-best approach is to derive an estimate based on assumption about the frequency of wrongful convictions and the proportion of these convictions attributable to false confessions. The approach has the benefit of working even with extremely low probability events. In theory, estimating this number is straightforward:

WC subFC = CV x ER x FC, where

WC subFC is the number of wrongful convictions from false confessions,

CV is the number of convictions in the system,

ER is the error rate in the system, and

FC is the proportion of the errors attributable to false confessions.

The difficult part, of course, is in deriving empirically-based estimates of the error rate (ER) and the proportion due to false confessions (FC).

Id. at 513.

²²⁶ *Id.* at 500.

²²⁷ See Weisselberg, *supra* note 221, at 175-77; see also Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 91 NW. U. L. REV. 500 (1996); Stephen J. Schulhofer, *Miranda and Clearance Rates*, 91 NW. U. L. REV. 278 (1996); Leslie Lunney, *The Erosion of Miranda: Stare Decisis Consequences*, 48 CATH. U. L. REV. 727, 786 (1999).

²²⁸ Cassell, *supra* note 218, at 501.

²²⁹ *Id.* at 500.

²³⁰ *Id.*

By casting his argument in quantitative terms – no matter how flawed his assumptions, and no matter how contrived its reasoning – Cassell eschews the doctrinal arguments traditionally necessary to argue before legal scholars that a Supreme Court decision – one of the most famous and influential Supreme Court decisions, no less – should be overturned.²³¹

Cassell also argues that the “exotic” problem of false confessions²³² is no trade off for the benefits of unrestricted interrogation or the harm of *Miranda* warnings. Leo and Ofshe maintain that the harms Cassell perceives are based on false dichotomies and speculation.

According to Cassell, there are two scenarios that describe how *Miranda* harms the innocent. Under the first, Cassell’s frustrated detective scenario, a guilty criminal suspect, who can be arrested only if he confesses, fails to do so, but instead invokes one of his *Miranda* rights and escapes arrest. Cassell supposes that in the absence of a rule requiring police to issue *Miranda* warnings to custodial suspects, the guilty party would not have refused to confess and would have been arrested and convicted. In the frustrated detective scenario, having failed to obtain a confession from the truly guilty party, the detective goes on and interrogates some conveniently available innocent suspect. The innocent not only waives *Miranda*, but thereafter gives a false confession. The innocent is then wrongly convicted.²³³

These scenarios are flawed, Leo and Ofshe argue, because they assume suspects who have not been *Mirandized* inevitably confess and that police officers who have been “foiled by a *Miranda* invocation”²³⁴ give up a pursuit of a strong suspect to go after an innocent. The ensuing conclusion that *Miranda* is therefore a danger to innocents must be dismissed, say Leo and Ofshe, because it is based on false alternatives and questionable assumptions, violations of *logos*.

Leo and Ofshe conclude that if Cassell’s goal is to protect the innocent from miscarriages of justice, his rhetoric backfires. Cassell should instead

redirect his energies to the advocacy of tougher safeguards to protect custodial suspects and criminal defendants – not only against police-induced false confession, but also against other prominent sources of wrongful convictions such as eyewitness misidentification, the prosecutorial withholding of exculpatory evidence, the use of perjured testimony by so-called jailhouse informants, and ineffective assistance of counsel. For it is these kinds of abuses – not the constitutionally-based *Miranda* warnings – that lead to miscarriages of justice

²³¹ Leo & Ofshe, *supra* note 219, at 574.

²³² Cassell, *supra* note 218, at 502.

²³³ Leo & Ofshe, *supra* note 219, at 571-72.

²³⁴ *Id.* at 572.

in the first place and that prevent the exoneration of the wrongfully convicted incarcerated.²³⁵

If, however, Cassell's goal is to win, these misleading tactics are understandable.

Indeed, the very "conceit" of Cassell's article – abolishing *Miranda* warnings in order to protect innocents within the criminal justice system as well as innocent victims of crime – is both disingenuous and manipulative. Cassell is driven by the "misuse of our justice system by criminal defendants"²³⁶ far more than he is by the plight of an innocent person frightened into false confession by coercive police tactics. This motivation is revealed when Cassell says "Blackstone's adage that ten guilty should go free rather than one innocent be convicted remains true today. But Blackstone's adage also reminds us that acceptable trade-offs are not unlimited. In evaluating an interrogation regime, the risks to innocents from inadequate crime control must also be assessed."²³⁷ This misreading of Blackstone is not surprising given that, as amici curiae for the WLF/SSC in *Dickerson*, Cassell admits he is primarily concerned with "cases in which technical *Miranda* claims have resulted in the release of dangerous criminals."²³⁸ Harm to innocent false confessors is but an excuse for Cassell to discuss confessions that are "lost" because of *Miranda*, a decision he, in an appeal from *pathos*, characterizes as "the epitome of Warren Court activism on behalf of criminal defendants."²³⁹

As we have seen, Cassell's emotional ploys and logical fallacies render much of Leo and Ofshe's critique valid, not the least because Cassell's tactics obscure the grounds on which the debate should center. Yet, Leo and Ofshe's critique is marred by their own attitude to their rival. Their reply confirms Dixon's suspicion that "the use of a hostile and belligerent tone" is "intrinsically undesirable, since it shows a lack of respect for one's opponent" – although it is unlikely a "friendly, non-confrontational approach" would make the opponents of this debate "more likely to be open-minded about the strength" of each other's arguments.²⁴⁰ Nonetheless, honest argument and courteous discussion would certainly be more edifying and respectful of their audience.

Leo and Ofshe keep up a barrage of sarcastic *ad hominem* attacks on Cassell,²⁴¹ employing language that depicts him as out-of-control. He is

²³⁵ *Id.* at 576-77.

²³⁶ Brief of Amici Curiae WLF/SSC at 2, *Dickerson II* (No. 97-4750).

²³⁷ Cassell, *supra* note 218, at 499.

²³⁸ Brief of Amici Curiae WLF/SSC at 2, *Dickerson II* (No. 97-4750).

²³⁹ Cassell, *supra* note 218, at 555.

²⁴⁰ Dixon, *supra* note 217, at 18.

²⁴¹ Leo & Ofshe, *supra* note 219, at 557.

accused of launching a "single handed assault" on *Miranda*.²⁴² He is sneered at for his exaggeration, his "steady stream of speculative accusations that Miranda causes tens of thousands of guilty suspects to escape conviction."²⁴³ He is accused of "*Miranda*-bashing,"²⁴⁴ a term evocative of "gay-bashers." He ignores, we are told, "most researchers' preference for an honest 'I don't know' to the use of guesswork to arrive at specious estimates."²⁴⁵ "Like the Emperor who wears no clothes, . . . Cassell's argument here is based solely on illusion."²⁴⁶ His scenarios are so "highly implausible as to seem fanciful."²⁴⁷ His argument that *Miranda* harms the innocent is but another "rhetorical weapon in his highly charged anti-*Miranda* crusade."²⁴⁸

There may be good reason to condemn speculative quantitative analyses because of the "fateful consequences" these analyses have on human lives, as Leo and Ofshe say.²⁴⁹ Some indignation may even be appropriate, but the acrimonious and sarcastic name-calling in which these authors indulge results in a loss of ethical integrity that serves neither their audience nor their cause.

Not all legal scholarship is so deeply marred. Fred E. Inbau was one of the most vocal opponents of *Miranda*, yet, unlike Cassell, he makes his arguments without rhetorical excess.²⁵⁰ Likewise Charles Weisselberg, a supporter of *Miranda*, uses no rhetorical dirty tricks despite his ideological commitment.²⁵¹

In a representative article,²⁵² Inbau argues that *Miranda* displays a "lack of sound judicial reasoning."²⁵³ He also decries the "mischief" that occurs when official "over-reaction" to *Miranda* convinces otherwise willing suspects not to confess.²⁵⁴ Inbau's choice of the word "mischief" is typical of his rhetorical strategy; he uses a term that conveys gratuitous harm but does not raise the emotional decibel-level, deploring but not resorting to *ad popule*m abuse of *pathos*. His anti-*Miranda* scholarship is also notable because it takes on the

²⁴² *Id.*

²⁴³ *Id.* at 558.

²⁴⁴ *Id.* at 560.

²⁴⁵ *Id.* at 561.

²⁴⁶ *Id.* at 575

²⁴⁷ *Id.* at 574

²⁴⁸ *Id.* at 576.

²⁴⁹ *Id.* at 575

²⁵⁰ See Inbau, *supra* note 220, at 797. See *infra* notes 253-55 and accompanying text for discussion.

²⁵¹ See Weisselberg, *supra* note 221, at 109.

²⁵² See generally Inbau, *supra* note 220.

²⁵³ He faults the Court for using the right to counsel, which by the text of the 6th Amendment applies to criminal *prosecutions* (and not to *investigations*), to protect against 5th Amendment violations during custodial interrogation. *Id.* at 808.

²⁵⁴ *Id.* at 797-807.

Warren Court on its own terms, starting from the premise of universal respect that underlies *Miranda*.

The *Miranda* doctrine . . . was created as a product of the Warren Court's pursuit of its egalitarian philosophy. Toward that objective the basic consideration was this: the rich, the educated, the intelligent suspect very probably knows from the outset that he has the privilege of silence, whereas the poor, the uneducated, or the unintelligent suspect is unaware of that privilege. Consequently, *all* persons in custody or otherwise deprived of their freedom, must receive the warnings prescribed in *Miranda*.

As commendable as is much of what the Warren Court attempted or accomplished with its egalitarian philosophy in the area of social inequalities emanating from a disregard of clearly applicable constitutional provisions, the writer suggests that the same egalitarian philosophy does not lend itself to the field of criminal investigation. Foremost is the fact that a very high percentage of the *victims* of crime are from the ranks of the poor, the uneducated, or the unintelligent. It is of little comfort to them to be told that the warnings administered to the person suspected of robbing or raping them, or of burglarizing their homes while they were at work, was for the noble purpose of equalizing humanity, and this is especially so in those instances where the suspect, reasonably presumed to be guilty, accepted the invitation to remain silent, or where his conviction was reversed because the *Miranda* rights were not properly accorded him. The time to show compassion toward a criminal suspect's unfortunate background is *after* a determination of whether or not he committed the offense, not before.²⁵⁵

Inbau leaves the reader free to accept or reject his "suggestions," to make a hard choice between two moral high-grounds.

On the opposite side of the debate, but with similar courtesy, Weisselberg, in *Saving Miranda*, tries to capture the Warren Court's "vision" of *Miranda* and directly addresses the question of "whether this Article's characterization of the Court's 'original vision' is fair."²⁵⁶ He attempts to convince us it is by laying out his reasons – by summarizing opposing readings and the grounds he has for rejecting them.²⁵⁷ He similarly traces the encroachments on, and reinforcements of, *Miranda* that have been made since that ruling, acknowledging – like the Department of Justice in *Dickerson* – *Miranda*'s somewhat bewildering and ambiguous history.²⁵⁸ In supplying the reader with

²⁵⁵ *Id.* at 808-09.

²⁵⁶ Weisselberg, *supra* note 221, at 122.

²⁵⁷ *Id.* at 122-24 (pointing to language in the opinion and exchanges between Chief Justice Warren and Justice Brennan that support his contention that *Miranda* governs police practices as well trial rights).

²⁵⁸ *Id.* at 125-32. Weisselberg accepts *Harris v. New York*, 401 U.S. 222, 224-25 (1971), *Oregon v. Hass*, 420 U.S. 714 (1975), *Michigan v. Tucker*, 417 U.S. 433 (1974), and *New York*

his sources and reasoning, in providing – where applicable – alternative readings, and in making his refutations explicit, Weisselberg demonstrates his scholarly pursuit of truth. His substantive advocacy is stronger for it.

Weisselberg argues in this essay that encroachments on *Miranda* have created significant incentives for police to violate its strictures.²⁵⁹ Because courts now admit “un-mirandaized” testimony for impeachment purposes, some police are now trained to interrogate “outside *Miranda*.” He, thus, urges we return to *Miranda*’s original vision and bar confessions for impeachment purposes as well as evidence that results from “un-mirandaized” testimony. In other words, he advocates a return to the strict bright line rule vision.

In arguing this, Weisselberg, like Leo and Ofshe, takes on some of Paul Cassell’s proposals. Cassell suggests the Court modify the warning to dispense with the offer of counsel and the requirement that police terminate interrogation when a suspect invokes his or her rights. In their place, Cassell suggests police officers videotape their interrogations since this is effective in preventing coercion. Weisselberg explains equably why this solution is not tenable.

Telling officers that they need not cease questioning when a suspect invokes his or her rights simply sends police and courts back into the Fourteenth Amendment morass of soft standards. Without a bright line rule, how does an officer or a judge decide the point at which questioning overcomes a suspect’s will? The number of times an accused asserts his or her rights certainly plays a role in the voluntariness inquiry. But must a suspect invoke several times to show that he or she is truly serious about remaining silent? *Miranda* simply presumes coercion when interrogation continues after a single invocation of the right Admittedly, videotaping would help resolve disputes about what was actually said and done during an interrogation; further, officers who know that they are on videotape also may refrain from clearly inappropriate conduct. Yet, in the end, videotaping cannot replace *Miranda*. A judge may review the videotape to decide a suppression motion, but will still decide the motion under a soft and value-laden standard.²⁶⁰

v. *Quarles*, 467 U.S. 649 (1984), as cases establishing a new vision of *Miranda* in which the Court tries to “deconstitutionalize” the case and thereby allow statements taken in violation of *Miranda* to be used for impeachment and the collection of other evidence. *Id.* On the other hand, he regards *Withrow v. Williams*, 507 U.S. 680 (1993), as a significant counterweight; it places *Miranda* alongside other cases that establish the constitutional authority of prophylactic rules. *Id.*

²⁵⁹ *Id.* at 111.

²⁶⁰ *Id.* at 166.

Not only does Weisselberg spell out his reasons for rejecting Cassell's proposal, but he is careful to do so on the merits. Besides describing Cassell as "*Miranda's* most ardent critic,"²⁶¹ he comments on him not at all.²⁶²

Inbau and Weisselberg's approach to scholarship has much to commend it and can help us to construct an ethic of rhetoric, one that is as appropriate for a judge as it is for a scholar.

III. TRADITIONAL DEFENSES OF ROLE-DIFFERENTIATED LEGAL RHETORIC

Like role-differentiated behavior in general, role-differentiated legal rhetoric is not without articulate defenders and plausible defenses. In this section, we summarize those defenses and explain why, at the end of the day, we find them unconvincing.

Those who defend legal rhetoric speak from the viewpoint of the advocate and the adversary system. To the charge that legal roles disassociate speakers from their arguments and, thereby, obscure the truth and violate the duty of universal moral agency, defenders, such as Jack Sammons and J.B. White, reply that the legal system and legal culture justify some seeming abuses and provide constraints against the rest.

First, according to these defenders, the legal system renders the adversarial performances of advocates moral in that they provide jury and judge with the optimal arguments that each party can make, and, thus, help a decisionmaker to "think" through the case and arrive at a just decision.²⁶³ Accordingly, even if an advocate uses weak or non-motivating arguments,

to refuse to use them based on . . . personal assessment of their merit would be equivalent, in . . . [a] baseball analogy, to taking the ball and going home – a pretentious assertion of self in what is supposed to be a communal activity. I must instead leave such arguments to the judge or the jury for their consideration consistent with their particular roles within the legal conversation. These men and women may not be the measure of all things, but, for the lawyer as rhetorician, they are and must remain the measure of all things within the legal conversation.²⁶⁴

²⁶¹ *Id.*

²⁶² Weisselberg also criticizes Cassell's quantitative analyses on both empirical and theoretical grounds. Weisselberg, *supra* note 221, at 170-77. But, although he observes that Cassell "provides the wrong answers to the wrong questions," *id.* at 176, he deals with Cassell's arguments on the merits. *Id.* at 170-77.

²⁶³ James Boyd White, *Plato's Gorgias and the Modern Lawyer: A Dialogue on the Ethics of Argument*, in HERACLES' BOW 215, 226 (1995).

²⁶⁴ See Jack L. Sammons, *The Radical Ethics of Legal Rhetoricians*, 32 VAL. U. L. REV. 93, 99 (1997). Sammons is an eloquent advocate respectful of opposing viewpoints. Yet his analogy of the adversary system – where the stakes can be as high as human life – to baseball seems to trivialize the debate. And the analogy of law to a game among men may say more than

This defense of legal rhetoric is problematic. First, the rhetoric of advocacy cannot be defended simply on the ground that it is required by the adversary system in that it assists in the truth-seeking function of a trial. In fact, there is a good likelihood that rhetorical excesses only compound the difficulty of ascertaining truth. It is a mistake to think that "conflicting biases and distortions will somehow cancel themselves out and result in a truthful verdict On the contrary, the more distortions that occur, the less likely the truth will emerge."²⁶⁵

Further, a defense of the rhetoric of advocacy as necessary to the functioning of the adversary system is only as good as that institution. Indeed, justice will prevail "only if the contest is a balanced one – that is, if each side has roughly equal access to relevant legal information, resources and capabilities."²⁶⁶ Even then, the very effectiveness of partisanship is unproven, "a mix of a priori theories of inquiry and armchair psychology."²⁶⁷

Finally, even if the adversary system justifies a litigator's use of an unchecked rhetoric of persuasion, such justifications do not pertain to other legal players. The problem here is that lawyers seem to change roles more easily than they change their behavior, and, as we have seen in Part II of this article, the win-at-all-costs rhetoric rooted in the adversary system finds fertile ground in judicial and scholarly prose.²⁶⁸

A second defense of legal rhetoric holds that advocacy rhetoric is not as unbridled as some legal ethicists allege, but rather, that it is constrained by institutional and practical considerations.

The game of lawyering is a particular conversation about certain social disputes. If lawyers are to continue to play this game, that is, if they are to continue to be lawyers . . . , they must accept the responsibility, as all game players must, of maintaining the game. . . .

Accordingly, I am always obligated, as a lawyer, to speak as persuasively as I can, but I am also obligated to maintain the legal conversation and the quality of it. Part of this constraint is that I can only utilize the means of persuasion available within this particular rhetorical culture, just as a baseball player can only use a bat within a certain size and weight range. My ethical obligation, then, as a good rhetorician, my integrity as a lawyer, if you will, is that I always

the writer intends.

²⁶⁵ Dixon, *supra* note 217, at 21.

²⁶⁶ Deborah L. Rhode, *Institutionalizing Ethics*, in *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 203 (Geoffrey C. Hazard, Jr. & Deborah L. Rhode, eds., 3d ed. 1994).

²⁶⁷ David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS AND LAWYERS' ETHICS* 91 (David Luban ed., 1983).

²⁶⁸ As Gerald Wetlauffer observes: "Within the discipline of law, there are systematic similarities between the rhetorical conventions of advocacy, judging, scholarship, and teaching." Wetlauffer, *supra* note 4, at 1587.

present myself as honestly offering the best means of persuasion available within this particular rhetorical culture on behalf of my client.²⁶⁹

Sammons identifies some of the constraints on rhetoric imposed by the legal context.

There are great constraints on rhetoric found in the efficiencies of the forms of persuasion most successful within this particular rhetorical community; great constraints on rhetoric in the nature of the particular audiences – judge, jury, and opposing counsel – addressed; great constraints in the particular casuistical and interpretive requirements of legal decision-making; great constraints in the necessary imposition of this rhetorical game upon the clients who enter it; great constraints in the representative nature of the advocacy with its requirement that the lawyer speak well for others, and the counseling and relationship essential to this speaking.²⁷⁰

Defenders also cite the constraints imposed by the profession on specific rhetorical practices: “lying, certain forms of deception, perjured testimony, preventing opposing arguments, misstating the law, tempting the judge to make decisions based upon means of persuasion that are not part of the rhetorical culture, and any other conduct that can fairly be described as ‘not playing the game.’”²⁷¹

We believe that the constraints Sammons identifies as ensuring ethical language behavior are not fully effective: both the nature of legal rhetoric and its practice are impediments to meaningful constraint.

The rhetoric of law aims to convince its audiences that the legal system and the decisions it engenders are impersonal, objective, forthright, reasonable, and fair.²⁷² It does this, Gerald Wetlaufer argues, by compelling acceptance and forestalling critique through reliance on

authority, hierarchy, intellectual unity, the impersonal voice, coercive argumentation, appeals to the narrowly rational faculties, the one right answer, the best solution, the disciplines of closure, and the one objective and ascertainable meaning of texts . . . [and to] the extinguishment of contingency, to acontextuality, to the one objective perspective, to an audience . . . perfectly rational and thus perfectly undifferentiated . . .²⁷³

Moreover, as we have undertaken to show, these rhetorical practices are present in all types of legal documents: to varying degrees, briefs, opinions,

²⁶⁹ Sammons, *supra* note 264.

²⁷⁰ *Id.* at 101.

²⁷¹ *Id.* at 99.

²⁷² Admittedly, legal rhetoric is not always successful in its goal. A close and expert reader can often detect rhetorical manipulation.

²⁷³ Wetlaufer, *supra* note 4, at 1587.

and scholarly articles present themselves as the "last word," even when those words offer a feigned and imperfect resolution.

Militating against legal rhetoric's impulse to closure, Sammons reassures, are restraints on rhetoric that the legal community has allegedly placed upon itself. Model rules and codes of conduct eschew the practice of lies, deception, misstatement of law and fact, concealment of adverse decisions.²⁷⁴ Yet, perhaps because the very practices condemned serve closure so well, these rules are clearly unequal to the task. Advancing, as they so often do, aspirational rather than mandatory standards, and so often relying on legal rather than moral or rhetorical notions of deceit, they fail to prevent all but the most egregious misconduct. As a result, the profession does not consistently practice what it preaches.

Finally, defenders have faith that any ethical improprieties that survive these constraints can be rectified by an ongoing and honest conversation about the nature and the practice of law.²⁷⁵

That we are responsible for how we speak and who we are; that self-conscious thought on these questions is among the most important tasks of a mature mind (or people); and that to establish a place of our own making from which cultural and ethical criticism can go on is essential to responsible life . . . and . . . the life of the lawyer."²⁷⁶

Moreover, as one defender notes, "[t]he character required for this inquiry into the profession is broader than the practice, but still required by it. This is, I believe, the way in which our professional roles are integrated with the rest of our lives"²⁷⁷ and, he might add, the way moral fragmentation is avoided.

²⁷⁴ See e.g., MODEL RULES OF PROFESSIONAL CONDUCT (1999). Rule 3.1 bars a lawyer from asserting an issue unless there is a basis for doing so that is not frivolous. Model rule 3.3 prohibits making a false statement of material fact or law to the tribunal, failing to disclose adverse authority, and knowingly offering false evidence. Model rule 3.4 prohibits obstructing access to or altering evidentiary material. Rule 4.4 prohibits a lawyer from using means that have no substantial purpose other than to embarrass, delay, or burden a third person. Rule 8.4 make it professional misconduct to violate the professional rules, to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, or to engage in conduct prejudicial to the administration of justice. Canon EC-1-5 of the Model Code of Professional Responsibility (1982) urges lawyers to be temperate and dignified, and to refrain from all illegal and morally reprehensible conduct. The Disciplinary Rules of the ABA Model Code of Professional Responsibility (1982) make a lawyer subject to discipline for making a materially false statement (DR 1-101), for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, or in conduct prejudicial to the administration of justice (DR 1-102).

²⁷⁵ See Sammons, *supra* note 264, at 100; White, *supra* note 70, at 867.

²⁷⁶ White, *supra* note 263, at 237.

²⁷⁷ Sammons, *supra* note 264, at 100.

Dialogue about legal culture and ethics is undoubtedly a good thing. But the conversation must be broad-based, encompassing not just academics, but practitioners and judges as well, and it must be implemented, not just examined. To curb ethical improprieties in any meaningful way, the profession must erect "a normative scale on which to judge legal behavior" and perform "a forthright analysis of such behavior as it is practiced."²⁷⁸ The standards adopted must reflect "the strength of an ethical system" rather than the "professional accommodation of the bad."²⁷⁹ In other words, rhetorical practices that allow a lawyer to evade or misrepresent what Richard Weisberg calls the "central reality of the situation" are practices that protect clients and positions at the expense of truth.²⁸⁰ Credibility, predictability, and justice require commitment to ethical language practice.

IV. CONCLUSION

The solution to the problem of disrespectful legal rhetoric is as clear as it is next to impossible: We have to change the way we talk and write, an enterprise that begins with a profession-wide commitment to avoid rhetorical practices that, by their nature, violate Audi's threshold and desirability principles.

Like all solutions to complicated questions, this solution raises more questions. To what extent, if at all, should there be different rules for different roles? Should litigators be exempted from the duty of respectful rhetoric? Should any such exemption be made only for criminal defense? Would a defendant whose counsel conceded the weaknesses of an argument have her rights to counsel and due process compromised? Before we make any exemptions, should we conduct empirical research to determine whether traditional advocacy rhetoric is in fact a more effective method of persuasion than forthrightness and balance? Should judges be held to the highest ethical standards because their words are so consequential? Although nothing justifies aggression and nastiness in judicial rhetoric, might there nonetheless be circumstances that justify violating the motivational and evidential principles – to get a majority, to spare the feelings of the court below, or to avoid hierarchical conflict, for example? Are these institutional arguments sufficiently strong to override the constraints on otherwise undesirable behavior? These are hard questions.

²⁷⁸ White, *supra* note 263, at 237.

²⁷⁹ Richard H. Weisberg, *Three Lessons from Law and Literature*, 27 LOY. L.A. L. REV. 285, 300 (1993).

²⁸⁰ Weisberg, *supra* note 70, at 10.

What seems certain, however, is that scholars should be held to the highest ethical-rhetorical standard, because truth-seeking is a scholar's primary goal. There are strong reasons for holding judges to the same high standard. Equally certain is that reform will not come from wishful thinking or from rules of professional conduct but from a commitment to an ethic of universal respect that is reflected in our use of language. The distinctions between persuading and silencing and between putting something in its best light and putting it in a false light are too important for mere lip service.

