

# PEDAGOGY OF THE SUPPRESSED: A CLASS ON RACE AND THE DEATH PENALTY

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## I.

### INTRODUCTION

A generation ago, Duncan Kennedy examined the myriad structures through which American law schools train students to take up elite roles in society. Within these structures, leftist analyses of social and political dynamics play a marginal role.<sup>1</sup> Nearly a quarter century after the publication of *Legal Education and the Reproduction of Hierarchy*,<sup>2</sup> the curricular structures Kennedy critiqued remain entrenched.

This symposium examines important questions derived from Kennedy's observations. For example, if law schools are infused with elitist norms, can a progressive perspective emerge from the legal academy? There is considerable reason to doubt that any classroom setting located within the hierarchical framework of legal education can advance the project of unmaking hierarchy. Were such a pedagogical project remotely possible, it would seem to require, as Monty Python prescribes, something completely different. Perhaps this explains why pedagogical experiments in legal education have been undertaken so infrequently.<sup>3</sup>

While I recognize the force of these views, I have not fully adopted them. Instead, as I have argued elsewhere, I find progressive possibilities in connec-

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1. Duncan Kennedy, *Teaching from the Left in My Anecdote*, 31 N.Y.U. REV. L. & SOC. CHANGE 449, 452–54 (2007) (noting that leftist analysis of social and political dynamics, while marginal, are not entirely absent). See also William H. Simon, *Fear and Loathing of Politics in the Legal Academy*, 51 J. LEGAL EDUC. 175 (2001) (noting pervasive opposition in legal scholarship to leftist politics and theory.)

2. Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982) [hereinafter Kennedy, *Legal Education*].

3. When reproaching Christopher Columbus Langdell, the founder of the prevailing appellate case method of legal education, for excluding law practice from legal education, Jerome Frank opined that “American legal education went badly wrong some seventy years ago.” Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1303 (1947). Despite the passage of an additional sixty years since Frank's remarks, and the development of law school clinical programs during this period, appellate case methodologies for studying law still dominate legal education, although some curricular reform may be on the horizon. See Sacha Pfeiffer, *Twos a Time...*, BOSTON GLOBE, May 7, 2006, at D1 (discussing proposed curricular reform efforts at Harvard Law School).

tions between legal critique and legal practice, such as those that can be forged in a law school clinic.<sup>4</sup> My intention here is to pose a related claim—that legal critique would benefit from a pedagogy.<sup>5</sup>

One source for a pedagogy of critique might be radical educational theory such as that elaborated by Paulo Freire, who saw that teachers are also students, students are also teachers, and that a learning community might collectively construct its curricular choices, its reading lists, and its allocations of shared responsibility for teaching a chosen subject.<sup>6</sup> Although I have employed Freire-inspired egalitarian educational experiments in the past, what I am suggesting now is something far more modest, perhaps deceptively so. What I explore here is whether the most conventional method of legal education—examination of appellate judges' opinions—can be channeled toward progressive ends.

The challenges are weighty. Judicial opinions are designed to “shut down thought” and put “issues to rest,” Pierre Schlag warns, and reading approximately 10,000 cases over three years of law school inscribes a vision of case law as law, suppressing broader visions of what law is.<sup>7</sup> Voicing similar concerns nearly seventy-five years ago, Jerome Frank reminded us that “[law students] *do not study cases*. They do not even study the printed records of cases (although that would be little enough), let alone cases as living processes. Their attention is restricted to “judicial *opinions*” that do not typically set forth “the real causal explanation[s] of the decisions.”<sup>8</sup> By convention, Frank implies, actual explanations for decisions are suppressed, misleading their readers and perhaps their authors too.

Nonetheless, I am suggesting here that engaging the most traditional of law school pedagogies—the examination of United States Supreme Court opinions—can facilitate progressive insights when legal doctrine is contextualized. I am buoyed in this suggestion by Amsterdam and Bruner's excavation of Supreme Court case law in their extraordinary work *Minding the Law*.<sup>9</sup> Through their

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4. See, e.g., Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991); Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717 (1992); Phyllis Goldfarb, *Picking Up the Law*, 57 U. MIAMI L. REV. 973 (2003).

5. I view this claim as a corollary to the proposition that, in Joanne Conaghan's words, “the indissolubility of theory and practice is a leftist platform.” Joanne Conaghan, Remarks at the Teaching from the Left Conference, Harvard Law School (Mar. 11, 2006).

6. PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 61 (1970) (advocating pedagogy initiated and directed by the disempowered rather than formed by those in control).

7. Pierre Schlag, *Ten Thousand Cases, Maybe More—An Essay on Centrism in Legal Education*, 2 AGORA 2 (2002), <http://agora.stanford.edu/agora/volume2/schlag.shtml>; Pierre Schlag, *The Anxiety of the Law Student at the Socratic Impasse—An Essay on Reductionism in Legal Education*, 31 N.Y.U. REV. L. & SOC. CHANGE 575, 576 (2007).

8. Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PENN. L. REV. 907, 910 (1933) (emphasis in original) (critiquing the “Harvard system” of legal education, which focuses on studying opinions, as inadequate preparation for the real work of a lawyer, which involves making fact-sensitive judgments).

9. ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000).

analysis of numerous Supreme Court opinions, the authors trace the source of the categories and rhetorics of legal doctrine to our deepest cultural narratives. To surface the suppressed cultural content that pervades court opinions is to understand far more consciously the nature and power of judicial lawmaking.

As Amsterdam and Bruner reveal so effectively, discerning what animates a court opinion requires reading between and beneath the words on the page. Although the method I propose is far more prosaic than theirs, I am suggesting here that contextualizing case law in a variety of ways offers some hope of illuminating its plausible animating forces and assumptions. This approach is especially promising when used to examine cases concerning American criminal justice because the methodology can be directed toward highlighting the attitudes found within mainstream legal culture for inflicting state violence on the disempowered. To my mind, this content lends itself to a left-leaning analysis. Moreover, since law students are already familiar with engaging standard legal texts, the accessibility of this approach may enhance the impact of a non-standard analysis.

Although I use words like “left-leaning” and “non-standard” to describe this analysis, I understand that it may stand in a contradictory relationship to some understandings of leftist politics. A methodology that plumbs conventional legal sources like Supreme Court cases, even one that further contextualizes these texts to expose what lies behind their logical veneer,<sup>10</sup> can simultaneously defy and reinforce liberal legalism.<sup>11</sup> If this method is construed as an effort to spur a liberal democratic regime to refine its legal norms, it may serve microtransformative ends, but not a broader transformative project of power-shifting that, by some lights, describes left political aims.<sup>12</sup>

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10. John Noonan has described the way that law’s analytic reasoning hides moral and political views. JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* (1976).

11. This is a version of the “double bind” phenomenon, much noted in critical legal scholarship, in which all options available to the subordinated are in some way harmful to them. See, e.g., John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 *FORDHAM L. REV.* 1927, 1938 (1999) (asserting that oppressive conditions generally create double binds) (quoting MARILYN FRYE, *OPPRESSION, in POWER, PRIVILEGE, AND LAW: A CIVIL RIGHTS READER* 60, 60–61 (Leslie Bender & Dann Braveman eds., 1995)); Mary Becker, *Four Feminist Theoretical Approaches and the Double Bind of Surrogacy*, 69 *CHI.-KENT L. REV.* 303 (1993) (describing the way that feminist law reforms, whether in the area of reproductive surrogacy or elsewhere, involve double binds); Michele Goodwin, *Assisted Reproductive Technology and the Double Bind: The Illusory Choice of Motherhood*, 9 *J. GENDER, RACE & JUST.* 1 (2005) (explaining double-bind problems in women’s reliance on assisted reproductive technologies); Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 *IND. L.J.* 783 (2003) (demonstrating that multiple theories of law create a double bind between “efficiency” and “redistribution”).

12. In their recent anthology that tries to enliven the practice of progressive legal critique, Wendy Brown and Janet Halley argue that the left needs bolder theory unencumbered by the imperatives of concrete political strategy. WENDY BROWN & JANET HALLEY, *Introduction, in LEFT LEGALISM/LEFT CRITIQUE* 2, 33 (Wendy Brown & Janet Halley eds., 2002). My approach is more

My overarching assertion is that the proposed methodology, paradoxically dependent as it is on the liberal legalism it questions, accomplishes something progressive in exposing both the values that underlie the hyperrationality of legal analysis and the difficulties of pursuing social, economic, and political justice within a rule-of-law framework. Yet a contest remains as to whether, by implicitly legitimating the very authorities that it explicitly challenges, the method constrains transformation more than facilitating it. In light of that contest, the ambivalent posture toward mainstream legality that I adopt is a useful place to stand.<sup>13</sup> Moreover, the method I articulate here recommends ambivalence as a gray but fertile land within which law school teaching from the left can operate with least discomfort.

## II. AN EXAMPLE

If I have had any success as a teacher in mining beneath the surface of judicial opinions to extract progressive insights, it has occurred in my course on the Death Penalty. In this course, I have taught a class that represents the most evolved pedagogical example that I have of tapping the progressive possibilities in the study of appellate opinions. This is a class that I devote to Warren McCleskey, a black man convicted of killing a white police officer.

A class that concerns Warren McCleskey would necessarily concern McCleskey's odyssey through the legal system to his death. In law schools, this is taught almost exclusively, when it is taught at all, through his best-known case before the Supreme Court, *McCleskey v. Kemp*.<sup>14</sup> My class too involves *McCleskey v. Kemp*, in which the Supreme Court rejects McCleskey's arguments that a demonstrated pattern of race discrimination in the allocation of death sen-

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akin to one that Martha McCluskey attributes to critical theorist Gayatri Spivak, that "theory is a strategy" and conversely that "strategy is a theory." See Martha T. McCluskey, *Thinking with Wolves: Left Legal Theory After the Right's Rise*, 54 BUFF. L. REV. (forthcoming 2007) (manuscript available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=892565](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=892565)) (reviewing LEFT LEGALISM/LEFT CRITIQUE, *supra*).

13. McCluskey's observations are consistent with this choice to respond to a double bind by consciously cultivating ambivalence. See, e.g., McCluskey, *Thinking with Wolves*, *supra* note 12, manuscript at 58 ("[E]schewing legalism is as illusory a route to power as embracing legalism.").

14. 481 U.S. 279 (1987) (holding that a statistical study offered to prove discrimination in the application of the death penalty did not establish violations of the Eighth or Fourteenth Amendments, despite significant race-of-victim effects). My impression is that *Kemp* is taught to relatively few law students because it falls outside the standard content of classes in Constitutional Law and Criminal Law. Some constitutional law casebooks include brief descriptions of the case. See, e.g., ERWIN CHERMERINSKY, CONSTITUTIONAL LAW, 584-89 (2001); DANIEL A. FARBER, WILLIAM N. ESKRIDGE JR. & PHILIP P. FRICKEY, CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 163-64 (2d ed. 1998). Others omit it entirely. See, e.g., WILLIAM COHEN, JONATHAN D. VARAT & VIKRAM AMAR, CONSTITUTIONAL LAW (12th ed. 2005); CALVIN R. MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES (2d ed. 2005); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW (14th ed. 2001).

tences in Georgia violated the Eighth and Fourteenth Amendments of the United States Constitution.

When I teach *McCleskey v. Kemp*, a searing case that reveals ugly realities about American law and American society, I teach it in conjunction with Warren McCleskey's subsequent case before the Supreme Court, *McCleskey v. Zant*.<sup>15</sup> The latter is often ignored despite the fact that the *Zant* case finally seals McCleskey's fate. Its opinion is searing too, although as a federal habeas corpus case, its ugliness is masked by its technical doctrinal detail. When read together, the two opinions expose more about the jurisprudence of the American death penalty than either does alone. Instead of compartmentalizing opinions by the subject of their doctrine—which in and of itself can stifle structural insights<sup>16</sup>—reading these cases together offers at least some sense of how the legal system looked to McCleskey, and to his lawyers, as they brought multiple grievances to multiple courts.

#### A. Historical Contexts

Among the critical contexts for understanding Warren McCleskey's appearance before the United States Supreme Court is America's history of subordination by race, from slavery to the present. A cursory glance at this notorious and protracted history is all that can be offered either in my class or in this Essay.<sup>17</sup> Yet even a glance is enough to notice the connection between race and the death penalty.

When viewing data about the contemporary administration of the death penalty through a historical lens,<sup>18</sup> students recognize that the states that rely most

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15. 499 U.S. 467 (1991).

16. See Kennedy, *Legal Education*, *supra* note 2, at 596 (“[T]he materials present every legal issue as distinct from every other, as a tub on its own bottom . . . with no hope or even any reason to hope that from law study one might derive an integrating vision of what law is, how it works, or how it might be changed.”).

17. Professor Tobias Wolff offers an efficient and effective pedagogy for contextualizing contemporary policy issues regarding race. At the beginning of class, he draws a historical timeline on the board showing the vast expansion of race-based chattel slavery in America from 1619–1865. The timeline then depicts the Civil War followed by Reconstruction. Reconstruction ends in 1877 with the official abandonment of the newly freed slaves and the formal embrace of their second-class citizenship in an era marked by lynching practices and Jim Crow laws. A glimmer of change does not emerge until 1954 with *Brown v. Board of Education*, followed in the mid-1960s by the Civil Rights Act and the Voting Rights Act, which were seriously enforced for but a dozen years. From 1978 to the present, the timeline depicts the Court and the federal government stepping back from efforts to achieve racial equality. If the timeline is drawn even remotely to scale, it graphically conveys three-and-a-half centuries of formal racial tyranny, followed by less than two decades of attempts at redress, and an even longer period of imposing significant limitations on such attempts. Tobias Barrington Wolff, *Tobias Wolff's Racial Equity Progress Timeline*, [http://www.equaljusticesociety.org/wolff\\_timeline.html](http://www.equaljusticesociety.org/wolff_timeline.html) (last visited Apr. 23, 2007).

18. In *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court struck down state death penalty statutes that gave capital juries unrestricted discretion to sentence capital defendants to life or death. In response to *Furman*, many states passed guided discretion statutes that asked the

heavily on the death penalty are states of the Old Confederacy.<sup>19</sup> The class might then be directed to slave codes that gave automatic death sentences to blacks for various crimes, especially those against whites,<sup>20</sup> and to studies of rape-law enforcement revealing that the most brutal punishments, particularly in southern states, were reserved almost exclusively for black men charged with raping white women, despite the backdrop reality that white slavemasters commonly raped black women.<sup>21</sup> Urging students to articulate the likely ideological

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sentencer, typically after a separate sentencing hearing following conviction, to find one or more specified aggravating circumstances before issuing a sentence of death. The contemporary death penalty era commenced when the United States Supreme Court upheld the constitutionality of guided discretion statutes in *Gregg v. Georgia*, 428 U.S. 153, 207 (1976), and its companion cases from the states of Florida and Texas. See *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). At the same time, the Supreme Court struck down mandatory death penalty statutes enacted in North Carolina and Louisiana, because they led automatically to death sentences upon the conviction of specified crimes, without affording discretion to issue a life sentence. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

19. As of January, 2007, when ranked in order of numbers of executions, the top ten death penalty states since 1976 are Texas (381 executions), Virginia (98 executions), Oklahoma (84 executions), Missouri (66 executions), Florida (64 executions), North Carolina (43 executions), Georgia (39 executions), South Carolina (36 executions), Alabama (35 executions), and Louisiana (27 executions). Together these ten states account for greater than eighty percent of the more than one-thousand executions in the United States in the post-*Gregg* era. DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY 3 (2007), available at <http://www.deathpenaltyinfo.org/FactSheet.pdf>.

20. George Stroud's research confirms that nineteenth century penal codes in Alabama, Florida, Georgia, Kentucky, Maryland, Mississippi, Missouri, South Carolina, Tennessee, and Virginia defined certain crimes as capital offenses when committed by slaves and non-capital offenses when committed by whites. GEORGE STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA, 158-188 (1856). For example, in Virginia and Mississippi, death was the prescribed punishment for slaves for every enumerated offense, but only for a small fraction of offenses committed by whites. *Id.* at 170, 176. See also A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only As An Enemy": The Legitimation of Racial Powerlessness Through the Colonial and Antebellum Laws of Virginia*, 70 N.C. L. REV. 969, 977 (1992) (stating that Virginia statutes imposed the death penalty for slaves for at least sixty-eight offenses, whereas whites committing the same acts were punished by imprisonment or not at all); DANIEL J. FLANIGAN, THE CRIMINAL LAW OF SLAVERY AND FREEDOM, 1800-1868, at 24-27 (1987) (reporting that statutes in Alabama, Louisiana, Tennessee, and Virginia authorized death for slaves and free blacks convicted of burglary, arson, or destruction of a house, building, or other property—including grain, corn, and other goods produced by whites—although whites committing the same offense would be sentenced to pay restitution or to serve two to five years in prison.).

21. Classic sources that might be deployed for developing aspects of this context are KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (1956); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS—THE COLONIAL PERIOD (1978). See also PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA (1984); WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812 (1977).

William Bowers notes that in Georgia, the death penalty was required for a black man who raped a white woman, but in the unlikely event that a white man were convicted of raping a black woman, he would receive a minimum sentence of two years in prison. See WILLIAM J. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982, at 140 (1984).

purposes of these historical phenomena begins to illuminate the origins of the death penalty system that Warren McCleskey faced.

Next the class might turn to the history of lynching and consider how lynching is connected to the death penalty.<sup>22</sup> The students might learn that history is replete with examples of white mobs held at bay by assurances from a judge or a sheriff that the black man on trial would be sentenced to death.<sup>23</sup> Indeed, as in the notorious Scottsboro case involving nine young black men falsely accused of raping two young white women in Alabama in the early 1930s, death penalty trials against blacks for violent crimes against whites have been described as legal lynchings.<sup>24</sup> Jim Crow laws, which formally enshrined views of black inferiority and were enforced through legal and extra-legal violence, would add to this picture of a dual legal system, imbued with ideologies of race.<sup>25</sup> The cumulative effect of the unrelenting litany helps frame the idea that state criminal justice systems were used in lieu of slavery as the institutional mechanism for subordinating black people, keeping many of them literally in bondage, and transmitting the message that black lives are not, and will never be, equal to white lives.<sup>26</sup>

After looking at the many ways that state criminal justice systems were pressed into service of this message, we see why, in the mid-twentieth century, lawyers for national civil rights organizations like the NAACP Legal Defense Fund began to represent poor black defendants charged with crimes; and how these cases created the impetus to advocate for the application of the Bill of Rights to the states, for the constitutionalization of criminal procedure, and for

22. This topic is the subject of a recent anthology. See FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

23. See LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* (1979) (scrutinizing lynching and criminal justice practices during the Reconstruction era). Scholars suggest that the fear of federal anti-lynching legislation spurred Southern states to turn away from lynching in the early twentieth century. See MICHAL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH* 21 (1987). It is a short leap from lynching to death sentences imposed by all-white juries on black defendants to send a similar message about racial subordination.

24. See, e.g., JAMES GOODMAN, *STORIES OF SCOTTSBORO* 24–31 (1994). Dan Carter writes that in their pleas to lynch mobs, Southern officials implicitly promised that the outcomes of capital trials would differ from lynchings only in their external forms. DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 115 (1969). The Reverend Jesse Jackson uses the term “legal lynching” as the title of his recent book on race and the death penalty. REV. JESSE JACKSON WITH JESSE JACKSON, JR., *LEGAL LYNCHING: RACISM, INJUSTICE, AND THE DEATH PENALTY* (1996).

25. See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d ed. 1974) (providing background on Jim Crow laws).

26. Lawrence Friedman writes that many white Southerners defended the death sentences in the Scottsboro case as if their way of life depended on black defendants in cases like these receiving extreme punishment. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICA* 376 (1993).

greater access to the federal courts through the writ of habeas corpus.<sup>27</sup> A goal common to all of these efforts was to curb the worst abuses associated with racialized enforcement of criminal law in the states.<sup>28</sup> However, years after the societal impulse toward curbing these abuses had ended, David Baldus demonstrated in a meticulous study of Georgia sentencing practices that the pattern of racialized punishment remains.<sup>29</sup>

The outline is clear. Throughout American history, from slavery to lynching to the death penalty, state violence has been most frequently and most harshly used for blacks believed to have harmed whites. Through his lawyers at the NAACP Legal Defense Fund, McCleskey used Baldus's research to establish empirically what many observers already knew—that a systematic pattern of discrimination was in place in the administration of the death penalty.<sup>30</sup> This rendered McCleskey's death sentences and many others vulnerable under prevailing interpretations of the Eighth and Fourteenth Amendments.

### B. Doctrinal Contexts

That in the 1980s the Supreme Court rejected McCleskey's powerful Eighth and Fourteenth Amendment arguments is, sadly, not surprising.<sup>31</sup> Yet how the

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27. See EDWARD LAZARUS, CLOSED CHAMBERS 85 (1998) ("The blood of the Scottsboro cases courses through all these decisions . . . which forced state law enforcement officials to observe federal constitutional standards.").

28. *Id.* ("Scottsboro was a potent symbol of what could go wrong locally in the American judicial system and a spur to both those who would expunge bigotry from the system and those seeking to enforce national standards of justice upon the states.").

29. Using sophisticated statistical techniques in an effort to isolate the role that race may have played in capital sentencing from the role that more than two hundred legitimate factors may have played, Iowa law professor David Baldus and his research team concluded that criminal defendants convicted of killing white people were 4.3 times more likely to receive the death penalty than were those convicted of killing black people. DAVID BALDUS, GEORGE WOODWORTH, & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 143 (1990). Having a white victim proved as significant an explanatory factor in who received death sentences as having a prior murder conviction. *Id.* at 147.

30. In *McCleskey v. Kemp*, Justice Powell assumes the statistical validity of the Baldus study. 481 U.S. 279, 291 n.7 (1987).

31. The 1980s was a decade when Justice Powell and other Supreme Court justices publicly vented their unhappiness that litigation efforts had dramatically impeded executions in the states. See, e.g., Linda Greenhouse, *Justice Powell Assails Delay in Carrying Out Executions*, N.Y. TIMES, May 10, 1983, at A16. The outcomes of most of the death penalty cases that the Supreme Court decided during this period were consistent with these sentiments. See, e.g., *Murray v. Giarratano*, 492 U.S. 1 (1989) (holding that indigent capital defendants are not entitled to appointed counsel in state post-conviction proceedings); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding that execution of mentally retarded person is not cruel and unusual punishment although jury instructions must allow evidence of mental retardation to be given mitigating effect); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (holding that death penalty for defendants age sixteen or seventeen at time of crime is not cruel and unusual punishment); *Lowenfield v. Phelps*, 484 U.S. 231 (1988) (holding that defendant's death sentence was not unconstitutional although imposed after sole aggravating factor found by jury duplicated an element of the offense of which he was convicted); *Burger v. Kemp*, 483 U.S. 776 (1987) (holding that representation of co-defendant by defense counsel's law partner did not create a conflict of interest that established ineffective



Supreme Court reached that decision is instructive. All McCleskey had to show to establish that his death sentence violated the Eighth Amendment prohibition on cruel and unusual punishment was a systematic pattern of discriminatory enforcement.<sup>32</sup> Despite the fact that the Baldus study establishes exactly this, Powell, in a notably tepid opinion, denied Eighth Amendment relief on the grounds that maintaining discretion in jury trials is a constitutional value of overriding importance.<sup>33</sup> Implicit in this holding is the view that maintaining jury

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assistance, and that failure to present mitigating evidence at capital sentencing hearing did not establish ineffective assistance); *Tison v. Arizona*, 481 U.S. 137 (1987) (holding that although petitioners did not kill, intend to kill, or attempt to kill, death sentences are constitutional if petitioners were major participants in felony and showed reckless indifference to human life); *Darden v. Wainwright*, 477 U.S. 168 (1986) (holding that prosecutor's inflammatory closing argument did not render trial unfair or sentence unreliable, and that defense attorney's failure to present mitigating evidence did not constitute ineffective assistance); *Lockhart v. McCree*, 476 U.S. 162 (1986) (holding that excluding jurors who oppose death penalty from determination of guilt as well as sentence does not violate capital defendant's right to fair and impartial jury, even where social science evidence shows juries so constituted are more conviction-prone); *Smith v. Murray*, 477 U.S. 527 (1986) (holding that capital defendant's constitutional claim was defaulted in post-conviction phase because his attorney failed to raise it on direct appeal, although ineffective assistance not established); *Wainwright v. Witt*, 469 U.S. 412 (1985) (retreating from need to show with unmistakable clarity that prospective capital juror would automatically vote against death penalty before being struck for cause from capital case); *Strickland v. Washington*, 466 U.S. 668 (1984) (holding that defense counsel's failure to seek or present evidence at capital sentencing hearing was not ineffective assistance due to strong presumption that counsel's conduct falls within wide range of reasonable professional assistance); *Barclay v. Florida*, 463 U.S. 939 (1983) (holding that death penalty was constitutional despite reliance by sentencer on an aggravating circumstance not authorized by state's sentencing statute); *Barefoot v. Estelle*, 463 U.S. 880 (1983) (holding that psychiatrist's testimony about future dangerousness based on hypothetical questions but no examination of defendant did not undermine reliability of death sentence); *California v. Ramos*, 463 U.S. 992 (1983) (jury instruction that life without parole sentence could be commuted by governor did not undermine reliability of death sentence); *Zant v. Stephens*, 462 U.S. 862 (1983) (holding that death sentence is constitutional despite invalidation by state supreme court of one of three aggravating circumstances found by jury).

Edward Lazarus understands views such as those expressed by Justice Powell as referenda on "the legacy of Scottsboro—on the idea that racism is endemic; that state judicial systems, especially in the South, cannot be trusted; and that the federal courts and, ultimately, the Supreme Court must serve as the guarantors of social justice." LAZARUS, *supra* note 27, at 85.

32. This is the meaning of the *per curiam* decision in *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*). Justices Douglas, Brennan, Stewart, White, and Marshall filed separate concurrences, each echoing the conclusion that capital sentencing procedures that lead to substantial risk of arbitrariness and discrimination in the administration of the death penalty violate the Eighth and Fourteenth Amendments. *E.g., id.* at 256–57 (Douglas, J., concurring) ("[T]hese discretionary laws are unconstitutional in their operation. They are pregnant with discrimination [which is] not compatible with the idea of equal protection . . . implicit in the ban on 'cruel and unusual' punishments). See also *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (death penalty must be imposed "fairly, and with reasonable consistency, or not at all.").

33. For example, Powell reasons:

Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process.

discretion is a more important value than eliminating race discrimination in capital sentencing.

McCleskey also argued to no avail that purposeful discrimination in his sentencing violated the Equal Protection Clause of the Fourteenth Amendment. In a single footnote, Powell denied the relevance of the long historical record of purposeful discrimination in the imposition of Georgia's criminal penalties, particularly its capital penalties, which McCleskey had offered as circumstantial evidence of present purposes.<sup>34</sup> McCleskey's showing of purposeful discrimination was as strong as in previous cases that found equal protection violations in employment and in jury selection. However, Powell—counterintuitively and in contradiction with those cases—held that the burden of establishing purposeful discrimination must be higher in death penalty cases than in other scenarios.<sup>35</sup>

The word "risk" appears numerous times in the majority opinion of *McCleskey v. Kemp*, even in the first sentence.<sup>36</sup> Clearly, some kind of risk was prominent in Justice Powell's mind—maybe reputational risks to the judiciary or risks to the stability of the criminal justice system. Maybe it was also a concern for the risk that race was determining who lived and who died. But if so, his words do not indicate it. In his majority opinion, Powell never grapples with the source, the magnitude, or the implications of the risk that race strongly influ-

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*Kemp*, 481 U.S. at 313.

34. *Id.* at 298 n.20 ("Although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent.").

35. *See id.* at 296–97 (distinguishing discrimination in Title VII and venire-selection cases from discrimination in capital sentencing cases); *id.* at 297 ("Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."). Under previous precedents, had McCleskey raised a claim of systematic discrimination in jury selection or in employment, the statistical evidence he presented would seem to have established a prima facie violation of the Equal Protection Clause. To deem inadequate the level of proof of discrimination that the Baldus study established for capital cases appears inconsistent with the Supreme Court's insistence on heightened reliability in proceedings where death is punishment. *See, e.g.,* *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). When the Court has intoned that "death is different," *id.*, *Ford v. Wainwright*, 477 U.S. 399, 411 (1986), it is intended to imply greater—not lesser—procedural care.

36. 481 U.S. at 282–83 ("This case presents the question whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment."). *See also id.* at 291 n.7 ("Even a sophisticated multiple-regression analysis such as the Baldus study can only demonstrate a *risk* that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular decision." (emphasis in the original)).

There is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case. There are similar risks that other kinds of prejudice will influence other criminal trials. The question is "at what point that risk becomes constitutionally unacceptable." McCleskey asks us to accept the likelihood allegedly shown by the Baldus study as the constitutional measure of an unacceptable risk of race prejudice influencing capital sentencing decisions . . . .

*Id.* at 308–09 (citations omitted).

ences decisions about who receives death as a criminal punishment.

Four years later, on McCleskey's return to the Supreme Court with his federal habeas corpus claims in *Zant*, nothing in the second case formally raised issues of race. Nonetheless, the subject must have been present to all involved, as McCleskey was the same petitioner with the same lawyers who had dragged the Supreme Court through the embarrassment of the race discrimination case in the first place.<sup>37</sup> Moreover, as observed earlier, federal habeas corpus remedies grew out of the same racialized dynamics that led to efforts to assert greater federal oversight over state criminal justice processes.<sup>38</sup>

In *Zant*, McCleskey petitioned the court for habeas relief after new evidence was unearthed: a twenty-one-page police document revealing that the police had planted an informant in McCleskey's cell after McCleskey had been formally charged with murder.<sup>39</sup> The Supreme Court has held that this practice is illegal because once the adversarial process has begun, the Sixth Amendment protects criminal defendants' right to talk to the police only through their lawyers.<sup>40</sup> But the issue in McCleskey's second petition to the Supreme Court was not whether his conviction was obtained unconstitutionally. Rather, it was whether McCleskey could use a second (or a "successor") habeas petition to ask a federal court to reverse his capital conviction when evidence that established the unconstitutionality of the conviction emerged after the litigation of his first petition.<sup>41</sup> McCleskey had omitted the Sixth Amendment claim from his first petition because for years the police had falsely denied that the jailmate was in their employ, and the jailmate had affirmed this falsehood when he testified under oath at McCleskey's trial.<sup>42</sup>

Nevertheless, the Supreme Court held that McCleskey did not have a legitimate excuse for failing to raise the Sixth Amendment claim in his first petition,

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37. Lazarus maintains that a majority of the Supreme Court justices—the five who voted against McCleskey in his first case before them—did not want to hear McCleskey's race discrimination claims. Despite the fact that race discrimination in the imposition of the death penalty is a matter of grave national consequence, only four justices—the four dissenters in *Kemp*—voted to grant certiorari in the case, over the stated objections of Justice Powell. See LAZARUS, *supra* note 27, at 189–91.

One likely target of Justice Powell's and others' frustrations concerning death penalty delays, see *supra* note 27 and accompanying text, was the NAACP Legal Defense Fund (LDF), the instigator and organizer of the national capital litigation campaign. That McCleskey was their client, and that his race discrimination claims had generated considerable delays in executions around the country, may have helped to harden these justices against him and his claims for relief. For support of this possibility, see *id.* at 189–190, 197, 202–05. For arguments in support of the general proposition that judges' emotions can be influential in how they decide cases, see MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* (2004).

38. See *supra* note 27 and accompanying text.

39. *Zant*, 499 U.S. at 474.

40. *Massiah v. United States*, 377 U.S. 201 (1964) (reversing federal narcotics convictions due to admission at trial of defendant's statements obtained during post-indictment interrogation by informant wearing a police radio transmitter).

41. *Zant*, 499 U.S. at 470.

42. *Id.* at 497.

even though the evidence that supported the claim had been wrongfully withheld by the State.<sup>43</sup> The Court reached that result through deadeningly technical reasoning, both figuratively and literally, ultimately changing the legal standard that applied to the situation.<sup>44</sup> While McCleskey could have prevailed under the existing standard, the Court raised the bar for relief in front of him, arguably to an insurmountable level.

Structurally, both of McCleskey's Supreme Court cases have this feature in common: after McCleskey appeared to meet the demands of an already exceedingly high burden of proof, the Court decided to insist on a higher burden. In *Zant*, they do this despite the fact that the State had not asked for the change in successor habeas law, the parties had not litigated it, and the Court had to ignore some of the findings of fact that had led the District Court to hold for McCleskey. Then, after discovering a new standard for permitting newly discovered evidence in a successor habeas petition, the Supreme Court refused to remand to the District Court for a determination as to whether he had satisfied the new standard.<sup>45</sup> The majority simply declared, without benefit of argument or briefing on the subject, that he had not.

The holding of *McCleskey v. Zant* is that McCleskey's successor petition constituted an "abuse of the writ."<sup>46</sup> However, "abuse" seems more descriptive of the State's actions than it does of the actions of McCleskey and his lawyers.<sup>47</sup> Perhaps by projecting abuses on to McCleskey's actions, the justices are concealing from themselves the abusive qualities of their own decision making. The Supreme Court's rejection of the compelling habeas corpus arguments in *Zant*

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43. *Id.*

44. *Id.* at 493. Prior to *Zant*, the doctrine that applied in this scenario was derived from *Sanders v. United States*, 373 U.S. 1, 18 (1963) (holding that the Court can decide an issue first raised in a successor petition if it had not been deliberately abandoned in the first petition). *Sanders*'s "deliberate abandonment" standard, as it was termed, simply required good-faith in raising all claims reasonably available to the petitioner. Under this standard, McCleskey had an excellent chance of prevailing. His odds plummeted when a majority of the justices in the *Zant* case articulated their preference for a new and stricter standard, known as the "cause and prejudice" standard, drawn from the state "procedural default" context, which bars appellants from raising issues in a federal habeas petition that were not raised in previous state habeas proceedings. See *Zant*, 499 U.S. at 493. The Court held that, under the newly applied standard, McCleskey's first habeas counsel's reasonable belief that the Sixth Amendment claim had no factual basis did not excuse the failure to raise it, and because there was no external impediment to raising it. *Id.* at 497-98. McCleskey's opportunity to challenge his conviction on these grounds was permanently barred.

45. These are procedural matters about which Justice Thurgood Marshall complains bitterly in his dissent. *Id.* at 506. Marshall challenges the majority's professed concern for the rule of law, when it "tosses aside established precedents without explanation, disregards the will of Congress, fashions rules that defy the reasonable expectations of the persons who must conform their conduct to the law's dictates, and applies those rules in a way that rewards state misconduct and deceit." *Id.* at 529.

46. *Id.* at 497-503.

47. Justice Marshall frames it this way: "Whatever 'abuse of the writ' today's decision is designed to avert pales in comparison with the majority's own abuse of the norms of proper judicial function." *Id.* at 529 (Marshall, J., dissenting).

led a few months later to McCleskey's execution.

### C. Cultural Contexts

After embedding both of McCleskey's Supreme Court cases in some of their pertinent historical and doctrinal contexts, and highlighting the structural similarity between the two opinions, I turn the attention of my class more explicitly to interpreting their political and cultural contexts. "Something profound has happened here," I might say, "but what is it? What does it teach us about law?" Among the insights often formed in this discussion are variations on several themes: that despite its claim to autonomy, law does not float above culture and identity, but participates actively in it; that in the face of felt necessities, legal doctrine can be malleable enough to serve perceived ideological and psychological needs; that the abstraction of doctrine helps mask its connection to these needs and helps disassociate it from their consequences; that the legal system grants rhetorical protections that serve a cultural function although it can deny them in reality whenever those protections will be too costly or too destabilizing to the status quo; that because of psychological and material investment in the idea that the past is past, and that the playing field is now level—proof to the contrary as presented by McCleskey notwithstanding—contemporary federal oversight of state criminal justice systems through constitutional law or habeas corpus will be resisted today for some of the same ideological reasons that it was resisted in the mid-nineteenth century.

One plausible conclusion is that we have come full circle: we have the same pattern of race disparities in capital punishment as we have always had; we have the same national legal organizations as were operating decades ago, incurring the wrath of judges for doing the same thing as they did then, that is, repressing poor defendants charged with capital crimes against white people and challenging the fairness of the state court processes that convict them.<sup>48</sup> But arguably the situation is now worse, because reformist impulses have been spent

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48. Lazarus reports that in their secret conference on *Lockhart v. McCree*, 476 U.S. 162 (1986), see *supra* note 31, a number of Supreme Court justices voiced contempt for the tactics and aims of the NAACP Legal Defense Fund (LDF), considering cases like *Lockhart*, and later *McCleskey*, as efforts to circumvent established law for purposes of abolishing the death penalty. See LAZARUS, *supra* note 27, at 189. According to Lazarus, this hostility toward relentless advocacy in death penalty cases, led by LDF, was evident throughout the Supreme Court's handling of the *McCleskey* case. For example, during McCleskey's oral argument, Justice White's questioning impugned the integrity of the Baldus study, and "his large, flushed face contorted into a nasty scowl; his every word dripped with contempt." *Id.* at 203. Before the oral argument, Justice White had taken the rare step of circulating a memorandum to the five conservative justices, urging them to reject McCleskey's claims. *Id.* at 202. After oral argument but before the Justices' conference on the case, Justice White circulated another memorandum in which he accused McCleskey's attorney of misleading the Justices during the oral argument about whether McCleskey had received a plea offer, an ambiguous and contested point in the case record. Lazarus asserts that "White was so suspicious of abolitionist lawyering that he was willing on flimsy evidence to implicitly accuse a leading lawyer at the nation's foremost civil rights organization of baldly lying to the Court." *Id.* at 205.

and, after extensive scrutiny, race disparities are now labeled “equal protection” and “non-discriminatory enforcement.” Federal courts now look at a profoundly tipped playing field in state courts, pronounce it level, and affirm the integrity and finality of state criminal justice systems.

After more than a century and a half of legal intervention invoked to ameliorate the same problems that McCleskey brought to the Court’s attention, lawyers perceived as abolitionists were rebuffed for interfering with the sovereign right of states to manage their affairs as they choose. The 150-year-old echo resounds in chilling tones. The Supreme Court of the late twentieth century, like the Supreme Court of the mid-nineteenth century, authorized states to inflict violence on the basis of race. In that respect, Justice Powell, the centrist, is situated not as far from Justice Taney as we might hope.<sup>49</sup>

#### D. Human Contexts

My claim is that the progressive tilt of the content I have just described grows out of the power of context: the broader historical, doctrinal, and cultural norms, extant but suppressed, which lie beneath the surface of legal doctrine. To counter the distancing facilitated by abstract doctrine and to confront the role that criminal law plays in affording some people the authority to kill others, I would also include in a progressive legal pedagogy another form of context: the human consequences of legal doctrine. To truly grasp the peculiar institution of the death penalty—or of law in general—we must not shield ourselves from the experience of the tragedies in which law participates. From this perspective, attention must be paid<sup>50</sup> to the life and death of Warren McCleskey.

My proposition here is that consideration of Warren McCleskey’s cases is improved by some attention to Warren McCleskey, the person and petitioner. In my class I include details such as these: McCleskey confessed to participating with three others in an armed robbery of a furniture store, during which Officer Frank Schlatt, who responded to a silent alarm, was shot and killed. Although

49. When understood precisely, the point is less incendiary than it sounds. It derives from the fact that both were Supreme Court justices hailing from the South who wrote opinions that gave a constitutional imprimatur to violent social practices that treated blacks and whites unequally. Justice Taney did so most notoriously in *Dred Scott v. Sanford*, 60 U.S. 393 (1857), and Justice Powell in *McCleskey v. Kemp*. Justice Powell, however, disavowed his holding only four years after he wrote it. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451–52 (1994).

Lazarus views Powell’s inability to uphold McCleskey’s claims as derived from Powell’s need to believe that “the South had achieved a dramatic reformation on matters of race.” LAZARUS, *supra* note 27, at 200. To hold for McCleskey would be to undermine the “myth of southern progress” that Powell found sustaining. *Id.*

50. The allusion to Arthur Miller’s wrenching tale *Death of A Salesman* is intentional. Speaking to her son, Willy Loman’s wife Linda pleads,

I don’t say he’s a great man . . . . But he’s a human being, and a terrible thing is happening to him. So attention must be paid. He’s not to be allowed to fall into his grave like an old dog. Attention, attention must be finally paid to such a person.

ARTHUR MILLER, *DEATH OF A SALESMAN: CERTAIN PRIVATE CONVERSATIONS IN TWO ACTS AND A REQUIEM* 56 (1949).

another defendant instigated the robbery, McCleskey was the only one against whom the State sought the death penalty, because the prosecutor believed that it was McCleskey who pulled the trigger, something McCleskey always denied. The prosecution bolstered its claim that McCleskey was the triggerperson and therefore deserved to die through the illegally obtained and perjured testimony of a jailmate who said in essence, "McCleskey told me that he was the one who shot Frank Schlatt." At trial McCleskey was represented by a lawyer who did no investigation, and who failed to read the prosecution file until the Friday before the trial began on Monday. After the jury convicted McCleskey, a sentencing hearing commenced, during which his lawyer presented no evidence in mitigation. After two hours of deliberation, the jury sentenced McCleskey to death.<sup>51</sup> This death sentence withstood thirteen years of appellate and post-conviction review on a number of compelling legal issues.

I might add that Warren McCleskey became deeply religious on death row. He started a death row poor fund, asking death-sentenced inmates to pool their meager individual resources to fund supplies for the neediest inmates who could not afford to buy supplies from the commissary.<sup>52</sup> As his execution date neared, those who spoke to him reported that McCleskey took comfort in the hope that the injustices in his case might disturb people enough to hasten the demise of capital punishment.<sup>53</sup>

The narrative then turns to September 25, 1991, when McCleskey was strapped into the electric chair and began his final statement, then received a stay of execution, was unstrapped, and returned to his cell. Fifteen minutes later, the stay was dissolved and Warden Walter Zant, presiding over the grim scene, had McCleskey strapped into the chair again. McCleskey finished his final statement and was electrocuted. In these torturous circumstances, McCleskey managed utterances that are stunning in their power and clarity, and frankly in their length, especially in contrast to the clipped voice of the warden-bureaucrat. In one especially poignant excerpt, McCleskey thanks God "for mercy, love, and grace extending to me" and prayed that the family of the victim would find it "in their hearts to forgive me not so much for me, but that they should be free—free of the spiritual weight of unforgiveness that continues to hold their lives in bondage [and] keeps destroying the happiness and peace that they desire."<sup>54</sup>

In my view, a progressive pedagogy of the death penalty would include this context as well because it is the only time in this unbearably tragic story of law that the voice of the subaltern, Warren McCleskey himself, is heard.<sup>55</sup> Apart

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51. See LAZARUS, *supra* note 27, at 170–81.

52. These events are recounted in detail by William Neal Moore, a former Georgia death row inmate and co-participant in these efforts. See William Neal Moore, *Remembering Warren*, HOSPITALITY, Jan. 1992, at 5.

53. See Joyce Hollyday, *A Gift of Dignity*, SOJOURNER, Jan. 1992, at 24–26.

54. *Id.*, at 26. See also Phyllis Goldfarb, *The Power of Last Words*, BC LAW MAGAZINE, Spring/Summer 2005, at 27, 53.

55. Content like this is ordinarily avoided in the law school classroom as it elicits strong

from anything else, the grace and eloquence that he reveals in that unimaginable situation of being strapped into, removed from, then returned to the electric chair, is potentially and fundamentally the most subversive of all.

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emotions and may be viewed as irrelevant. While I do not seek to sensationalize the study of law, I do want students to appreciate law's importance and implications, which are harder to grasp—and harder yet to care about—when law's effects, emotionally laden or otherwise, are sidestepped. For a discussion of emotions in the classroom, see Angela P. Harris & Marjorie M. Schultz, "*A(nother) Critique of Pure Reason*": *Toward Civic Virtue in Legal Education*, 45 STAN. L. REV. 1773, 1774 (1993) (arguing that although law professors "traditionally shun openly-expressed emotions in the classroom . . . emotions can never successfully be eliminated from any truly important intellectual undertaking, in the law or elsewhere").