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Introduction: Varieties of Recognition

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INTRODUCTION: VARIETIES OF RECOGNITION

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What a wonderful thing it is, to be recognized. To get off the plane, go down the jetway, and emerge to a smiling face, waving arms and maybe giving hugs. To be recognized by people delighted to see you again. The experience of this festschrift has been full of the warmth of such recognition. Even more wonderful has been the recognition so prized by scholars: recognition of one's work.

Compared to other fields where researchers normally work together, legal scholarship can be a lonely enterprise, authors toiling alone for weeks, months, and years on self-defined and self-assigned projects with little feedback from others. But the scholar's aim, we always say, is to join, shape, or (best of all) start a larger conversation about the law. In this endeavor even fierce critique may be preferred to silence, because at least then you have provoked conversation. More often than not, though, the world proves largely indifferent. After publication, silence reigns. Then we must remind ourselves that we don't do scholarship for immediate returns. We aim for truths that will last for years. In other words, we go on to the next.

For much of my academic career, but especially in its later years, I despaired of broad recognition. It seemed to me that the more I had to say about law's understanding of justice, the less recognition my writing got. I wanted to start a new conversation about criminal justice in America but almost no one was listening. I risked becoming the bore at the party that no one wants to engage because he always goes on about the same thing, endlessly.

My last book, *Imagining a Greater Justice*, into which I poured everything I had intellectually and emotionally, drawing from a lifetime in and around criminal justice, did not receive much attention.

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The sole (wonderful) exception until now was Mary Graw Leary's essay review.[1] I took the quiet reception as confirmation of something I had suspected: my life as a scholar was done.

Which means that the recognition that this event brought came as a great gift for which I am enormously thankful. My thanks to Lauren Willis, Loyola's Associate Dean for Research, who saw the possibilities here; to Dean Michael Waterstone, who agreed to commit school resources to the endeavor; and to Kevin Lapp for organizing the speakers at the event and for his essay here. And of course I am grateful to the contributors, both speakers and writers (some of them both), and the staff of the *Loyola of Los Angeles Law Review* for their editorial assistance and granting space for what follows.

LOOKING BACK ON A SCHOLARLY CAREER

For me there was a Tom Sawyer attending-his-own-funeral aspect to the in person celebration, people saying and writing wonderful things about me that I never expected to hear. What fun. The experience of reading the written contributions has been equally rewarding. Though I must say, looking back at one's work over some 35 years does have its awkward moments. You change over time, you learn. I stand by what I have written but see more clearly now what I missed before.

In this Introduction, I offer thoughts about my scholarly career as prompted by the contributors. I begin with the questions that motivated me, then look at how they played out in the areas of legal theory, doctrine and practice. I throw in some entirely unsolicited advice for present and future criminal law professors, and conclude with one last plea for culture change in American law.

MY QUESTIONS

Most legal scholars have their own meta-questions that drive their teaching and scholarship. Here are mine.

With respect to any legal doctrine or problem, I asked, What's really going on here? What is actually driving the results? For example, Does premeditation in the sense of homicidal calculation really capture our sense of the worst kinds of murder? Or, Do we blame for recklessness that causes serious harm because we believe the person

1. Marcy Graw Leary, *A Vision of Criminal Violence, Punishment, and Relational Justice*, 17 OHIO ST. J. CRIM. L. 227 (2019).

actually saw the risk and ignored it, or because they acted in a way that showed culpable indifference to the welfare of others?

I always wanted to know, Can a particular rule or principle be universalized? Would we accept the results if these were applied to all similar cases? For example, if we mitigate punishment for wrongful violence because the perpetrator experienced a high level of emotion, are we willing to do so in other cases of high emotion violence? If syndrome evidence provides a partial excuse for battered partners who kill their batterers, should syndrome evidence do similar work for others who kill? And if not, why not?

I frequently asked, What can law learn from life? If the life of the law has not been logic but experience,[2] then what should we be learning from life? How can law engage the dynamics of decision-making, intellectual *and* emotional, deliberative *and* intuitive?

Beneath these questions was always the question of justice. When does law diverge from justice, however justice is defined? How does it diverge? In the latter stages of my writing career I wanted to know, What must law do to build a just community? I became increasingly convinced that justice depends on our conception of life in community and cannot be restricted to rules and rights regulating the state's power over individual actors.

THEORY

Two of the essays that follow, by my colleague Kevin Lapp and by Guyora Binder & Matthew Biondolillo, focus on my work on criminal law theory. I appreciate how both pieces locate my writing within the larger body of criminal law scholarship, showing its contributions to developments in emotion and law and deserved punishment. I always found criminal law theory important and fascinating. Yet I never considered myself a theorist because I was never interested in theory as theory. I looked to first principles to solve particular problems. In this way I worked more bottom-up than top-down. And also from side to side, looking to the fields of history, sociology and journalism, philosophy, psychology, and cognitive science for insights into human experience and conduct. As a result I particularly appreciate the way Professor Binder and Matthew Biondolillo show how recent work in social science may inform our understanding of deserved punishment.

2. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

I became fascinated by emotion in the law because emotions seemed so important to decision-making and yet their significance was either barely noticed or actively denied. My first article as a professor took as its starting point *California v. Brown*,[3] in which the United States Supreme Court considered the Eighth Amendment implications of a capital jury being given the standard "no sympathy" instruction in a penalty phase proceeding.[4] This is the basic instruction telling jurors not to decide a case based on their own feelings. The Court found no constitutional harm in the instruction,[5] even though penalty phase presentations by both prosecution and defense appeal directly to the emotions: the prosecution to retributive passions inspired by the crime, and the defense to empathy for the defendant.

In the end, I did not stick with emotion and the law as my central framework for scholarship because for me it seemed more the beginning than the end. The field did not promise, like law and economics did back in its heyday, new methods to tackle a wide range of legal issues. And while its analysis of particular emotions in particular legal settings is useful, it has mostly operated at a high level of abstraction, raising questions about its application to everyday decision-making. Most people are not good at recognizing their own emotions. Some don't recognize others' emotions. Most have a very limited emotional vocabulary. All of which makes challenging the prospect of emotive guidance for legal decisions. Still, I suspect my reservations here likely say more about me than the field. I'm just trying to explain why I eventually headed in another direction.

For me, inquiry into emotion led toward a more relational understanding of human identity—that who we are depends significantly on who we are in relationships with *even if* that relationship is unchosen. This led to the concept of relational justice with its goal of just relations beyond, or in addition to, just outcomes.

In the first phase of my career I also sought to develop a coherent view of deserved punishment. This I did primarily in articles and a book that examined the law of murder and manslaughter. I appreciate Professor Lapp's critical questions concerning my work here, to which I now offer a brief response.

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3. 479 U.S. 538 (1987).

4. Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 702 (1989) (citing *Brown*, 479 U.S. at 542).

5. *Id.*

I still resist the move he urges, to use sociology to mitigate individual responsibility for criminal wrongdoing. That social conditions can be criminogenic, that the majority of those incarcerated today have suffered disproportionately from race discrimination, educational deficits, family dysfunction, and other forms of entirely unchosen disadvantage cannot be doubted.[6] For moral and public safety reasons society should address these conditions. My problem with Professor Lapp's proposal is that I cannot see a principled way to mitigate individual responsibility for socially disadvantaged offenders without also mitigating responsibility for other offenders based on the social and genetic causes of their criminality. All criminal behavior, like all human behavior, can be traced to social and genetic causes, or could be with sufficient information. Which raises the prospect of mitigating or even eliminating the responsibility of all wrongdoers, which is not what Professor Lapp seeks.

More important, I worry that if this step is taken (unlikely though that is in the libertarian United States), it would in practice lead to further disregard of people already suffering from pervasive social disregard. It would even further marginalize the marginal. Individual responsibility is inextricably bound to individual value in modern America. It is a big part of what we value people for. To treat some adults as less responsible than others is to treat them more like children, or the mentally disabled or mentally ill. This would open the door for a variety of coercive, though perhaps less openly punitive, responses by the state.[7]

What I resist in Professor Lapp's critique about individual responsibility, however, I must accept with respect to my writing about the punishment part of deserved punishment. Or rather my *not writing* about the punishment part. Outside of brief discussions of the death penalty, I excluded from my early work significant consideration of how and how much to punish. In those years I was trying to find my footing as a scholar and thought I should focus on what I could reason to a logical conclusion, putting aside subjects where I felt conflicted. Which is of course explanation, not excuse. Nearly fifteen years of work in jails, prisons and juvenile detention halls, and a lot of life

6. *See generally* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006).

7. There is a long history in the U.S. of the state employing humanitarian rationales to increase its coercive powers over those who break the law. For example, see the creation and use of probation and parole, and a separate juvenile justice system. *See* Samuel H. Pillsbury, *Understanding Penal Reform: The Dynamic of Change*, 80 J. CRIM. L. & CRIMINOLOGY 726, 740–51 (1989).

experience, has changed my understanding of American punishment practice. I see now how often it not only reinforces social disadvantage but actually expresses the disvalue of some persons because of race and class. When I was a young man I was more confident and punitive than I am now. I have become skeptical of those who feel righteous in the imposition of long-term incarceration. It may be necessary under some circumstances, but should never be simple or morally easy.

To be just, punishment decisions must acknowledge the complex, interactive relationship between state, community, and individual in the past and in the future. If we send people away for incarceration, it must be to a place where they have the opportunity to change and where they have a realistic chance of release. Any return to free society must be accompanied by a sincere welcome, and not the endless suspiciousness and pernicious punitiveness that Professor Lapp and others have documented in the collateral consequences that presently apply to those who *have done* their time. These collateral consequences are among the clearest examples of how principles of deserved punishment get trashed in American practice. Which means we should be suspicious of their use to justify present practice.

DOCTRINE

Deborah Denno and Stuart Green's contributions both focus on my writing on criminal law doctrine, particularly definitions of mens rea in homicide.

I started to focus on these issues because of teaching Criminal Law. I needed to make sense of basic murder and manslaughter rules in the Anglo-American tradition. Professor Green reviews my efforts to revise understandings of doctrines like premeditation and provocation; Professor Denno looks at my efforts to revise our understanding of culpability for unintentional wrongdoing through an assessment of culpable moral indifference. I am very pleased that this work has received recognition in the academy, and I think it has stood up to the test of time. Alas, as Professor Green recognizes, this work has had very little (as in no) influence on the actual law of the land. I always had to emphasize to my students that they should not confuse the law as it is with the law that their professor would like it to be. But then, we do not write scholarship for immediate results, right? On to the next.

PRACTICE—RULES FOR ATTORNEY-CLIENT RELATIONS

"I have trust issues when it comes to attorneys."

I heard this recently from a man in jail who was awaiting resentencing in his case pursuant to new state law on the punishment of youthful offenders.[8] It's a common sentiment among people in jail, though not always so openly expressed. Distrust puts a heavy burden on representation by court-appointed attorneys. I thought of it with respect to the contribution here of my old friend George Thomas—once a defense attorney himself—and his discussion of *Strickland v. Washington*.[9]

Strickland constitutes a landmark decision in constitutional criminal procedure, setting basic Sixth Amendment rules for ineffectiveness of counsel. To prevail, one claiming ineffective assistance must prove (1) ineffective performance by the attorney that (2) prejudices the outcome of the case.[10] It's worth noting that this is a rule about relations—the relationship between attorney and client. And yet the Court looks almost exclusively at attorney conduct and case outcome rather than attorney-client interaction.

I agree with everything Professor Thomas says about the case, including what my past scholarship suggests about representation here, but I want to go a step further in this Introduction to say why the decision demonstrates the need for a more relational understanding of law's practice.

In David Washington's capital murder case, the penalty phase was the only opportunity for defense representation. Washington confessed to the crimes of which he was charged and pled guilty to them. Then he waved his right to a penalty jury, leaving sentencing to the court.[11]

To prepare for the penalty phase of a capital case, defense attorneys have a special obligation of inquiry and investigation. Defense attorneys must become as curious as a novelist about her main protagonist. Lawyers must learn everything they can about their client in order to present him as a fully recognizable human being to the sentencer. Usually working with a team of investigators and experts,

8. *See* People v. Franklin, 370 P.3d 1053 (Cal. 2016); *see also* CAL. PEN. CODE § 3051 (2022).

9. 466 U.S. 668 (1984).

10. *Id.* at 687.

11. *Id.* at 671–72.

attorneys often spend months, even years, looking into their client's background to discover how he became the man who acted as he did.[12] There are few instances of defense representation where the relationship between defendant and attorney is more important.[13]

In *Strickland v. Washington*, three questions should have been critical to assessing the effectiveness of representation: (1) Who was David Washington?; (2) Who was William Tunkey, his attorney; and (3) What was their relationship? I believe none of these questions was sufficiently explored by the Court.

The David Washington presented by the majority opinion was seen primarily through the retrospective eyes of his attorney as presented in habeas testimony. Washington was a young man of unspecified race and background whose violent actions seem horrific and bizarre; his subsequent legal decisions appear self-destructive. Here was a man with a wife and small child, who had no history of violence, who was unemployed and feared that his family would soon be evicted from their home. He was approached for sex and a promise of money by a man who was a pastor. This solicitation seems to have incensed Washington. Two days later, working with an accomplice, Washington stabbed Daniel Pridgen to death.[14] In the course of the next week Washington fatally shot and stabbed Katrina Birk, repeatedly stabbed her three daughters-in-law, leaving them with permanent injuries, including one in a comatose state, and in a final horrific episode killed college student Frank Meli as he begged and prayed for his life. There is no question that, in the words of Florida death penalty law, these murders were "especially heinous, atrocious, [and] cruel."[15]

After his arrest, Washington gave a complete confession to the police, pled guilty to the crimes, and waived his right to a jury trial on the death penalty. This left the sentencing decision entirely to the

12. There is a large literature dating back to the 1980s on the defense of death penalty cases, especially at the penalty phase. For excellent examples see Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 325–35 (1983); Stephen P. Bright, Essay, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547 (1995); Sean D. O'Brien, *When Life Depends on It*, 36 HOFSTRA L. REV. 693 (2008) (focusing particularly on mitigation specialists).

13. *See* Goodpaster, *supra* note 12, at 321–23.

14. The account here is drawn from George C. Thomas III, *Samuel Pillsbury and the "[L]owest of the [D]ead,"* 56 LOY. L.A. L. REV. 203, 206–09 (2023) and DOUG MAGEE, SLOW COMING DARK: INTERVIEWS ON DEATH ROW 150–52 (1980).

15. 466 U.S. at 674; FLA. STAT. § 921.141(6)(h) (2022).

judge in the case. Given this sequence of events, attorney Tunkey's resulting sense of hopelessness made sense. What can you do for a client seemingly determined to sabotage his own defense? Tunkey decided to emphasize Washington's remorse for his actions. The attorney undertook no significant investigation into his client's past life or psychological state at the time of the crimes, certainly not commensurate with the life and death stakes of the proceeding.[16]

Of course, like every human being, Washington was more than his crime and the legal decisions he made. Evidence presented in a subsequent habeas proceeding showed that others knew him as a quiet and peaceful boy growing up, a leader in the high school band, and a peaceful nonviolent churchgoing man.[17] An expert spoke about his experience of "homosexual panic" in the initial offense.[18] That his crimes represented a profound break from his prior life and identity is corroborated by his subsequent time in prison.[19] He spent hours in his cell weeping, and would tell anyone, including those who did not want to hear, about how sorry he was for what he had done. His last words before being executed expressed remorse to the survivors of his crimes.[20]

That Washington was sincerely and deeply remorseful for what he had done, seems clear from his decisions to confess, plead guilty, and waive a penalty jury, but as presented in the Court's opinion nevertheless appears inadequate for mitigation. In argument, generality rarely defeats detail; here generalities about Washington's remorse stood no chance against the awful details of his offenses. Washington the unique human person, is largely missing from the Court's opinion,

16. 466 U.S. at 671–74. Tunkey also cited a desire to keep new potentially damaging information that he might discover in investigation from the court. As Thomas points out, though, it's not clear why *his* learning more about his client's past meant that the court would learn more, unless Tunkey chose to share it. *See* Thomas, *supra* note 14, at 213. Perhaps Tunkey worried that he would learn new facts that would worsen his own view of his client.

17. *See* Thomas, *supra* note 14, at 215–16 (citing Joint Appendix to the Petition for Certiorari, Strickland v. Washington, 466 U.S. 668 (1984) (No. 82-1554), 1983 U.S. S. Ct. Briefs LEXIS 529, at *203–18).

18. *Id.* at 212. Also unexplored was the moral teachings of Washington's church on sexuality, which might shed light on how this might affect Washington's view of a sex-soliciting male pastor.

19. *See* DAVID VON DREHLE, AMONG THE LOWEST OF THE DEAD 134–35 (2006).

20. *Id.* at 254. While on death row Washington told an interviewer that he would do anything to stop the suffering of his victims' families. "I'm always thinking about these people I killed, every day, every day." MAGEE, *supra* note 14, at 157.

just as he was missing from the penalty phase presentation to the trial judge.[21]

Now we turn to attorney Tunkey, identified by the trial court as a conscientious lawyer with significant defense experience, at least in terms of total number of cases handled. There is no indication that he had any experience in death penalty cases, however, which are different from any other kind of case, to understate the matter considerably. There is no indication that he had experience of a case with similarly extreme facts, or a defendant as remorseful as the defendant. Tunkey might have been a good lawyer for another defendant, might have been a good lawyer in many other cases, but he was not a good fit for this one. He described himself as feeling hopeless. At some point, it seems he gave up, emotionally and legally.

The Court says little in its opinion about the actual relationship between defense attorney and client. We hear nothing about how much time they spent together or their interaction. Client confidentiality can make a retrospective assessment of this relationship difficult, but the absence of facts to the contrary suggests that Tunkey did not spend much time with his client, at least not given his task of arguing for life in this death case.

To this critique, an important historical caution must be added, concerning the state of death penalty law and practice at the time in Florida. Florida was the first state to reenact a death penalty after the U.S. Supreme Court in *Furman v. Georgia*[22] overturned all death penalty laws in the country in 1972.[23] The case was litigated not long after the U.S. Supreme Court found the state's new death penalty law constitutional in 1976.[24] Bifurcated death penalty practice, with a separate penalty phase proceeding, was still new to Florida and most states. Tunkey was operating at a time before there were generally recognized standards for how to defend capital cases at the penalty phase.[25]

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21. For an overview of the defense of capital cases, see Sean D. O'Brien, *Capital Defense Lawyers: The Good, the Bad, and the Ugly*, 105 MICH. L. REV. 1067 (2007) (reviewing WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES (2006)).

22. 408 U.S. 238 (1972).

23. *See* Daniel D. Polsby, *The Death of Capital Punishment?* Furman v. Georgia, 1972 SUP. CT. REV. 1, 1.

24. Proffitt v. Florida, 428 U.S. 242 (1976); *see also* Gregg v. Georgia, 428 U.S. 153 (1976).

25. For example, the first ABA guidelines for representation in death penalty cases were not issued until 1989. *See* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (1989), https://secure.in.gov/ipdc/files/1989-ABA-Guidelines.pdf [https://perma.cc/Q6TL-KNJA].

Which leads to another real world point missing from the Court's discussion: whether Tunkey had any help in the case. Per modern ABA guidelines, in many states today courts appoint two defense lawyers in capital cases, with an expectation that limits will work with a team including an investigator, mitigation expert and often mental health experts.[26] There's no mention of any other lawyer or supporting cast here. Nor of whether Tunkey had colleagues to turn to for advice. He seems to have been very much alone. This was a case that would be too much for even a more experienced lawyer, alone. Whether Tunkey knew enough to ask for help, or whether help was unavailable, seem to me important questions to ask if we want to know what really happened, relationally.

Finally there is the question of race. Washington was Black, his attorney appears to have been white, facts not mentioned by the Court or even the lone dissenter Justice Thurgood Marshall.[27] Here I am going to be explicitly speculative, not to pile retrospective blame on Tunkey, but to use the case as a vehicle for raising hard questions about attorney-client relations. Maybe race had nothing to do with Tunkey's sense of helplessness and decision not to explore further mitigation investigation. Or, maybe race had an unconscious effect.

A fundamental tenet of race prejudice in America is the inherent violence of Black men. In the absence of an individual explanation for Washington's violent conduct that bias could fill the explanatory gap. Again, this speculation may be unfair to Tunkey, but as a white man I think it is critical that we consider the what ifs of race. If the two men had been of the same race, would there have been more chance for a personal connection and a more vigorous investigation of the possibilities of mitigation evidence? A white man representing a Black man in America needs to work hard to gain the understanding and trust of his client. And to understand what's going on in the case.

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26. *See* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES Guideline 4.1(a) (rev. ed. 2003), *reprinted in* 31 HOFSTRA L. REV. 913 (2003).

27. The identification of Tunkey as white is made from his Florida bar photo. *See Member Profile: William R Tunkey "Bill Tunkey,"* THE FLA. BAR, https://www.floridabar.org/directories/find-mbr/profile/?num=125153 (last visited Jan. 23, 2023). My thanks to George Thomas for this. Washington's attorneys later made a systemic race discrimination challenge to the Florida death penalty that was denied by the Florida courts. State v. Washington, 453 So. 2d 389 (1984). A similar claim based in Georgia death penalty practice was turned aside by the U.S. Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987).

The race question raises the importance of attorney self-understanding, which comes from self-questioning. Tunkey needed to think hard about what he thought and felt about his client and why. He needed to ask himself, Why am I feeling hopeless? What do I think of David Washington? What do I feel about him? Why? Much better for an attorney to acknowledge negative personal views of a client than to ignore them on the assumption that professionalism will magically carry the day. The, *I'm a professional, my feelings don't matter, I just follow the facts and the law*, is a dangerous myth. No one is immune from emotional influence. Without self-reflection, particularly in an intensely emotional proceeding like a penalty phase trial, the attorney may miss things critical to the defense in the facts and the law.

As many others have noted, the Court's choice of David Washington's case as its vehicle for establishing rules about ineffective assistance creates problems due to the unusual nature of penalty phase proceedings. Death penalty cases are statistically rare, and in important ways different from other cases (death is different as the Court has been wont to say in its Eighth Amendment jurisprudence).[28] Still the issues raised in *Strickland* also appear in the defense of many other cases.

I have never defended a case at the trial level, and so in that respect am not qualified to say much on the subject. But as a jail chaplain, talking with a wide range of men who have had a wide variety of experiences with legal representation in the criminal justice system in California, I have access to sources that many others do not. The men tell me sometimes about their representation, though that is not usually the focus of our conversations. What I hear is anecdotal, but not for that reason unworthy of consideration, particularly as it mostly tracks what sociological studies have shown. A good defense requires a relationship of trust.[29]

While I hear some men express great animus towards their appointed attorneys (almost all have appointed counsel), strong negative

28. *See* Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OH. ST. J. CRIM. L. 117, 117 n.1 (2004).

29. *See* MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT (2020) (sociological study showing how class and race correlate with client trust of attorneys, with significant impact on effectiveness of representation); *see also* NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACE AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT (2016) (a closely observed ethnographic study of Chicago criminal courts revealing how structural racism works within the legal system, affecting prosecutors, defense attorneys, and judges).

views are the exception. More common is confusion and mystery. They often do not know what is going on in their case and do not have a clear idea of what the attorney is doing or when they might talk again except for perhaps briefly at their next court date. The men would like to trust their lawyers, but do not know if they should. Many have felt betrayed by lawyers in the past. And so we have a baseline problem, expressed in the opening quotation of this section—a lack of trust.

As people who are not, mostly, great with abstractions and untrained in the law or related subjects, who often did poorly in school, they tend to read their attorneys more emotionally than legally. What else can they do? They look for personal signs that this man or woman is on their side. Patients who do not know much about medicine will do the same thing with doctors. Which is why having a good bedside manner in that profession can make such a difference.

Persons accused of crime, particularly those awaiting trial in jail, tend to be suspicious of lawyers who seem (to them) to put more energy into selling them on the strength of the state's case in support of a guilty plea than in fighting the state's case on their behalf. The same goes for lawyers who appear more concerned with their own continuing relationships with judges and DAs than with their client's welfare. And to say given the dynamics of modern criminal practice, they are wrong?[30] The point is that even if the lawyer is doing just as she should to zealously represent the client's interests legally, relational missteps with the client can seriously hurt the attorney-client relationship and undercut any belief in justice being done.

Constructing a sound attorney-client relationship requires relational qualities in attorneys that are often missed, neglected, or undeveloped. Here I suggest three: curiosity, time, and hope—not necessarily in that order.[31]

By curiosity I mean a genuine interest in learning about the client as a person as well as a defendant.[32] This will motivate active listening, watching, asking questions. It's extraordinary how quickly serious personal interest in another can shift a relationship. Remember a few

30. For evidence that defendants may have reason to suspect the loyalty of their appointed lawyers, see GONZALEZ VAN CLEVE, *supra* note 29, at 92–116.

31. For an insider's view of the personal requirements for criminal defense attorneys in public service, see Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203 (2004) (responding in part to Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 L. & CONTEMP. PROBS. 81 (1995)).

32. *See* Smith, *supra* note 31, at 1221, 1243–51.

names and details, ask about family and what's really bothering the client, even if legally irrelevant, and trust will grow. Genuine curiosity will produce more information and cooperation. Curiosity should also extend to the lawyer herself, as noted in the *Strickland* discussion.

Time is, I think, the single most neglected ingredient of justice. While the criminal justice system tends to be profligate with the time of defendants and witnesses and sometimes jurors, time for case preparation, especially attorney time with a client in custody, is always under pressure.[33] Speaking relationally, attorney-client time is more like water than air—not very compressible. You can try to get a lot done relationally in a short period of time, but mostly, building a good relationship takes time.

In the circumstances of David Washington's case, Tunkey's inability or unwillingness to slow the legal process in order to gain more time to forge a strong attorney-client relationship, to address the defendant's despair, and conduct a full mitigation investigation almost certainly impacted the quality of representation.

The statement we constantly hear about inadequate representation in criminal cases is that public defenders and other appointed attorneys are overworked. They just have too many cases to spend significant time with each client. Let's assume that is true (and I believe it often is). Why do we accept this as a sufficient answer? If time is essential to adequate representation and there is insufficient time, then the representation is inadequate. In this respect the system is constructed to produce injustice.[34]

Hope, the last of the qualities I suggest, may appear the least likely for a criminal defense attorney. Defense attorneys will regularly encounter legally hopeless cases. In these cases it's the attorney's job to deliver tough news to clients who don't want to hear it.[35] Defense attorneys must be realistic; unbounded optimism is as dangerous as losing all hope. But attorneys need to convey some hope for the future of their client as a person. Clients in custody often despair for

33. Another issue here can be the difficulty that defense attorneys experience getting access to their clients in custody. This has been a long-standing problem in Los Angeles county jails. For an example of how law enforcement can casually impede access, see GONZALEZ VAN CLEVE, *supra* note 29, at 94.

34. For an introduction to the pervasive dearth of time and resources for indigent defense attorneys, see Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 GEO. WASH. L. REV. 1564 (2018); NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE (2011).

35. *See* Smith, *supra* note 31, at 1230–31.

themselves, and with reason. Attorneys cannot do the same. It's a big reason the accused needs defense counsel.[36]

Which brings me to perhaps my most important learning from men in jail: the experience of justice, of being treated justly, can matter as much or even more than the outcome of the case. Lawyers constantly forget this, or do not want to recognize it, to the great detriment of justice.

A. had spent almost nine years in jail waiting for trial when I met him. Stunned by that length of time, I asked a little about proceedings in his case. He was on his second attorney or third attorney (I can't recall precisely now). He did not want to criticize his present attorney but expressed discomfort with his effort and approach. A. reported that at their last meeting, as A. expressed some of his reservations, his attorney nodded while scrolling through messages on his phone. When A. stopped talking, hoping to gain the lawyer's full attention, the attorney said—without stopping his phone perusal—"No, go ahead, I'm listening." But he was not listening in a way that A. could trust.

After considerable difficulty, A. switched representation to a public-interest lawyer who with his legal team heard him out fully. (And also litigated vigorously.) A. told me about his relief at being heard and respected by his new counsel, regardless of what happened in court. For him, being heard and seen by someone in the justice system mattered most. This might be hard for others to understand, but it shows how justice can be relational at heart.

SUGGESTIONS FOR FUTURE WORK

Though I know never to say never, having had to backtrack on such pronouncements more than once when I, or circumstances, changed, I do think it unlikely that I will produce more legal scholarship. I am being pulled in different directions now. Which makes this perhaps my last chance to tell other professors what they should do, knowing full well that such advice is unlikely to be heeded. Who among us wants to be told what to do? Many of us went into academics just to avoid just such direction. Still, good ideas are good regardless of the source, and if you can make any of this yours, please do so. I

36. In practice, legal system players, including defense attorneys, often write off defendants' futures. "They're not seen with a future. They are de-futurized. They're just . . . '[T]his is you, this is your destiny, you're going to be a convicted felon . . . .'" GONZALEZ VAN CLEVE, *supra* note 29, at 102 (quoting a defense attorney).

will limit myself to two suggestions, about the craft of legal rulemaking, and addressing the experience of violence in the teaching of criminal law.

RULE CRAFT

The craft of rulemaking in law is that of putting words together in phrases and sentences that will reliably guide decision-makers across time and place. It's not sufficiently appreciated in the contemporary legal academy where law professors tend to focus on big issues, grand theories, and interpretations of U.S. Supreme Court decisions. Down these paths career advancement seems to lie. I found myself wrestling with rule craft in my effort to propose specific definitions for different kinds of murder and manslaughter, and supporting jury instructions, as part of my first book on murder and manslaughter.[37]

Legislators generally take a political and transactional approach to drafting statutes. There's not much space or time in the process for careful rule craftsmanship. Which is unfortunate but not surprising given the political nature of their work. What is more surprising is that even appellate courts neglect the craft of rulemaking, though in their common law decisions they effectively make rules for later cases. Courts tend to take a what's-needed-here approach to rule declaration in criminal law, failing to anticipate problems that the wording of their reasoning and holdings may cause in the future.[38]

I get frustrated that so few lawyers, educators, or courts care about rule craft, though it is key to making the rationale, articulation, and practice of law congruent. Obviously we can get by with imperfect rules. California proves the case in criminal law, as in both statutes and court decisions, general and specific intent remain key mens rea distinctions, despite their inherent vagueness.[39] The alternative clarity

37. *See* SAMUEL H. PILLSBURY, JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER app. at 189–96 (1998).

38. Rules involving reasonableness are a frequent source of confused rule statement for legislatures, courts, and students of the law. In provocation, see Samuel H. Pillsbury, *Misunderstanding Provocation*, 43 U. MICH. J.L. REFORM 143, 145 (2009). With respect to reasonableness and syndrome evidence in battered partner situations, see efforts to simultaneously allow and limit the use of such evidence in *State v. Kelly*, 478 A.2d 364, 377–79 (N.J. 1984), and *People v. Humphrey*, 921 P.2d 1, 8–16 (1996).

39. *See*, *e.g.*, CAL. PEN. CODE §§ 21(a), 29.4(b) (2022) (attempt; voluntary intoxication defense). The difficulties of the general/specific intent distinction have particularly troubled courts in the offense of assault with a deadly weapon. *See* People v. Colantuono, 865 P.2d 704 (1994). For a critical overview of the distinction, see SANDFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES 289–91 (11th ed. 2022).

of the Model Penal Code's quartet of mens rea forms has been available for use since 1960! In criminal law, most of the time we can get by with, *you know what I mean*, but not always, and why would we ever be satisfied with less than the best we can do here? I would humbly urge law educators to spend a little more time talking about rule drafting in class and maybe just a little less on rule interpretation. At a minimum, students would learn that writing clear rules is a lot harder than it looks.

Also why not recognize the obvious—that ordinary English grammar and syntax are not sufficient for statutory clarity. Standard linguistic rules about adverbs, adjectives, word sequence, and punctuation cannot on their own produce reliable and accurate readings of complex statutory constructions. There is the familiar interpretive problem that every first year student and professor encounters in Criminal Law of deciding how far down the line of a statutory sentence a mens rea term should travel. Does the knowingly or intentionally term modify every element in the statute that follows it? Might it modify elements that precede the term in the statutory sentence? And if the term does modify the element, how? Does purposely convert to knowingly with respect to particular elements, or recklessly, or negligently?[40] Ordinary language rules are not sufficient to provide all answers.

It has often struck me that we might devise new logical or verbal symbols to solve some of these problems. Perhaps digital tools such as hypertext could be deployed to fill in potential interpretive gaps. I realize that the uncertainty of statutory language may sometimes be intentional and in some instances may even produce good results by leaving to courts questions of particular application they are better suited to answer than legislators. But surely that is not always the case. And it would be a contribution to the profession to provide new tools for when statutory clarity is needed.

CRIMINAL LAW AND THE EXPERIENCE OF VIOLENCE

Criminal law is a central means for society to address wrongful violence. Mostly it seeks to distinguish violent acts according to lawfulness and culpability. But I have long believed that lawyers who deal with cases of violent offenses should also engage both intellectually

40. A partial answer is to have default rules of interpretation for criminal statutes as in section 2.02(4) of the Model Penal Code.

and emotionally with what violence does to individuals and community, especially what it does to survivors.

A music lawyer needs to know the music business in addition to contract and intellectual property law to represent clients well. A divorce lawyer needs to know about the dynamics of marital and other romantic relationships to effectively negotiate and litigate. The same should be true about violence for criminal lawyers and legal educators who deal with violent offenses.

An excellent example of what it means to deal with the experience of violence in criminal law can be found in efforts to address sexual violence against girls and women, and more recently boys and men. A large legal literature has been produced, and a significant effort made to address the phenomenon of sexual violence in the law school classroom. Not that all the needed work has been done in either realm. I worry most about the classroom. Too many professors still do not teach rape or related subjects in any depth, fearing causing offense and controversy. I would urge any teachers who are anxious here, that if you feel unfit for this endeavor because of group identity, if like me you are male, straight, cisgender, and white, these characteristics make your voice especially needed. (This is what my younger daughter always told me.) It's when folks who look and sound like us take sexual violence seriously and personally that the change we want to see becomes the change that happens.

The same should be true in teaching homicide, to which most professors devote more time than any other offense. Here the challenge is the opposite from that with sexual violence—it's not too hard to talk about but too easy. Killing has been normalized by a culture that depends heavily on it for entertainment in both fictional and nonfictional forms. As a result, we can discuss murder without emotional baggage, meaning without full understanding.

I made it my custom every year in Criminal Law before beginning the discussion of murder and manslaughter to do a reality check on the cases to come. I said, "There's blood on these pages." I meant it as a reminder of the deep and lasting harms that come from homicide, which are easy to forget in discussions of the law of premeditation, provocation, recklessness, negligence, and causation.

Here and elsewhere in the course I introduced the personal and social effects of fatal violence—the terrible sense of isolation it can produce in survivors, the way it disrupts their ability to connect with others, and the damage it does to family and community bonds at the

time of the offense, over the course of a lifetime, and even to the next generation.

In doing this, student experiences surfaced that I never would have heard about otherwise. In two different classes in recent years students told me in my office about losing a parent to murder. In both cases the murder was still unsolved. If I had not raised the experiential dimension of homicide in class, they would have struggled with the emotional consequences of encountering homicide law on their own, making learning here much more difficult.

CONCLUSION: ONE LAST CALL FOR CULTURE CHANGE

I recognize, to return to the word with which I began, that the big thing I have been arguing for throughout my academic career is a hard sell. Though the reasons are different, I have found it is just as hard to get law professors to talk about feelings as it is for police officers. Most don't go into these fields to do feelings. For police the attraction tends to be the action; for law professors, ideas. And if you go to the market because you want bananas, even the shiniest apples won't appeal. If you're in the mood for a romantic comedy, that great new documentary on climate change probably won't get the nod for the night's viewing.

Scott Wood's thoughtful essay on my career illustrates the challenge in the very manner of his writing: metaphoric, personal, and even poetic. To some such writing will seem out of place in a law review. As if it's not what we really do. As if this is not what we are about. So I get why there's so much resistance.

What I'm trying to sell here is nothing less than culture change. We need to change the dominant understanding of justice under law as a fundamentally intellectual and political enterprise to one that includes, as an integral part, the emotional dimensions of human experience. We need to address the myths about emotions and relations that promote injustice.

I'll close with one last example from jail. M. and I met on an HOH (High Observation Housing) floor in the Twin Towers jail in Los Angeles. This is a floor where guys with a high security classification and a significant mental illness diagnosis are housed. When I met him, M. had been locked down for months, never let out of his cell even for phone calls or showers. He complained bitterly about this and about the corruption and malice of the deputies, and how his written

grievances were never investigated, let alone recorded in the jail system. (He had evidence of this.) M. is Black and was sure that he was the victim of racial discrimination by the predominantly Latino deputies. He was furious, seething; the tirade which he launched through the security glass of his cell continued without cease for ten or fifteen minutes. It was all I could do to stand there and receive it.

When I spoke to the custody staff later about his solitary confinement they told me about his disrespect for them (a criterion they use to judge what privileges to grant) and how he went from "0 to 60" in seconds, meaning he got angry almost instantly. I suggested that the longer he was locked down, the more furious he became. Wasn't there a way they could ratchet things back, to change the dynamic between them at least in small steps?

No question, M.'s rage was scary, disturbing. In speaking to me on other occasions I heard him make graphic threats to the lives of deputies and their families, even his own family when he thought they had cut him off. He got into terrible arguments with other inmates on the floor. His anger and intelligence could combine to make his words nasty and unforgettable. Their hurt went deep.

I did not see him every time I went in, because I found him so hard to engage. But I did come back and we started to talk about a variety of topics, including his art—he was a skilled draftsman with a pencil—and civil rights history and the law. He was hungry for knowledge.

He had a sharp eye for people and identified early on something about me no one else in jail did. He looked at me straight and asked if I went to an Ivy League school, then ran through the best known, one by one. I found myself admitting that yes, I had gone to Harvard undergrad. Not something I generally reveal in jail. I still remember in my first career as a journalist, when the previous police beat reporter for the paper that had hired me in Jacksonville, Florida—a 20-year Navy veteran with crew cut who smoked non-filter Camels—smoothed the way for my taking the position by telling the Robbery Homicide detectives that I was a recent Harvard grad. Which in that southern police department in the late 70s really did not help.

Over time, M. and I connected. I brought him a dictionary and books on history, biographies, articles, and always two or three pencils. I followed him when he was transferred to different floors, and through a round of alleged incompetence to stand trial proceedings that sent him to a state mental hospital (within weeks they sent him

back, saying he was competent—which he clearly was. His real issue, as he will admit, is anger.) He is doing better now; deputies let him out of his cell regularly, though not in the company of other inmates. He looks forward to the chance of a post-release program that will give him the help he knows he needs, so he can end his life in lockup. He has been in the system off and on since he was a boy. He wants to be there for his own son growing up.

When he sees me coming now, M. calls out with a big grin, "Harvard Sam! Harvard Sam!"

It's a moment of recognition even though I don't particularly identify with my alma mater. He sees me, I see him, and our spirits dance for a moment. He knows I care about him because I show up, and listen. And I know he cares about me. He says I have helped him through some hard times. When I told him recently I had to go out of state for a while, he said in a somber tone, eyes fixed on me, that I needed "to be really really really careful." Which was his way of saying, stay safe.

To this some readers may say, So what? What about M's criminal case for which he was locked up, his grievances, his mistreatment in solitary, his claims of race discrimination, his mental health? How is this more than just a churchy feel-good story? To be clear, the only thing that really changed for M. because of our interactions was that he came to recognize me as a unique person who cared about him, and I the same with him. So what?

The answer is that recognizing each other is part of justice. We can't get to where we want to go without it. Because justice is relational.