

MAINSTREAMING CIVIL RIGHTS IN THE LAW SCHOOL CURRICULUM: CRIMINAL LAW AND CRIMINAL PROCEDURE

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INTRODUCTION

I am honored to contribute my thoughts on teaching, and teaching civil rights issues in particular. As a former prosecutor, now full-time law professor, I have the dream job: regularly teaching the required criminal law and procedure courses at my institution. My approach to criminal law and procedure contains a civil rights perspective—keeping one eye towards potential discrimination, abuse of discretion,¹ and injustice connected to race (or gender). Although there are many definitions for and perceptions of civil rights law, when I think of civil rights issues, I point to laws that prohibit discrimination and intend to promote fairness irrespective of immutable characteristics. In the area of criminal law and criminal procedure, the law speaks very neutrally to issues of fairness and due process,² rarely singling out groups for special treatment or special protection. Notwithstanding the seemingly objective standards, civil rights problems arise in the administration of criminal justice in unique ways.

In criminal procedure, civil rights issues are typically triggered by the wide discretion given to the police in investigating crime³ and administering force,⁴ and the even broader discretion afforded to prosecutors⁵ in litigating criminal

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1. Tamara F. Lawson, “*Whites Only Tree*,” *Hanging Nooses, No Crime?: Limiting the Prosecutorial Veto for Hate Crimes in Louisiana and Across America*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 123 (2008).

2. “[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

3. See, e.g., *Whren v. United States*, 517 U.S. 806 (1996) (discussing that an observed traffic violation is sufficient probable cause to justify a lawful traffic stop).

4. *Scott v. Harris*, 550 U.S. 372 (2007) (discussing the reasonableness and level of force allowed to apprehend a fleeing felon).

5. *McCleskey v. Kemp*, 481 U.S. 279 (1987); *United States v. Armstrong*, 517 U.S. 456 (1996); ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 6–8 (2007).

law violations. It is within these areas where discrimination may intentionally or unintentionally distort the intended goals of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution. In criminal law, civil rights issues are often less obvious and, instead, subverted within the cultural subtext of seemingly neutral or generic definitions like “the reasonable person”⁶ or “imminent threat.”⁷ Neutral definitions can still create issues of injustice in their application. In teaching these respective courses it is important to tease out for students the relevant civil rights arguments that stem from both the substantive laws as well as the procedural rules of criminal prosecutions.

It is optimal for students to take a specialized course in Race-in-the-Law, Critical Race Theory, or Civil Rights, but many students are unable to take such a course either due to their schedules, their university’s offerings, or their lack of interest in the subject. Therefore, by integrating some civil rights topics into the core curriculum, students get the opportunity to consider these concepts. They will not leave law school ignorant of such issues or without an informed opinion about such vital debates of law and policy. Another benefit of teaching civil rights issues in a required course is the contact with a wide range of students with diverse viewpoints. This allows for fertile conversations.

Law school has a luxury we often take for granted: it has the benefit of time and space unrestrained by the pressures of lawyer–client obligations and, therefore, provides students with the liberty to explore issues, mold their analysis, and experiment with problem solving in a dynamic way. This is an extravagance that does not exist in law practice.⁸ Particularly with regard to civil rights issues that have the potential to foster politically and culturally charged discussions, it is important for the law professor to carve out an academic safe space for these debates. Further, law school is the time students should be most encouraged to step outside their comfort zone and grapple with complex situations, competing interests, and the concept of just and unjust punishments within our legal system. It is from this pedagogical perspective that I embrace the intersection of civil rights and criminal law and procedure and explore it with my students.

6. CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* 223 (2003) (discussing courts’ reluctance to incorporate race or ethnicity into the reasonable person standard under the guise of being colorblind).

7. *State v. Stewart*, 763 P.2d 572, 579 (Kan. 1988) (“[W]hen a battered woman kills her sleeping spouse when there is no imminent danger, the killing is not reasonably necessary and a self-defense instruction may not be given.”).

8. See *MODEL RULES OF PROF’L CONDUCT* R. 1.3 cmt.1 (2009) (“A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”). Law students and their analysis are not bound in this way. It is rare in the legal profession that a lawyer can speak freely, unrestrained by fiduciary obligations, and analyze the law, public policy, and overall fairness of the situation.

I. TEACHING IS AN ART, SELECTING THE TEACHING MATERIALS IS A SCIENCE

My prosecutorial background makes me accustomed to carrying the burden of proof. I learned early in my career that it is critically important that the facts of the case are told in the appropriate context. Without a full understanding of the setting around the crime story and the circumstances in which the alleged facts took place, the meaning of the evidence can be distorted and become misleading. In the same way, unless criminal law courses expose students to the full picture of the criminal justice system, students can reach false conclusions.

When I began teaching law, I did not connect the similarities between the moving party carrying the burden of proof and persuasion and my role as a law professor. For many of my students, I still carry the burden of persuasion. Although the proof is at their fingertips, in their casebooks, and other supplemental sources, I still play an integral role in framing the lens through which they view the subject matter. I carry the burden of establishing the legitimacy of why they must learn the course material I have selected, especially if some of it is not tested on the bar exam. So careful selection of the course materials as well as the presentation of those materials is critical. I purposefully seek diverse perspectives within the substantive readings and force myself to vary my lecture style to include traditional and nontraditional methods. I accept as part of my professorial role the task of challenging each student to view at least one case, one fact, or one issue in a new light or from a different vantage point. Selecting the right course materials is essential to accomplishing this goal.

A. *Selecting the Casebook*

Criminal law and criminal procedure cases present several instances of civil rights triumphs. It is important to highlight these cases, particularly cases which represent a seismic shift in the law. For example, *Gideon v. Wainwright*,⁹ *Miranda v. Arizona*,¹⁰ and *Batson v. Kentucky*,¹¹ are cases that changed the way the criminal justice system operates. These cases established the right to have a court-appointed lawyer at trial, required the police to advise a suspect of his right to remain silent and to have an attorney present during a custodial interrogation, and prohibited prosecutors from preemptively excluding jurors based on racial grounds, respectively. In so doing, these cases helped to turn a progressive page towards promoting and protecting civil rights of the criminally accused. Rulings that provide rights and services to indigent defendants also have significant civil rights implications for racial minorities

9. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

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

11. *Batson v. Kentucky*, 476 U.S. 79 (1986).

who disproportionately are defendants in the criminal justice system.¹² But only highlighting the civil rights successes would give students an incomplete and, therefore, inaccurate, picture of the criminal justice landscape.¹³ It is equally important to discuss the civil rights failures, such as: *United States v. Armstrong*,¹⁴ *McCleskey v. Kemp*,¹⁵ *Whren v. United States*,¹⁶ and *Terry v. Ohio*.¹⁷ In these cases, the problems of racial discrimination were raised but not remedied by the Court's rulings. These negative rulings also have a systematic impact on the criminal justice system. It is important to critique both the triumphant and the disappointing civil rights cases with students.

A reality of teaching required courses is that they are subjects tested on the bar exam, and towards that end, coverage is a legitimate concern.¹⁸ Thus, as much as I would like to expose my students to all the nuances of the intersection of race and criminal law or gender and criminal law, class time is precious and will not permit it. Certain essential topics of the curriculum must be covered; they are not optional. The flexibility in teaching these courses in this respect is limited. But squeezing the civil rights issues of race and gender into the course adds richness and practicality to the subject, which is also

12. See Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622 (1986).

13. It also may lead them to erroneously believe that there is no work left to be done because all the "bad" laws have already been changed, and in the case of those laws that have not been changed, that the arguments that are made to change them are not winnable. One thing I like to remind my students when we discuss monumental cases like *Miranda* and *Gideon* is that these cases were once losers. See, e.g., *Miranda*, 384 U.S. at 492. Many significant United States Supreme Court cases involve litigants who lost in a lower court because a lawyer's arguments, although well-reasoned and well-researched, failed to persuade the judge or jury. See, e.g., *id.* The analysis of the merits of a case and its corresponding law goes beyond the question of which party won or lost the suit.

14. *United States v. Armstrong*, 517 U.S. 456, 458 (1995) (holding that claims alleging discriminatory selective-prosecution must overcome the evidentiary burden of establishing that the government declined to prosecute similarly situated suspects of other races before claimant is entitled to discovery); see generally DAVIS, *supra* note 5, at 186 ("Given the inadequacy of current legal remedies to combat race discrimination in the criminal justice system, the Court's affirmation of broad prosecutorial discretion, and the high legal barriers erected to discourage selective prosecution claims, other remedies must be constructed and implemented.").

15. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987); see *infra* Part II.B.

16. *Whren v. United States*, 517 U.S. 806, 813 (1996); see *infra* Part II.A.

17. *Terry v. Ohio*, 392 U.S. 1 (1968) (developing the reasonable suspicion standard allowing police to temporarily "stop and frisk" citizens based on evidence less than probable cause).

18. See 2009–2010 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 301 (2009) (discussing bar passage rates as a factor in assessing law school educational programs' compliance with ABA guidelines).

necessary and helpful for students.¹⁹ With careful and strategic planning, professors can accomplish both adequate coverage and inclusion of civil rights.

One option is selecting a nontraditional book that incorporates civil rights issues within the mainstream topics. This allows students to seamlessly broaden their thinking about the subject matter. In my criminal law course, I use Harris and Lee's *Criminal Law: Cases and Materials*.²⁰ This book includes excerpts from law review articles that highlight provocative issues for the students to consider alongside the seemingly neutral black letter law.²¹ In this way, exposing the students to countervailing views is effortless; it is in the assigned text. Also, the casebook authors select other outstanding scholars in the field to raise the relevant civil rights concerns. These scholars reinforce my teaching by subliminally communicating to the student, "not only does my professor think civil rights issues are important to the subject matter, but the casebook authors and other important professors think it is important too."

A second option is to select a traditional book that does not highlight civil rights issues in the text and, instead, the professor can strategically intersperse relevant supplemental materials that address civil rights concerns into the in-class presentation. In my Criminal Procedure course I use a traditional casebook, White and Tomkovicz's, *Criminal Procedure: Constitutional Constraints Upon Investigation and Proof*.²² I also supplement the course with documentaries and video clips that illustrate some of the pertinent civil rights issues.²³ With either method the same objective can be reached, including civil rights issues, in order to provide an ample picture of the legal, social, and cultural landscape surrounding the subject matter. This approach is consistent

19. See generally Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001); Ascanio Piomelli, *Cross-Cultural Lawyering by the Book: The Latest Clinical Texts and a Sketch of a Future Agenda*, 4 HASTINGS RACE & POVERTY L.J. 131 (2006).

20. ANGELA HARRIS & CYNTHIA LEE, CRIMINAL LAW: CASES AND MATERIALS (2d ed. 2009). Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO ST. J. CRIM. L. 217 (2009); but see Angela Harris & Cynthia Lee, *Teaching Criminal Law from a Critical Perspective*, 7 OHIO ST. J. CRIM. L. 261 (2009).

21. See Paul Butler, *Walking While Black: Encounters with the Police on My Street*, LEGAL TIMES, Nov. 10, 1997 at 23B, reprinted in HARRIS & LEE, *supra* note 20, at 77. In Chapter 7's subsection on involuntary manslaughter, the authors include *State v. Williams*, 484 P.2d 1167 (Wash. Ct. App. 1971), involving Native American parents who failed to take their child to the doctor for fear that their child would be taken by child protective services. Immediately following *Williams*, the casebook authors include a Congressional Report documenting the fact that Native American children are commonly separated from their parents just as the Defendants in *Williams* feared. HARRIS & LEE, *supra* note 20, at 372-73.

22. WELSH C. WHITE & JAMES J. TOMKOVICZ, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF (6th ed. 2008).

23. See *infra*, Part II.A.

with the intended goals of a required survey course—giving the student a broad overview.

Think beyond just the substance and also factor in the presentation. Consider injecting technology into the course. I like to incorporate multimedia into the in-class lecture presentation to break it up and shift the energy in the classroom. Students react favorably. Modern law students are used to receiving most of their information in some electronic format, and some scholars say that the modern law student subconsciously expects information and entertainment together.²⁴ But irrespective of the latest trends in Powerpoint, clickers, or other forms of multimedia—a picture is worth a thousand words. Video clips show, in vivid detail, the impact of discrimination better than the cold record of a legal opinion can. Select video clips can highlight relevant civil rights issues related to the reading material. Exploit current events to stimulate the class and increase participation. Discussions ripped from the headlines always spark students' curiosity.²⁵ It is important to stay current—particularly with criminal law and procedure. It is easier for students to relate to cases that are happening now. Even if the students have not heard about the case prior to discussing it in class, the more recent the case example, the more powerful the impact on the student. Current events and news reports provide vital sources for practicum exercises.²⁶

II. EXPLORING CIVIL RIGHTS ISSUES IN CRIMINAL LAW AND PROCEDURE

A. *Put a Real Face on the Rule—Does It Still Seem Just?:* Whren v. United States

As a general point, it is important to emphasize the significance of discretion in the criminal justice system to students. Many come to the course with a misconception that every time a crime occurs, it is investigated, and

24. Joan Catherine Bohl, *Generations X and Y in Law School: Practical Strategies for Teaching the "MTV/Google" Generation*, 54 LOY. L. REV. 775, 780–81 (2008).

25. See Dwight Aarons, *A Nuts and Bolts Approach to Teaching for Social Change: A Blueprint and a Plan of Action*, 76 TENN. L. REV. 405, 408–09 (2009) (stating that there are many benefits from using hypotheticals that raise issues of diversity and difference, including social justice issues and arguing that using such hypotheticals sharpens a student's critical thinking skills.) In my criminal law course I devised practical exercises that allow the students to confront practical issues of racial discrimination, bias, and stereotyping as they naturally occur in real cases.

26. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 10 (2007). [Editor's Note: This book is commonly referred to as the "Carnegie Report."]

someone is arrested, prosecuted, convicted, and sent to jail.²⁷ Instead, significant discretion exists at each stage of the criminal litigation process, starting with the police.²⁸ I like to stress the issue of police discretion with my students and also ask them to consider whether the facts indicate any abuse of discretion.²⁹ And although I do not ask my students directly, I want them to consider if the race of the suspect is a relevant factor when analyzing whether an officer abused his discretion. Instead of asking the class outright, I present the course materials in a way that begs the question nonetheless.

There is a fervent debate in criminal procedure and civil rights over whether police officers exercise their discretion evenly or, instead, are racial minorities disproportionately subjected to unreasonable searches and detentions based on minimal or nonexistent probable cause or suspicion?³⁰ Once a citizen is detained the officer may gain the right to further investigate depending on what he sees,³¹ hears,³² smells,³³ or otherwise becomes reasonably suspicious about.³⁴ He can use his own senses, enhanced technology,³⁵ or drug-sniffing dogs³⁶ to investigate further. Thus, an unauthorized or borderline initial detention may seem like a small point, but on the street, and in the technical analysis of constitutional criminal procedure, the lawfulness of the initial detention is the key first step into a potentially deeper

27. Further, some students believe that the police treat everyone the same. Their belief is largely molded by their own personal experiences with the police—negative and positive. Yet, the reality reveals that police have wide latitude regarding how they treat people.

28. See DAVIS, *supra* note 5, at 6–8.

29. Sometimes the Court acknowledges a police officer is acting badly, yet still rules that the officer's conduct was constitutionally allowed. See, e.g., *Atwater v. Lago Vista*, 532 U.S. 318 (2001). The Court held the arrest for a seat belt offense was not a violation of the Fourth Amendment. However, the Court mentioned the officer's conduct was not optimal. *Id.*

30. See David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 546 (1997); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 265–66 (1999); Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 392–95 (2001) ("The law not only allows police harassment of minorities, but also seems to encourage it."). Racial profiling is defined as the "law-enforcement practice of using race, national origin, or ethnicity as a salient basis for suspicion of criminal activity." BLACK'S LAW DICTIONARY 1286 (8th ed. 2004).

31. See *Arizona v. Hicks*, 480 U.S. 321, 325–26 (1987).

32. See *United States v. Jackson*, 588 F.2d 1046, 1050–52 (5th Cir. 1979).

33. See *United States v. Johns*, 469 U.S. 478, 480 (1985).

34. *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (articulating the standard for reasonable suspicion as "conduct which leads [an officer] reasonably to conclude in light of his experience that criminal activity may be afoot").

35. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (remanding on the issue of probable cause).

36. See, e.g., *Illinois v. Caballes*, 543 U.S. 405, 410 (2005).

warrantless investigation that would otherwise be unconstitutional.³⁷ Without a constitutional first encounter, the fruit from any subsequent investigation is tainted and useless in prosecution.³⁸ The legal question of whether minor violations of the traffic code constitute sufficient probable cause to allow an officer to conduct a traffic stop has, therefore, been a highly contested topic at the state³⁹ and federal levels.⁴⁰

In 1996, in *Whren v. United States*,⁴¹ the United States Supreme Court reviewed the issue and its implications for the Fourth Amendment's prohibition on unreasonable searches and seizures.⁴² In *Whren*, the legal question was whether it is an unreasonable and, therefore, unconstitutional seizure, to stop a vehicle based on a minor traffic violation. *Whren* presents the classic criminal procedure case of competing interests—law enforcement's zeal to catch the bad guys versus a citizen's right to be free from government intrusion.⁴³ In my criminal procedure course, *Whren* is a Fourth Amendment probable cause case⁴⁴ assigned in the traditional casebook early in the term. In many respects, *Whren* is a clear and straightforward case, and my initial presentation of it in class is very narrow.

37. *Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting) ("Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual. After [*Atwater*], the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest.").

38. *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963).

39. Some state legislatures have addressed this issue when determining whether citizens can be stopped for seat belt violations. The fear Florida legislatures had of allowing police officers to stop citizens for seat belt violations is that the law would be over-enforced against racial minorities and police would use the seat belt violation as pretext to stop a vehicle and conduct additional investigations for which they had no probable cause, such as possession of drugs or other contraband. See John G. Van Laningham, Comment, *The Making of the 1986 Florida Safety Belt Law: Issues and Insight*, 14 FLA. ST. U. L. REV. 685, 695 (1986).

40. Compare William Jefferson Clinton, Op-Ed., *Erasing America's Color Lines*, N.Y. TIMES, Jan. 14, 2001, §4, at 17, available at <http://www.nytimes.com/2001/01/14/opinion/erasing-america-s-color-lines.html>, with Heather MacDonald, *The Myth of Racial Profiling*, CITY J., Spring 2001, at 1, available at http://www.city-journal.org/html/11_2_the_myth.html. (discussing the federal debate on racial profiling citations).

41. *Whren v. United States*, 517 U.S. at 806.

42. U.S. CONST. amend. IV.

43. The government always argues maximum authority to investigate with the minimum amount of justification and the citizen wants the maximum amount of freedom with the minimum amount of government intrusion.

44. The Fourth Amendment requires that reasonable searches or seizures be supported by probable cause. U.S. CONST. amend. IV; *United States v. Watson*, 423 U.S. 411, 415–16 (1976).

Factually, police officers observed a traffic code violation and stopped the vehicle.⁴⁵ During the stop the officers saw crack cocaine in plain view in the passenger's hands. Both the driver, James L. Brown, and passenger, Michael A. Whren, were arrested and convicted on federal drug charges.⁴⁶ Whren and Brown appealed their convictions on Fourth Amendment grounds, arguing that the initial stop was an unconstitutional detention unsupported by reasonable suspicion or probable cause of drug activity.⁴⁷ They argued that a reasonable officer would not have stopped them.⁴⁸

The United States Supreme Court unanimously ruled that the seizure was constitutional. The Court's reasoning was simple: the observed traffic violation provided sufficient probable cause for the stop and the drugs were in plain view.⁴⁹ The Court further clarified that once an officer has observed a crime, even a minor traffic violation, the stop is justified by probable cause and any subjective motivations behind stopping the suspect are irrelevant to the Fourth Amendment analysis.⁵⁰ At first blush, the *Whren* decision appears to make good, seemingly uncontroversial, law. It states a clear, concise, and objective rule that is easy to apply. It gives law enforcement a clear guideline. It gives trial judges faced with a suppression motion a clear rule to use. After this short and narrow presentation of the *Whren* holding, I show my class a video clip from a documentary titled *A Pattern of Suspicion*, produced by NBC and Dateline in 2004.⁵¹

The documentary chronicles racial profiling and excessive force issues in Cincinnati, Ohio. The clip starts by showing a live police chase in-progress and a voice dispatch over the radio telling the officers in pursuit that their suspect "has fourteen warrants on him." The suspect is chased into a dark one-way alley and shots are fired. The police shoot and kill the suspect. On the tape the shooting appears almost immediate. This scene leaves the impression on the audience that the fleeing suspect was armed and dangerous and had a violent record—wow, fourteen warrants. Yet the documentary goes on to tell the story of the suspect/victim, Timothy Thomas. He was nineteen years old

45. The observed traffic code violations were: 18 D.C. Mun. Regs. §§ 2213.4, 2204.3, and 2200.3, respectively. *Whren*, 517 U.S. at 810 ("An operator shall . . . give full time and attention to the operation of the vehicle"; "No person shall turn any vehicle . . . without giving an appropriate signal"; and "No person shall drive a vehicle . . . at a speed greater than is reasonable and prudent under the conditions").

46. *Whren*, 517 U.S. at 809.

47. *Id.*

48. *Id.* at 813–14.

49. *Id.* at 819.

50. *Id.* at 813 ("We think these cases [*Robinson*, *Villamonte-Marquez*, *Gustafson*, and *Scott*] foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.").

51. On file with author.

and did not have a violent criminal history. In fact, he had never been convicted of any real crime. All of his warrants were for traffic tickets.

The documentary begins to unravel another perspective of the *Whren* case—one profound consequence of ignoring a police officer's subjective, and even discriminatory, motivations is that pretextual stops and racial profiling are allowed to continue unchecked by the Constitution. Post-*Whren*, without a real legal remedy for racial profiling abuses, citizens like Timothy Thomas can end up with a record of fourteen warrants for traffic tickets simply because probable cause is satisfied once the officer observes a minor traffic violation. Even more horrific, citizens like Timothy Thomas can end up dead because his criminal record of fourteen warrants makes him sound like a serious and potentially violent criminal over the police dispatch radio. The documentary interviews other young African-American men from various parts of the country. These men describe multiple incidents of unjustified traffic stops that they personally experienced. And the documentary reveals even more disturbing facts about the alleged pretextual traffic stops that Timothy Thomas experienced—many of the tickets were for nonmoving violations, such as driving without a license.⁵² Dateline questioned, how could an officer observe such a violation before the stop?

It was Dateline's hypothesis that these nonmoving violation tickets were potential evidence of pretextual stops and racial profiling.⁵³ The logic behind Dateline's theory was that detentions initiated based on alleged nonmoving violations, which could not have observed before the stop, would be an insufficient basis for probable cause under *Whren*. In other words, the initial first step would be an unconstitutional detention by the police, which would taint any subsequent investigation, citation, or arrest.⁵⁴ Dateline also queried whether these types of nonmoving violations were disproportionately issued to racial minorities.⁵⁵

To test its theory, Dateline launched a national investigation and analyzed the racial disparity across the country in many major cities of traffic tickets issued for nonmoving violations.⁵⁶ Based on its statistical analysis, black drivers were three to four times more likely than white drivers to be ticketed for nonmoving violations.⁵⁷ The documentary includes an interview with Professor David Harris, an expert in the area of criminal procedure and racial

52. Melanie McFarland, 'Dateline' Gives a Shocking Look at Racial Profiling, SEATTLE POST-INTELLIGENCER, Apr. 9, 2004, at E2, available at http://www.seattlepi.com/tv/168304_tv09.html.

53. *Id.*

54. *Wong Sun v. United States*, 371 U.S. 471, 485 (1963) (establishing the fruit-of-the-poisonous-tree doctrine).

55. McFarland, *supra* note 52.

56. *Id.*

57. *Id.*

profiling.⁵⁸ Professor Harris explains: “The problem is, the wider your discretion and the less regulated your discretion, the more you’re subject to the possibility of abuse.” Harris added, “Police officers will tell you, ‘Traffic code is my best friend. I know I can stop pretty much anybody I want to. If I follow them for a few blocks, it’s all legal.’”⁵⁹

After showing the relevant sections of the documentary, I return to class lecture and ask my students if they have a different opinion of the *Whren* case after viewing Dateline’s piece. During this part of the classroom discussion, I start to flesh out other significant parts of *Whren*. I elaborate on the petitioners’ allegation that the traffic violation was used by the police as merely a pretext, and the true motivation of the officers stopping them was racial profiling.⁶⁰ Specific facts of the opinion are highlighted at this point in the presentation, such as: (1) the officers conducting the traffic stop of Brown were plainclothes vice-squad officers of the District of Columbia Metropolitan Police Department patrolling in an unmarked car; and (2) the District of Columbia Police Department’s internal regulations do not allow undercover officers to make stops for minor traffic infractions, and instead only allow such stops in instances where the violation is “so grave as to pose an *immediate threat* to the safety of others.”⁶¹ Why were Brown and Whren stopped? Was this really a drug investigation? Are Brown and Whren correct to argue that these officers were acting unreasonably or based on pretext?

I never ask my students, “Is there discrimination in the criminal justice system based on race?” Instead, I ask my students a series of different questions: (1) Does the litigant who raised issues of discrimination, abuse of discretion, or injustice have a point? (2) What is the litigant’s point? (3) Is it a valid point? (4) If yes, what makes it valid? (5) If yes, how could the court have addressed the litigant’s point or remedied the injustice? (6) If yes, why did the court refuse to address the litigant’s point or remedy the problem? (7) Was the court’s decision motivated by public policy or some other countervailing interest? (8) Is the outcome in the case a fair result?

In the specific situation of the *Whren* decision, my goal is to present a full context in which to evaluate the validity of the court’s ruling. Did Brown and Whren have a point when they alleged discriminatory treatment regarding why they were stopped? Why did the Court unanimously reject this argument? There was not even a dissenting opinion. Considering the larger landscape that

58. *Id.*

59. *Id.*

60. *Whren*, 517 U.S. at 813 (rejecting racial profiling analysis on Fourth Amendment grounds and instead holding that such claims are appropriately made under the Equal Protection clause).

61. *Id.* at 815.

includes evidence from Cincinnati and Dateline's statistical data, does the *Whren* case reach a fair result?

The goal of my in-class presentation of *Whren* is not to lead my students to a static opinion about the case. My goal is to illustrate to the students that a seemingly straightforward, well-reasoned, and objective case like *Whren* can have larger ramifications in its application. And this method of introducing a video documentary puts a real face on the rule. They will likely remember the face of Timothy Thomas and his fourteen warrants for traffic violations. Was Timothy Thomas treated fairly by the police? Did they abuse their discretion in ticketing him so many times? Would Timothy Thomas have been shot if *Whren* had produced a different rule?

Supplementing the class discussion with the Dateline piece allows students to consider *Whren* in the larger public policy debate surrounding pretextual stops, racial profiling, and intentional racial discrimination arguments raised by Brown and *Whren* in the case. The students become exposed to the possibility that the petitioners' arguments were not unique or original but, instead, are part of a larger law and policy debate. They can consider whether racial profiling is a real problem, and if so, what is the appropriate remedy? Regardless of the students' opinion of the *Whren* case or their personal views on racial profiling, it is important that they not leave my course (or any professor's course) on constitutional criminal procedure ignorant of the existence of the debate.

B. Apply the Rule to a More Familiar Factual Situation—Does it Still Seem Fair?: McCleskey v. Kemp

By necessity, discretion is a large part of the administration of criminal law.⁶² Prosecutorial discretion shapes criminal law in very significant ways.⁶³ Prosecutors determine which laws will be enforced, against whom, and to what degree.⁶⁴ They determine which cases are pled out, litigated, and to a lesser degree, what punishment will be levied.⁶⁵ Prosecutors decide which cases will be treated harshly and which will be treated leniently—and even which will be dismissed.

It is important to illuminate for students that it is not only the police who have discretion over which cases to investigate; prosecutors have further discretion over which cases to prosecute.⁶⁶ They additionally make decisions about the degree of charges to pursue and the corresponding punishment to seek.⁶⁷ In other words, decisions of whether the consequence of the accused's

62. DAVIS, *supra* note 5, at 6.

63. *Id.* at 13.

64. *Id.* at 12.

65. *Id.* at 23–24.

66. *Id.* at 23.

67. DAVIS, *supra* note 5, at 23.

actions will be a warning and dismissal, a misdemeanor charge and a potential fine, a felony charge and a potential prison sentence, or a murder charge and a potential death sentence, are all within the prosecutor's authority.⁶⁸ But as prosecutors exercise their discretion and determine which charges to file, the Constitution protects the accused against unequal application of the law.⁶⁹ Under the Fourteenth Amendment everyone is protected against discriminatory exercises of discretion by law enforcement.⁷⁰

In homicide cases, prosecutorial discretion is most acute.⁷¹ Deciding to charge murder and to seek the death penalty represents the prosecutor's most serious exercise of discretion.⁷² Prosecutors decide which cases are the most serious, which facts are the most egregious, and which defendants are the most dangerous and worthy of the most serious punishment allowed in our American system—the death penalty.⁷³ To be clear, prosecutors, as a sole entity, do not determine which defendants will actually receive the death penalty;⁷⁴ but they definitely determine which defendants will not receive it.⁷⁵ The prosecutorial decision to file a “notice to seek the death penalty” is the critical first step in a capital murder case. Notwithstanding this wide discretion, even alleged murderers are entitled to equal protection of the laws, and, therefore, are protected against discriminatory exercises of discretion by the prosecutor.

In my criminal law course we cover *McCleskey v. Kemp*,⁷⁶ a death penalty case in which the accused appealed his death sentence on the grounds that the prosecutor, among others,⁷⁷ violated Equal Protection. McCleskey claimed

68. *Id.*

69. U.S. CONST. amend. XIV; *United States v. Armstrong*, 517 U.S. 456, 464 (1995).

70. *Armstrong*, 417 U.S. at 464.

71. DAVIS, *supra* note 5, at 89–90.

72. *Id.* at 78–81.

73. As the law currently stands, the only crime eligible for penalty of death are murder cases. *Kennedy v. Louisiana*, 554 U.S. ___, 128 S. Ct. 2641, 2650–51 (2008) (holding that a death sentence for one who raped but did not kill a child is unconstitutional); *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (holding that the death penalty is an “excessive penalty for the rapist who, as such, does not take human life”).

74. The death penalty in most jurisdictions is ultimately decided by a bifurcated jury, which first determines guilt and then separately determines punishment. *See Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

75. *McCleskey v. Kemp*, 481 U.S. 279, 312 n.34 (1987) (discussing that at one point in McCleskey's pre-trial litigation the Prosecutor indicated that he would offer McCleskey a guilty plea with a life sentence, but noting that this negotiation never reached a concrete stage).

76. *See generally id.*

77. *Id.* at 292 (“In its broadest form, McCleskey's claim of discrimination extends to every actor in the Georgia capital sentencing process, from the prosecutor who sought the death penalty and the jury that imposed the sentence, to the State itself that enacted the capital punishment statute and allows it to remain in effect despite its allegedly discriminatory application.”).

that the death penalty system in Georgia, where he was sentenced, was intentionally discriminatory based on race.⁷⁸ Factually, McCleskey is a hard example for discrimination because of its underlying criminal facts. It is a murder conviction based on the killing of a white police officer⁷⁹ who responded to an armed robbery in-progress. McCleskey, an African-American, was one of the armed robbers, although he may or may not have been the actual shooter.⁸⁰ McCleskey was charged with murder under alleged aggravating circumstances: “[T]he murder was committed during the course of an armed robbery, . . . and the murder was committed upon a peace officer engaged in the performance of his duties.”⁸¹ The jury convicted McCleskey of murder in the guilt phase.⁸² In the penalty phase, the jury recommended death, and the judge followed the jury’s recommendation and imposed a death sentence.⁸³

For some students, it is hard to see past these brutal facts of the crime scene to appreciate any discrimination arguments McCleskey may have regarding his sentence. Instead, the predominant thought running through the minds of many students is: “There’s a dead cop here for goodness sake: what type of sentence does this defendant expect?” They may also be asking, “How could race possibly be a factor in a case like this?”

My first step to shift students away from the murder itself is to ask them the technical requirements of McCleskey’s claim.⁸⁴ This is an important part of the in-class presentation of this case, because McCleskey is not claiming actual innocence, nor insufficiency of the evidence that supported his conviction. And the concept of appealing a case like this with a concession of guilt is conceptually difficult for students to grasp, especially early in the semester when they have not yet learned the nuances of mens rea and levels of culpability in homicide. At this stage of the course, they are still burdened by ideas about criminal law learned from watching *Law and Order* and *CSI* before coming to law school.⁸⁵ *McCleskey* challenges students, as young emerging

78. *Id.* at 291.

79. *Id.* at 283.

80. *McCleskey*, 481 U.S. at 283 (“[McCleskey] confessed that he had participated in the furniture store robbery, but denied that he had shot the police officer. At trial, the State introduced . . . the testimony of two witnesses who had heard McCleskey admit to the shooting.”).

81. *Id.* at 284–85.

82. *Id.* at 284.

83. *McCleskey*, 481 U.S. at 285.

84. *Id.* at 286.

85. Tamara F. Lawson, *Before the Verdict and Beyond the Verdict: The CSI Infection Within Modern Criminal Jury Trials*, 41 LOYOLA U. CHI. L.J. 119, 130–35 (2009) (discussing how expectations of jurors are shaped by their exposure to television depictions of criminal investigations and prosecutions).

criminal law experts, to remain technically focused on the essential elements of substantive criminal law and its corresponding constitutional limitations.⁸⁶

The precise claim McCleskey urged was that racial discrimination tainted the Georgia death penalty system in two ways: “[P]ersons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers.”⁸⁷ Allegations of racial discrimination are constitutionally serious claims, and towards that end, the movant has the burden of proving not merely accidental or coincidental discrimination, but rather the “existence of purposeful discrimination.”⁸⁸ The Court states, therefore, in order for McCleskey to prevail, he must show that “the decision makers in *his* case acted with discriminatory purpose.”⁸⁹ McCleskey, however, had no evidence regarding the intentions of the actual decision makers in his case. He had no secretly taped conversation of the jury deliberations or covert prosecutorial memo using racial slurs against him.⁹⁰ As evidence of intentional discrimination, McCleskey proffered a statistical study, performed by Professors Baldus, Pulaski, and Woodworth, commonly known as the “Baldus study.”⁹¹ The Baldus study analyzed two thousand murder cases,⁹² focusing on the disparate treatment of the black defendants that killed white victims and white defendants that killed white victims.⁹³ McCleskey argued that the Baldus study compels an inference that McCleskey’s sentence rests on purposeful discrimination.⁹⁴ The Baldus study articulates a disparity in the imposition of the death sentence, and to a lesser extent, a disparity based on the race of the defendant.⁹⁵ In the end, the results of the Baldus study showed defendants charged with killing white victims were 4.3 times more likely to

86. In HARRIS & LEE, *supra* note 20, at 121–31, *McCleskey v. Kemp* is presented in Chapter 2, entitled “Constitutional Limitations on the Power to Punish.” Harris and Lee include a *Washington Post* article by Richard Morin outlining the impact of race and gender of the victim on the length and severity of sentence that will be received. *Id.* at 131. See also Richard Morin, *Justice Isn’t Blind: New Facts and Hot Stats from the Social Sciences*, WASH. POST, Sept. 3, 2000, at B5.

87. *McCleskey*, 481 U.S. at 291.

88. *Id.* at 292.

89. *Id.*

90. See *infra* notes 103–05 and accompanying text (discussing example of Texas prosecutors caught using code words such as “Canadian” to improperly identify the race of potential jurors).

91. *McCleskey*, 481 U.S. at 286.

92. *Id.*

93. *Id.*

94. *Id.* at 293. The use of statistical evidence had been accepted by the court in other Equal Protection cases such as jury selection and violations of Title VII. *Id.* at 294–95.

95. *Id.* at 286 (“[Baldus] found that the death penalty was assessed in 22% of the cases involving black defendants and white victims, [and] 8% of the cases involving white defendants and white victims.”).

receive death than defendants that killed blacks.⁹⁶ But in *McCleskey*, the Court found the Baldus study insufficient proof of intentional discrimination in the death penalty context.⁹⁷ The Court further opined that the Baldus study only shows the risk of racial discrimination, not that racism affected McCleskey's sentence.⁹⁸ Although the Court had accepted statistical evidence before, in discrimination cases involving jury selection⁹⁹ and employment discrimination,¹⁰⁰ it was unwilling to accept statistics in sentencing discrimination cases, because the Court thought there are too many variables in sentencing to use general statistics to make inferences. On balance, McCleskey's claim was denied for lack of proof of purposeful discrimination.¹⁰¹

In class, I ask my students if they find the Baldus study to be persuasive. Most often, students tell me it is not persuasive. They typically articulate similar reasons given by the Court, such as "there are too many factors in criminal cases to prove intentional discrimination by statistics." In the midst of one recent class discussion, a student asked: "If the accused cannot use statistics to prove intentional discrimination, how could he prove his claim unless he overheard the prosecutor using the N-word or something?" This student keyed in on one important aspect of the *McCleskey* case, at least from a civil rights perspective. Was the Court's ruling in *McCleskey* creating an insurmountable hurdle for any criminal defendant?¹⁰² In response to the student's question, I shared one newsworthy example where the prosecutor was, essentially, overheard making intentionally discriminatory remarks.¹⁰³

It was reported in the Harris County District Attorney's Office, located in Houston, Texas, that internal e-mails between two prosecutors revealed them talking to each other about "Canadian" jurors in their juries.¹⁰⁴ Were Canadians actually in their jury? The e-mails raised suspicions as to what the prosecutors were really talking about. One rookie prosecutor checked the identity cards of the jurors referred to in the e-mails and found no Canadians,

96. *McCleskey*, 481 U.S. at 287.

97. *Id.* at 297.

98. *Id.* at 309.

99. *Batson v. Kentucky*, 476 U.S. 79 (1986).

100. *McCleskey*, 481 U.S. at 294–95.

101. *Id.* at 296–97.

102. Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 105–06 (1990) ("At other times, racism takes on what I call a procedural cast. In these periods, there are fewer images, stories, and laws conveying the idea of black inferiority. . . . Instead, we promulgate narratives and rules that invalidate or handicap black claims. We erect difficult-to-satisfy standing requirements for civil rights cases, *demand proof of intent*, and insist on tight chains of causation.") (emphasis added).

103. Lisa Falkenberg, *When is a Canadian not a Canadian?*, HOUS. CHRON., Jan. 24, 2008, at B1.

104. *Id.*

but he did find blacks on the jury. It turned out that the word Canadian may have been used as a code phrase for African-American jurors, and, therefore, the e-mails were potentially evidence of discriminatory intent in jury selection.¹⁰⁵ The e-mailing prosecutors deny that they were using “Canadian” as code for anything and say they actually believed some of the jurors were Canadian. Even if you could get a prosecutor to admit to the intended derogatory meaning of the email, the likelihood of discovering a smoking gun e-mail like this from the prosecutor’s office is slim. And the facts contained in the reported Canadian e-mail example, even if true, would be insufficient evidence to prove intentional discrimination as defined by the Court in *McCleskey*.¹⁰⁶ It is hard to get proof of the prosecutor’s true intent and even harder to learn jurors’ intentions.¹⁰⁷

In an effort to direct the class to notice not only the high burden the Court created for future *McCleskeys*, but also the potential abuse of prosecutorial discretion in the criminal justice system, I highlight one of the statistics regarding prosecutorial discretion contained in the Baldus study. According to the Baldus study of two thousand murder cases, Georgia prosecutors sought the death penalty in 70% of the cases where the defendant was black and the victim was white and only 32% of the cases in which the defendant was white and the victim was white.¹⁰⁸ I ask my students to look only at that statistic and further consider whether that statistic alone is persuasive to them as proof of intentional racial discrimination. The students generally maintain it is not persuasive. I believe this is mainly because they are still thinking about the fact that *McCleskey* killed a cop and that the prosecutor’s decision to charge him with the death penalty was correct. But that is not the question that I am asking. I want to know if the statistics create a reasonable inference of either abuse of discretion or intentional racial discrimination, or both. Most often, students still say that the statistics are not persuasive.

In order to make the Baldus study and its conclusions more tangible, I change the facts and relate them to something with which the students are more familiar. I ask the students to consider the following hypo:

Pretend that you are planning your law school schedule for next semester. You want to take Professor X’s Wills and Trusts course because it fits best in your schedule. You ask your colleagues around campus if you should take Professor X’s class and learn that in past semesters 70% of the As went to the

105. But the prosecutor, Mike Trent, denied any discrimination or the use of “Canadians” as a code word. *Id.*

106. *McCleskey*, 481 U.S. at 292.

107. The rules requiring the jury’s secrecy protect it from discovery, and neither the litigants nor the court can invade it to extract proof of intentional discrimination. *See* FED. R. EVID. R. 606(b).

108. *McCleskey*, 481 U.S. at 287.

black students and 30% of the As went to the white students. You are a white student, and you want an A in Wills and Trusts. Is this information learned from your colleagues about Professor X's grading practices persuasive to you in selecting your schedule next semester?

Usually, the students say that the information is not persuasive because it is just rumor, student gossip, and they would not rely on it in selecting their course schedule.

Next, I change the hypo slightly:

Assume that the statistics were not given to you by your colleagues, but instead Professor Baldus and his colleagues based on a statistical study conducted on Professor X's last 2000 students, and they found that among those past students, 70% of the As went to the black students and only 30% of the As went to the white students. You are a white student and you want an A in Wills and Trusts. Suppose further that Professor X was questioned regarding the racial disparity in his grading and he stated that there were too many variables in grading to use general statistics to make any inferences about the reasonableness of his discretion in grading. Would Professor Baldus' study on Professor X's grades be persuasive to you in selecting your class schedule for next semester?

At this point, students start to comment that Professor X's grades would have to be biased based on those statistics and that they would try to take a different class, or report the situation to the Dean's office.

Changing the facts from the Baldus study of Georgia's death penalty scheme to the Baldus study of Professor X's grades works because it forces the students to step outside the harsh facts of the murder case and legitimately analyze the reasonable inferences, if any, that the statistical analysis within the Baldus study compels. The hypo further makes McCleskey and his claim of discrimination more tangible once it relates to something the students are themselves very sensitive about: grades. Students have a keen sense of equality once the conversation shifts to the fair distribution of grades as opposed to the fair imposition of sentence. Converting the substantive case material to something with which students are more familiar takes away their hesitation, and they are able to more authentically discuss the substantive meaning of the study and its conclusions.¹⁰⁹

I close the class discussion by underscoring two larger policy debates that are relevant to McCleskey's claim—racial disparities in the exercise of prosecutorial discretion to charge and racial disparity in sentencing outcomes. Scholarly attention has focused on studies that analyze charging decisions that

109. Students don't perceive people who commit murder as their peers; this creates an inherent barrier in critically analyzing a murder's claims of injustice.

appear skewed due to the race of the victim¹¹⁰ as well as the race of the accused.¹¹¹ Additional studies have analyzed the disparities of the harshness of sentencing based on race.¹¹² Exposing students to these civil rights issues provides context—a necessary ingredient for a thorough analysis of both the law and policy rationales of the *McCleskey* Court. It is true, as *McCleskey* pointed out, a myriad of factors go into a sentencing decision; but the empirical research suggests that the factor of race is unique. Taking students the next step and getting them to fearlessly grapple with the true meaning of the evidence, even initially uncomfortable evidence of racial discrimination, is an experience they should have in the law school setting first as part of full survey of the substantive law.

III. CONCLUSION

The goal of teaching civil rights issues in required courses is to give students a broader and more complete picture of the legal landscape relevant to the subject matter. Using innovative and provocative course materials and presentations that incorporate civil rights issues enhances the course, increases students' interest in the subject, and challenges them to consider multiple perspectives, including race, when analyzing a case, its facts, and its underlying policy rationales. When students leave my course, my hope is that they had an experience that they could not have had simply by reading the casebook and studying from canned outlines for the test. I want them, at some level, to experience criminal prosecutions from the varying perspectives of the competing parties, appreciate the magnitude of the high stakes involved, and the problems that discrimination, both procedural and substantive, can create in each case.

110. See Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC'Y REV. 437, 440 (1984) ("The race of the victim in particular has a strong impact on both the charging of murder cases and imposition of the death penalty.").

111. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 32 (1998) ("Like police officers, prosecutors often make decisions that discriminate against African American . . . defendants."); N. Douglas Wells, *Prosecution as an Administrative System: Some Fairness Concerns*, 27 CAP. U. L. REV. 841, 844 (1999) ("[R]acism, both overt and unconscious, may influence discretionary charging and sentencing decisions.").

112. See Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 56 (1984) (examining studies that reflect that blacks who kill whites were several times more likely to be sentenced to death than whites who killed whites); Cassia Spohn et al., *The Effect of Race on Sentencing: A Re-Examination of an Unsettled Question*, 16 LAW & SOC'Y REV. 71, 78 (1981) (finding that blacks receive harsher sentences than whites because of racial and wealth discrimination and because they are charged with more serious crimes).

