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# CRIMINAL LAW

## A CRITICAL VIEW FROM THE INSIDE: AN APPLICATION OF CRITICAL LEGAL STUDIES TO CRIMINAL LAW

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Critical Legal Studies (CLS) provides a theoretical critique of the law in operation. To date, very few CLS analyses have focused upon criminal law. This phenomenon is particularly glaring given the prominence of criminal law in the American judicial system. This paper provides an overview of the CLS movement and a discussion of the value of deconstructing criminal law cases. Four legal formalisms are then used to critique the *McCleskey v. Kemp*<sup>1</sup> decision. A fifth formalism, the "sociology of race relations," is offered and applied to critique *McCleskey*.

### I. INTRODUCTION

In existence for less than a score of years, Critical Legal Studies (CLS) has engendered a great deal of debate and controversy. Reactions have been as diverse as calling for the academic ouster of its proponents,<sup>2</sup> heralding it as the heir to the school of legal realism,<sup>3</sup> and mandating its inclusion into the law school curriculum.<sup>4</sup> Much of

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<sup>1</sup> 481 U.S. 279 (1987).

<sup>2</sup> For example, Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984), argues that critical legal studies cynicism imposes upon its scholars "an ethical duty to depart from the law school." *Id.*

<sup>3</sup> See David Kairys, "Introduction," THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1-11 (David Kairys ed., 1990); David O. Friedrichs, *Critical Legal Studies and the Critique of Criminal Justice*, CRIM. JUST. REV., Fall 1986, at 15. But see Jeffery A. Standen, Note, *Critical Legal Studies as an Anti-Positivist Phenomenon*, 72 VA. L. REV. 983 (1986).

<sup>4</sup> Richard M. Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505, 507 n.13 (1987).

the criticism against CLS has focused on the political leanings of its proponents.<sup>5</sup> But those who criticize it on that level cannot deny its scholarly value.<sup>6</sup>

Specifically, CLS scholars set out to:

[e]xpose the assumptions that underlie judicial and scholarly resolution of such issues, question the presuppositions about law and society of those whose intellectual product is being analyzed and examine the subtle effects these products have in shaping legal and social consequences.<sup>7</sup>

Like the legal realism movement, the CLS movement provides a paradigm for analyzing the law.<sup>8</sup> The value of the CLS approach lies in its non-static interpretation and analysis of the law.

Given the apparent charge and worth of a critical legal critique, it is surprising that critical legal scholars have focused so little of their attention upon criminal law.<sup>9</sup> This paper seeks to take one step toward filling this void.<sup>10</sup> This paper is divided into six sections. The next section examines the role of criminal law in the critical legal studies movement. In particular, this section analyzes why so little attention has been given to criminal law. The third section outlines the methodology employed by Professors Mark Tushnet and Jennifer Jaff for "deconstructing" the legal reasoning used in criminal cases. The

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<sup>5</sup> *Id.* at 530-31. See Friedrichs, *supra* note 3, at 18-19. Much of the criticism about the critical legal studies movement suggests that it is comprised of a fringe, outside group. In fact, the critical legal studies critique of the law and its pedagogy results in what could be termed a critical view *from the inside*. The training and profession of critical legal scholars make them a part of the system rather than external to it. *Id.* at 16; John H. Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984).

<sup>6</sup> Friedrichs, *supra* note 3, at 17 ("[w]hether or not one agrees with the substance of this [critical legal studies] attack, its importance lies in its forcing us not to take our assumptions for granted.").

<sup>7</sup> David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 588-89 (1984).

<sup>8</sup> Theories reflecting Weberian, Marxist, and pluralistic analyses have all been applied by critical legal studies scholars. Central to the critical legal studies search for theory has been the work of the Frankfurt school and Gramsci. See, e.g., ANTONIO GRAMSCI, PRISON NOTEBOOKS (1991); JURGEN HABERMAS, LEGITIMATION CRISES (Thomas McCarthy trans., 1975). The diversity in theoretical perspectives has led at least one sociologist to state that the critical legal studies movement is "currently in search of [a] theory." DRAGAN MILOVANOVIC, A PRIMER IN THE SOCIOLOGY OF LAW 102 (1988).

<sup>9</sup> Critical legal scholars have also been criticized for failure to incorporate race consciousness into their analyses. E.g., Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

<sup>10</sup> Evidence is another area requiring attention. See Roger C. Park, *Evidence Scholarship, Old and New*, 75 MINN. L. REV. 849 (1991). Clinical education has also been neglected. See Phyllis Goldfarb, *Theoretics of Practice: The Integration of Progressive Thought & Action: Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717 (1992).

fourth section uses this methodology—an application of legal formalisms—to critique the *McCleskey v. Kemp* decision. The fifth section considers the ability of these formalisms to deconstruct *McCleskey*. Finding them inadequate, this paper offers a fifth legal formalism. This formalism, the “sociology of race relations,” considers the impact of race relations upon judicial decision making. The conclusion discusses the value of using CLS principles to examine criminal law.

## II. CRITICAL LEGAL STUDIES AND A CRITIQUE OF THE CRIMINAL LAW

Scholars have applied the CLS methodology<sup>11</sup> to several substantive areas of law, including labor law,<sup>12</sup> anti-discrimination law,<sup>13</sup> contract law,<sup>14</sup> and the role of women and the law.<sup>15</sup> The relative omission of criminal law from the critical legal scholars' scrutiny is particularly glaring given the seminal role criminal law plays in the American legal system.<sup>16</sup> Professor David Nelken observes:

It is *the* branch of law where most social studies have been done of the 'law in action' and where the gulf between ideals of equality and the reality of differentiation has been shown to be glaring and recurrent, and where official arbitrariness and repression are most obvious.<sup>17</sup>

Within the fifteen-year history of the CLS movement,<sup>18</sup> fewer than fif-

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<sup>11</sup> While critical legal studies proponents do not have a uniform perspective or ideological commitment, the school has some unifying principles. Trubek identifies four such principles: (1) *indeterminacy*, or the belief that legal doctrine is not systematic and does not offer a definitive answer for all circumstances; (2) *anti-formalism*, in that critical legal scholars argue that there is neither a value-free, nor an autonomous legal methodology; (3) *contradiction*, in that critical legal scholars argue that legal doctrine does not provide a single, coherent view of human relations, but describes competing relationships; and (4) *marginality*, in the view that the law is not necessarily a significant variable controlling social behavior. Trubek, *supra* note 7, at 577-79. For a detailed discussion of critical legal studies doctrines, see ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986).

<sup>12</sup> Karl E. Klare, *Critical Theory and Labor Relations Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 61-89 (David Kairys ed., 1990).

<sup>13</sup> Alan Freeman, *Antidiscrimination Law: The View from 1989*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 121-50 (David Kairys ed., 1990).

<sup>14</sup> Jay M. Feinman & Peter Gabel, *Contract Law as Ideology*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 373-86 (David Kairys ed., 1990).

<sup>15</sup> Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 151-75 (David Kairys ed., 1990) (examining legal reasoning used in response to challenges to exclusion of women from the work place).

<sup>16</sup> See, e.g., Albert P. Cardarelli & Stephen C. Hicks, *Radicalism in Law and Criminology: A Retrospective View of Critical Legal Studies and Radical Criminology*, 84 J. CRIM. L. & CRIMINOLOGY 502, 544 (1993) (stating, "CLS has hardly focused on criminal law as a prime locus of the deployment of class and power by way of liberal values," citing David Nelken, *Critical Criminal Law*, 14 J.L. & Soc'y 105, 107 (1987)).

<sup>17</sup> Nelken, *supra* note 16.

<sup>18</sup> Kairys, *supra* note 3; Fischl, *supra* note 4; Friedrichs, *supra* note 3. But see Standen, *supra* note 3.

teen articles have applied a CLS critique to criminal law.<sup>19</sup>

Is this void in critical legal analysis the result of simple oversight or intentional slight?<sup>20</sup> Scholars have proffered a number of rationales to explain this absence. Professor David Friedrichs suggests that the lack of an "autonomous tradition of radicalism" within criminal law is "best explained as a reflection of the relative de-emphasis in elite law schools on criminal law, which is regarded as a less intellectually challenging (and lucrative) realm of legal practice."<sup>21</sup>

Nelken systematically rejects the reason offered for the comparative neglect of criminal law by critical legal scholars.<sup>22</sup> Nelken discusses three arguments which are offered to explain this neglect. First, he examines the argument that because the criminal law is an instrumental arm of state repression, deconstruction would be neither necessary nor forthcoming: "It seems fatuous and insubstantial to offer to 'deconstruct' criminal law in the face of solid facts of punishment and degradation."<sup>23</sup> Nelken properly rejects this reasoning. He observes that not only are some areas of criminal law inseparable from civil law<sup>24</sup> and, therefore, unavailable for analysis, but further that all branches of the law arguably reflect state repression.<sup>25</sup> Nelken concludes that if the nexus to state repression determines whether critique is possible, then there could be no critiques of the law.<sup>26</sup>

Second, Nelken considers the argument that because criminal law is integral to any governmental structure, its critique is fruitless:<sup>27</sup>

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<sup>19</sup> A handful of critiques of criminal law have been written. *E.g.*, M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 25-32 (1982); Elliot Currie, *Crime, Justice, and the Social Environment*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 294-313 (David Kairys ed., 1990); Friedrichs, *supra* note 3; Sherri L. Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981); Nelken, *supra* note 16; David Rudovsky, *The Criminal Justice System and the Role of the Police*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 314-25 (David Kairys ed., 1990); Mark Tushnet & Jennifer Jaff, *Critical Legal Studies and Criminal Procedure*, 35 CATH. U.L. REV. 361 (1986).

<sup>20</sup> The study of crime and criminal justice, with its skewed focus upon street crime, requires detailed discussion and analysis of race and ethnicity. Perhaps critical legal scholars have been wary of or disinterested in pursuing race issues. See Kathryn K. Russell, *Development of a Black Criminology and the Role of the Black Criminologist*, 9 JUST. Q. 667 (1992), for a parallel argument regarding the discipline of criminology's failure to squarely address the race and crime question.

<sup>21</sup> Friedrichs, *supra* note 3, at 15, 19 n.12. It is also possible that those interested in radical critiques of criminal law are more likely to pursue graduate studies in criminology or criminal justice, and in turn radical criminology.

<sup>22</sup> Nelken, *supra* note 16, at 107.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (identifying theft as one area of overlap).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> This issue has also been raised in analyses of the development of critical criminology.

"Criminal law is not worth discussing . . . because it is too *essential* a feature of the social order, including any realistic alternative order."<sup>28</sup> Nelken rejects this argument as well. Accepting the conclusion that criminal law is necessary—and as such, that there is no alternative to it—does not require accepting the premise that criminal law is above criticism. In fact, the opposite is true. It is precisely the importance of criminal law to the social order which necessitates its close scrutiny.

While few CLS articles critique criminal law, even fewer deconstruct criminal law cases.<sup>29</sup> The few CLS writings in this area have critiqued abstract criminal law doctrine rather than case law analysis—the heart of law school pedagogy. As Professor Mark Kelman observes, it is as important to know that "interpretive constructs" pervade substantive criminal law,<sup>30</sup> as it is to know how these constructs are applied in legal discourse analysis.<sup>31</sup> Nelken elaborates:

[C]ritical discussion of substantive legal doctrine in this area [criminal law] is all the more important because of recent trends in which those on the left have emphasized the importance of taking crime seriously as a blight on the lives of those living in working-class neighbourhoods. This must surely also entail seeing how far the concepts and categories of the *criminal law* can serve to further rather than hold back their political goals.<sup>32</sup>

Given the relationship between crime and the social order as evidenced by the salience of crime in the American mind<sup>33</sup> and the influence the courts have in shaping public opinion, wide scale case law deconstruction is worthwhile.

### III. CASE LAW CRITIQUE OF LEGAL FORMALISM

Tushnet and Jaff offer one of the few CLS treatments of criminal law.<sup>34</sup> They critique legal formalism which they define as, "the position which claims that results in any particular case are in some non-trivial sense determined by a set of general principles."<sup>35</sup> They outline four types of legal formalism: (1) *classical doctrinal formalism*: princi-

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See, e.g., Willem De Haan, *Fuzzy Morals and Flakey Politics: The Coming Out of Critical Criminology*, 14 J.L. & Soc'y. 321 (1987).

<sup>28</sup> Nelken, *supra* note 16, at 107.

<sup>29</sup> As observed by Friedrichs, the existence of a radical criminology does not fill the void for an "autonomous tradition of radicalism" in criminal justice. Friedrichs, *supra* note 3.

<sup>30</sup> Kelman, *supra* note 19, at 592.

<sup>31</sup> *Id.*

<sup>32</sup> Nelken, *supra* note 16, at 105-06.

<sup>33</sup> Richard Berke, *Fears of Crime Rival Concern Over Economy*, N.Y. TIMES, Jan. 22, 1994, at 1 (New York Times/CBS News Poll).

<sup>34</sup> Tushnet & Jaff, *supra* note 19.

<sup>35</sup> *Id.* at 361.

ples of law are drawn from controlling legal documents; (2) *moral philosophy*: legal principles are determined by fundamental principles of morality; (3) *law and economics*: legal principles are drawn from what are believed to be the logical consequences of assumptions about human rationality and strategic behavior in situations with limited resources, and (4) *sociology of professions*: principles are based upon the systematic observation of the actions of participants in the legal system.<sup>36</sup> Accordingly, principles are adopted which make the criminal justice process easiest for 'repeat players'—those participants most frequently involved in the criminal justice system.<sup>37</sup> These four legal formalisms are an outgrowth of "rule-skepticism."<sup>38</sup>

Tushnet and Jaff use *Bordenkircher v. Hayes*,<sup>39</sup> a plea bargaining case, to examine how these formalisms are applied in a criminal case.<sup>40</sup> They find that with each type of formalism, the Court's decision was neither logical nor predetermined. In *Bordenkircher*, the defendant was indicted for passing a bad check worth \$88.30.<sup>41</sup> The defendant had two prior felony convictions, and if convicted of passing a bad check, he would have faced a mandatory life sentence under the Kentucky habitual offender statute.<sup>42</sup> With the stated goal of judicial efficiency, the prosecutor offered to recommend a five year sentence in exchange for a guilty plea.<sup>43</sup> The defendant refused the plea bargain and pleaded not guilty. He was subsequently indicted and convicted at trial.<sup>44</sup> On appeal, he argued that the plea bargaining offer constituted a threat in violation of his constitutional right to due process.<sup>45</sup> The United States Supreme Court upheld plea bargaining as an "important component"<sup>46</sup> of the criminal justice system which does not violate due process.<sup>47</sup>

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<sup>36</sup> *Id.* at 361-62.

<sup>37</sup> Tushnet and Jaff clearly note that "repeat players" is narrowly defined. The term refers to courtroom personnel, including judges, defense attorneys, and prosecuting attorneys. *Id.* at 375. As such, the term does not include a "repeat" defendant in the criminal justice system.

<sup>38</sup> According to Tushnet and Jaff, rule-skepticism posits that "in a reasonably well developed system of legal rules, talented lawyers could produce arguments, resting on accepted premises of the system, that supported both a result and its opposite, and that those arguments would satisfy any demands that might be made for internal coherence or consistency with prior decisions." *Id.* at 361.

<sup>39</sup> 434 U.S. 357 (1978).

<sup>40</sup> Tushnet & Jaff, *supra* note 19, at 362.

<sup>41</sup> 434 U.S. at 358.

<sup>42</sup> *Id.* at 359.

<sup>43</sup> *Id.* at 358.

<sup>44</sup> *Id.* at 359.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 361.

<sup>47</sup> *Id.* at 365.

In their discussion of classical doctrinal formalism, Tushnet and Jaff note that both individual and systemic level analyses are available.<sup>48</sup> On both levels they find that the Court's decision was not mandated. First, the Court could have found that the plea bargain constituted a unilateral—thus unfair—offer, rather than a bilateral offer.<sup>49</sup> The Court, however, found that plea bargaining reflects a “mutuality of advantage,” suggesting that the parties (prosecution and defense) are in equal bargaining positions.<sup>50</sup> Tushnet and Jaff's analysis proves that there is no such obvious mutuality.<sup>51</sup> Second, Tushnet and Jaff reject the Court's suggestion that its decision was necessary to make plea bargaining work.<sup>52</sup> Had the Court decided in favor of the defendant, plea bargaining would still be available to prosecutors, with some limits. The prosecutor could have “overcharged” him, thereby forcing the prosecution to bargain downward.<sup>53</sup>

The second legal formalism Tushnet and Jaff examine is moral philosophy.<sup>54</sup> Among the points they discuss is the role of “free will.”<sup>55</sup> Tushnet and Jaff find that the Court offers free will as a rationale for its decision—*i.e.*, that the defendant could accept or reject the plea offer.<sup>56</sup> However, they maintain that free will does not operate in a plea bargaining system.<sup>57</sup> Their discussion of moral philosophy overlaps with their discussion of doctrinal formalism. Tushnet and Jaff conclude that defendants who are offered a plea bargain are not being offered an equally acceptable alternative or choice, since they will expose themselves to a potentially longer sentence if they are convicted.<sup>58</sup>

Tushnet and Jaff also note the fallibility of the Court's retribution rationale.<sup>59</sup> They argue that the retribution argument is unpersuasive since habitual offender statutes violate the principles of retribution philosophy. An offender who presumably has committed and already

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<sup>48</sup> *Id.* at 364.

<sup>49</sup> *Id.* at 366.

<sup>50</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 369 (1978).

<sup>51</sup> Tushnet and Jaff elaborate: “[t]he risk the defendant runs—an almost certain conviction—is much greater than the risk the prosecutor runs—increased costs. Thus, at the moment the prosecutor decides to make a final offer, the bilateral exchange becomes unilateral.” Tushnet & Jaff, *supra* note 19, at 366.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 366-67.

<sup>54</sup> *Id.* at 367.

<sup>55</sup> *Id.* at 368.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 369.

<sup>58</sup> *Id.* at 368.

<sup>59</sup> *Id.* at 370.



received punishment for prior offenses is being punished twice.<sup>60</sup>

Third, Tushnet and Jaff examine law and economics formalism as applied in *Bordenkircher*.<sup>61</sup> The law and economics approach is one of the leading recent innovations in formalism.<sup>62</sup> Utilizing the analysis of Judge Frank Easterbrook, Tushnet and Jaff examine whether plea bargaining is a "well functioning market."<sup>63</sup> They discover that the Court does not prove that its decision to leave the prosecutor unregulated is socially optimal.<sup>64</sup> Tushnet and Jaff observe that while a plea deal may be entered into, it may be based upon false or misleading information.<sup>65</sup> They also point out that plea bargaining is not always available to the prosecution.<sup>66</sup> For example, in cases involving politically unpopular figures or sensational murders, society may force a trial when the prosecutor would otherwise make a plea offer.<sup>67</sup> Tushnet and Jaff's discussion of law and economics raises the question of the overall cost-benefit of plea bargaining and the selectiveness with which it is applied.

The last formalism Tushnet and Jaff discuss is the "sociology of professions."<sup>68</sup> As noted, this type of legal formalism maintains that the criminal process "is designed to meet the concerns of the participants in a system that the participants conceive of as a system of jobs."<sup>69</sup> Accordingly, an examination of the system should show that the established rules make life easiest for regular participants in the system.<sup>70</sup> Tushnet and Jaff conclude, however, that plea bargaining, as used in *Bordenkircher*, does not necessarily make the job easier for the participating judge and lawyers. This is true because defendants like the one in *Bordenkircher* leave the system believing they were treated unfairly. Such an outcome does not benefit any of the system's legal actors.<sup>71</sup>

The next section applies each of the above formalisms to the

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 371. If plea bargaining is economically viable, it "reaches socially optimal results by the mechanism of self-interest; external regulations such as a prohibition on certain negotiating tactics are undesirable because they impair the functioning of the market." *Id.*

<sup>64</sup> *Id.* at 371, 374.

<sup>65</sup> *Id.* at 372-73. For example, defendants who learn that the prosecutor would call three eyewitnesses at a trial may overestimate the strength of the evidence against them.

<sup>66</sup> *Id.* at 373.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 374.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 375. One of the obvious threads running through the discussion of these formalisms is the inequity between the bargaining parties.

Court's decision in *McCleskey*, and concludes that none of them is adequate to explain the result. The *McCleskey* case was selected for three reasons. First, it has had an impact upon the use and applicability of social science research in criminal cases in general, and capital cases in particular.<sup>72</sup> Second, the decision provides legal ammunition for both death penalty proponents and opponents: Proponents of capital punishment offer *McCleskey* as "proof" that the death penalty is not discriminatorily applied; abolitionists suggest that the rationale offered by the Court is legal "mumbo jumbo" designed to maintain the status quo. Third, *McCleskey* involves society's ultimate criminal sanction. The history of the death penalty, which includes its use as a method of "disciplining" racial minorities,<sup>73</sup> as well as its joining of law, criminology, and politics, makes it ripe for CLS application.

#### IV. *MCCLESKEY V. KEMP*: FORMALISM IN ACTION

In 1978, a Black man named Warren McCleskey was found guilty of murdering a White police officer during the course of a robbery.<sup>74</sup> At the penalty hearing, upon consideration of the aggravating and mitigating factors, the Georgia jury recommended the death penalty.<sup>75</sup> The Georgia Supreme Court affirmed the decision.<sup>76</sup> After a series of unsuccessful state court appeals, McCleskey sought federal *habeas corpus* relief, claiming that the Georgia capital sentencing process was administered in a racially discriminatory manner.<sup>77</sup> Specifically, he argued that the Georgia statute operated in violation of the Eighth and Fourteenth Amendments' protections against arbitrariness and discrimination in capital sentencing.<sup>78</sup>

To support his constitutional claims, McCleskey offered the results of an empirical study of the Georgia capital sentencing system by Professor David Baldus.<sup>79</sup> The study provides a multiple regression analysis of over 2000 cases prosecuted in Georgia during the 1970s.<sup>80</sup>

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<sup>72</sup> *Lockhart v. McCree*, 476 U.S. 162 (1986), is another example of a capital case in which substantial social science research was presented to the United States Supreme Court. To establish that the defendant's Sixth Amendment rights were violated by a conviction-prone and death-qualified capital jury, the defense offered the results of 15 empirical studies. The Court found the studies unpersuasive and rejected defendant's claims.

<sup>73</sup> See FRANKLIN ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 34-35 (1986).

<sup>74</sup> *McCleskey v. Kemp*, 481 U.S. 279, 283 (1987).

<sup>75</sup> *Id.* at 284-85.

<sup>76</sup> *Id.* at 285.

<sup>77</sup> *Id.* at 286.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 286-87. The details of the two studies which constitute the Baldus study are outlined in DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY* (1990).

<sup>80</sup> BALDUS ET AL., *supra* note 79; see also, *McCleskey*, 481 U.S. at 286-87. The study in-

Professor Baldus controlled for over 230 variables in addition to race, which could have explained the reported disparities on nonracial grounds. The study reported findings in three major areas. First, the *race of the victim* was a significant predictor for whether a defendant would receive a death sentence.<sup>81</sup> Defendants charged with killing White persons received the death penalty in 11% of the cases, while those defendants charged with killing Blacks received the death penalty in only 1% of the cases.<sup>82</sup> Further, the raw numbers indicated that 4% of the Black and 7% of the White defendants received a death sentence.<sup>83</sup> Second, the racial combination of *race of the victim* and race of the defendant was found to be an important factor in determining who would be sentenced to death.<sup>84</sup> The Baldus study showed that courts were most likely to impose the death penalty where the defendant was Black and the victim was White (22%) and least likely where the defendant and victim were both Black (1%). Where both the victim and the defendant were White, courts imposed a death sentence in 8% of the cases. In those cases with a Black victim and a White defendant, courts imposed the death penalty in 3% of the cases. Third, the Baldus study examined the impact of *prosecutorial discretion* by race of the victim and defendant. The study found that prosecutors requested the death penalty in 70% of the cases involving Black defendants and White victims; 32% of the cases which involved White defendants and White victims; 15% of the cases with Black defendants and Black victims, and 19% of the cases involving White defendants and Black victims.<sup>85</sup>

The Court accepted the validity of the evidence but found, in a 5-4 decision,<sup>86</sup> that the Baldus study was "clearly insufficient to support an inference that any of the decision makers in McCleskey's case acted with discriminatory purpose."<sup>87</sup> Further, the Court stated that "at most the study indicated a discrepancy that appears to correlate with race."<sup>88</sup> The Court found that because discretion is essential to the criminal justice process, it cannot be assumed "that what is unex-

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cluded cases where the defendant was convicted of murder or voluntary manslaughter in Georgia between 1973 and 1979. BALDUS ET AL., *supra* note 79, at 45.

<sup>81</sup> *McCleskey*, 481 U.S. at 286-87.

<sup>82</sup> *Id.* at 286.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 287.

<sup>86</sup> Justice Powell wrote the majority opinion, joined by Chief Justice Rehnquist and Justices White, O'Connor, and Scalia. Justices Brennan, Marshall, Stevens, and Blackmun dissented. *Id.* at 282.

<sup>87</sup> *Id.* at 297.

<sup>88</sup> *Id.* at 312.

plained is invidious."<sup>89</sup> McCleskey was directed to present his arguments to a legislative body.<sup>90</sup>

#### A. CLASSICAL DOCTRINAL FORMALISM

An examination of the doctrinal formalism operating in *McCleskey* establishes that the Supreme Court could just as easily have found that the Baldus study proved that the Georgia capital sentencing scheme operated in a racially discriminatory manner in violation of the Eighth and Fourteenth amendments. An analysis of two aspects of the Court's reasoning shows that it could have used its formalistic arguments to reach a contrary result.

First, the Court found the Baldus statistics distinguishable from those presented in venire selection and Title VII (employment discrimination) cases. The Court noted that although it has accepted statistical disparities as proof of an Equal Protection Clause violation in cases where the statistics did not present a stark pattern of racial disparity, the *McCleskey* facts did not compel such a result.<sup>91</sup> Further, the Court stated: "[T]he nature of the capital sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from the corresponding elements in the venire-selection or Title VII cases."<sup>92</sup> Specifically, the Court found that drawing an inference from general statistics to a specific venire selection (or Title VII employment discrimination) case cannot be compared with an inference drawn from general statistics to a specific decision in a trial and sentencing.<sup>93</sup> According to the Court, these stages are not comparable, since in the former fewer variables are relevant to the challenged decisions and the statistics relate to fewer entities.<sup>94</sup> Further, "in venire-selection and Title VII contexts, the decision maker has an opportunity to explain the statistical disparity."<sup>95</sup>

The Court in *McCleskey* could have determined that the Baldus

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<sup>89</sup> *Id.* at 313.

<sup>90</sup> *Id.* at 319. For a description and discussion of post-*McCleskey* legislative proposals, see H.R. Rep. No. 711, 103d Cong., 2d. Sess. (1994) (1994 Crime Bill, Racial Justice Provision); Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing?*, 18 N.Y.U. REV. L. & SOC. CHANGE 777 (1990-1991); Vada Berger et al., Note, *Too Much Justice: A Legislative Response to McCleskey v. Kemp*, 24 HARV. C.R.-C.L. L. REV. 437 (1989). Warren McCleskey was executed on September 25, 1991. NAACP LEGAL DEFENSE & EDUCATION FUND INC., DEATH ROW, USA 8 (Summer 1994).

<sup>91</sup> *McCleskey*, 481 U.S. at 293-94. See *Castenada v. Partida*, 430 U.S. 482 (1977) (venire selection); *Bazemore v. Friday*, 478 U.S. 385 (1986) (Title VII).

<sup>92</sup> *McCleskey*, 481 U.S. at 294.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 294-95.

<sup>95</sup> *Id.* at 296.

findings were *stronger* than those offered in the venire-selection and Title VII cases. It could also have found that because the inequity established by the empirical data could result in death, as opposed to a denial of participation in a jury pool or discrimination in employment, they were sufficient to establish a constitutional violation. Further, the Court might have made a distinction between the types of cases on civil versus criminal grounds. Alternately, the Court could have found that a death penalty petitioner seeking to establish a "stark" pattern of discrimination has a *lighter* burden than is required in other equal protection clause contexts. Also, the Court could have found that because of the nature of the penalty involved, McCleskey had a burden no greater than that of a venire-selection or Title VII claimant.<sup>96</sup>

The Court observed that unlike the jury selection cases, the state in *McCleskey* did not and would not have a chance to rebut the Baldus findings.<sup>97</sup> While noting this distinction, the Court could have resolved that the statistics speak for themselves—that disparity which is unexplained may, in select instances, be sufficient to establish a constitutional violation.

Second, the Court found that because discretion is an integral part of the criminal justice process, "exceptionally clear proof" of abuse is required before an inference can be drawn that there has been an abuse of discretion.<sup>98</sup> The Court set out the following premises and conclusion: (1) discretion is necessary for the smooth operation of the criminal justice system; (2) abuse of discretion can only be established by exceptionally clear proof; (3) death penalty cases are unique; and, therefore (4) the Baldus statistics do not allow for an abuse of discretion inference to be drawn.

This line of reasoning is circular and self-legitimizing. The Court makes clear that while discretion is necessary and abuses may be established, no abuse of discretion is manifest by the *McCleskey* facts. But the Court could just as well have said that discretion is necessary, abuses may be established, and they *are* proven by the case facts. The Court does not explain why the Baldus statistics are insufficient. Would statistics showing that a Black defendant whose victim was White had a 37% probability of being sentenced to death constitute exceptionally clear proof, or does the Court say that Baldus-type statistics are never sufficient to prove an inference of discriminatory pur-

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<sup>96</sup> For a discussion of alternative court strategies for equal protection cases, see Veronica Patton, Comment, *Rethinking Equal Protection Doctrine in the Wake of McCleskey v. Kemp*, 11 NAT'L BLACK L.J. 348 (1990).

<sup>97</sup> *McCleskey*, 481 U.S. at 296.

<sup>98</sup> *Id.* at 297.

pose? The Court questions the point at which the risk of racial prejudice in capital sentencing becomes “constitutionally unacceptable,”<sup>99</sup> but it never indicates where this point is or whether such a point even exists.<sup>100</sup> For these reasons, it is not clear that the Court’s decision was either logical or required by the facts.

#### B. MORAL PHILOSOPHY

Beyond classical doctrinal formalism, the Court in *McCleskey* invoked moral philosophy to justify its decision. In its discussion of fairness, the Court attempted to show that it had to reject McCleskey’s arguments. The Court stated that imposition of the death penalty is fair since it is proportionately imposed and allows the sentencer to consider all relevant information.<sup>101</sup>

The Court noted that public opinion affects whether or not a particular punishment constitutes cruel and unusual punishment.<sup>102</sup> Further, interpretation of the Eighth Amendment is guided by “evolving standards of decency.”<sup>103</sup> The Court also noted that the post-*Furman v. Georgia*<sup>104</sup> legislative response reflects society’s long history of accepting the death penalty for murder.<sup>105</sup> The majority surmises that imposition of the death penalty for murder is justifiable since it reflects a moral consensus and has social utility.<sup>106</sup>

The second prong of the Court’s moral philosophy argument—that the decision is fair because the Georgia scheme meets constitutional guidelines—is circuitous. Specifically, the Georgia death penalty law has three features: (1) it requires the sentencer to consider the circumstances of the offense and the character of the offender; (2) it allows for consideration of mitigating facts which allows the sentencer to decline to impose the death penalty; and (3) it allows the death penalty only for certain cases. While the Court argued that its decision was fair, it also made clear that “fair” is a relative concept.

The claim that the decision is fair can be challenged on at least two grounds. First, because the moral climate partly determines the

<sup>99</sup> *Id.* at 308-09 (quoting *Turner v. Murray*, 476 U.S. 28, 36 n.8 (1986)).

<sup>100</sup> Johnson, *supra* note 19, at 1018. Johnson notes that the *McCleskey* majority states that statistical disparities must be “stark” to establish discriminatory intent. Johnson comments, “apparently a 300% or 400% overrepresentation in the ranks of the condemned is not stark enough *even when that overrepresentation cannot be explained in a noninvidious way.*” *Id.*

<sup>101</sup> *McCleskey*, 481 U.S. at 307.

<sup>102</sup> *Id.* at 300 (citing *Weems v. United States*, 217 U.S. 349, 378 (1910)).

<sup>103</sup> *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>104</sup> 408 U.S. 238 (1972).

<sup>105</sup> *McCleskey*, 481 U.S. at 301.

<sup>106</sup> *Id.* at 300.

constitutionality of the death penalty,<sup>107</sup> it is possible that five years from now the Court could decide a case involving comparable facts to *McCleskey* differently. This observation is an important one. The Court in *Trop v. Dulles* stated that the acceptability of the death penalty reflects society's evolving morality,<sup>108</sup> but the death penalty cannot be discriminatorily or arbitrarily applied.<sup>109</sup> The Baldus findings raise a reasonable doubt as to whether the death penalty meets these standards. Second, the Court's decision is questionable because the death penalty is not a morally required punishment for those who kill—it is not absolutely required.<sup>110</sup> Specifically, the retributivist philosophy of punishment, adopted by some death penalty proponents, does not require taking the life of a person who has taken another's life.<sup>111</sup> Thus, a critique of the moral philosophy in *McCleskey* shows that the Court's holding was not necessary to produce a fair result.

### C. LAW AND ECONOMICS

The third type of formalism discussed by Tushnet and Jaff is law and economics. The Court in *McCleskey* relies upon law and economics formalism for part of its decision. Law and economics formalism seeks to explain results in terms of the allocation of scarce resources. The Court found that *McCleskey's* claim, at its core, questioned "the principles that underlie our entire criminal justice system."<sup>112</sup> The Court suggested that a verdict in favor of *McCleskey* would result in increased litigation and further clog the courts. In particular, the Court observed that a decision favorable to *McCleskey* would open the door to unlimited kinds of *McCleskey*-like challenges.<sup>113</sup> The Court cites other minority group claims, gender-based claims, and claims based upon arbitrary variables (*e.g.*, facial hair), as the possible result of a finding favorable to *McCleskey*.<sup>114</sup>

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<sup>107</sup> Gallup poll figures show public support for the death penalty was at an all time high (75%), just two years prior to the *McCleskey* decision. See Robert M. Bohm, *American Death Penalty Opinion, 1936-1986: A Critical Examination of the Gallup Polls*, in *THE DEATH PENALTY IN AMERICA: CURRENT RESEARCH* 113-45 (Robert M. Bohm ed., 1991). Recent studies, however, show that the public strongly favors a "life without parole + restitution" alternative to capital punishment. RAYMOND PATERNOSTER, *CAPITAL PUNISHMENT IN AMERICA* 275-81 (1991).

<sup>108</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>109</sup> *Furman v. Georgia*, 408 U.S. 238 (1972) (plurality opinion).

<sup>110</sup> See PATERNOSTER, *supra* note 107.

<sup>111</sup> *Id.* at 268 ("[T]here is only one moral requirement, that those who murder must receive one of the most severe punishments available in society, which could include a long term of confinement").

<sup>112</sup> *McCleskey v. Kemp*, 481 U.S. 279, 315 (1987).

<sup>113</sup> *Id.* at 315-18.

<sup>114</sup> *Id.* at 314-17.

When constitutional protections are at issue—especially those involving life or death—questions regarding the economic efficiency of the court system should not be controlling. More to the point, applying a law and economics analysis to the *McCleskey* facts shows that a decision for McCleskey would at least have been as efficient as a decision against him. In fact, the Court's concern that a decision in favor of McCleskey would burden the already full court dockets is misplaced.

First, if the Court had found for McCleskey, it could have decided to limit its holding to capital cases since these involve the most serious criminal penalties.<sup>115</sup> Second, even assuming that a decision for McCleskey would initially result in an increased number of cases, ultimately the volume of claims would fall off. Each state faced with the threat of *McCleskey*-like challenges would likely commission studies to determine whether the death penalty was being discriminatorily applied. If these studies showed disparities like those found by the Baldus study, the state would take corrective measures.<sup>116</sup> Third, the Court's concern with overcrowded courts appears somewhat disingenuous, given its directive to McCleskey to present his claims to a legislative body.<sup>117</sup> If the majority in *McCleskey* was truly concerned with decreasing (or at least not increasing) court dockets, it would not have suggested that McCleskey petition a legislative body. A successful petition would create a new basis for a constitutional challenge and increase litigation.

#### D. SOCIOLOGY OF PROFESSIONS

Of the four versions of legal formalism discussed by Tushnet and Jaff, the Court in *McCleskey* relied least upon the sociology of professions to justify its decision. The Court did, however, make clear that a contrary decision would adversely impact the role of the prosecutor.<sup>118</sup> The Court rejected the argument that discretion in the criminal justice system should be curtailed: "McCleskey's argument that

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<sup>115</sup> See Note, *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1611 (1988). "The Court's fear of opening the floodgates is unfounded . . . Beyond the severity of the death sanction, [r]ace is a unique characteristic. The Court has continually expressed its commitment to abolish distinctions based on ancestry or race. In particular, the consideration of race in capital sentencing is constitutionally impermissible." *Id.* (citations omitted).

<sup>116</sup> One possible corrective measure, though far from ideal, would be for states to more closely monitor, and in some instances encourage, the use of reduced jury overrides. These overrides would allow a capital judge to impose a sentence of life without parole where the jury has advised a death sentence.

<sup>117</sup> *McCleskey*, 481 U.S. at 319.

<sup>118</sup> *Id.* at 311.



the Constitution condemns the discretion allowed decision makers in the Georgia capital sentencing system is antithetical to the fundamental role of discretion in our criminal justice system."<sup>119</sup> The Court, however, could have reasoned that Baldus-like findings make the jobs of the courtroom players *easier*. Without question, allowing the use of Baldus-like data to establish discrimination, would lighten defense counsels' burden. Further, allowing Baldus-type data to minimally establish a *prima facie* case of discrimination, would put prosecutors on notice as to what their burden would be in cases akin to *McCleskey*.

#### V. CRITIQUE OF FORMALISMS AND THE 'SOCIOLOGY OF RACE RELATIONS'

The four legal formalisms Tushnet and Jaff applied to *Bordenkircher* begin to fill the void of CLS criminal law case analysis. While these formalisms offer divergent perspectives from which case law can be deconstructed, they do not provide a complete paradigm for analysis. In fact, Tushnet and Jaff did not intend their formalistic analyses to be exhaustive.<sup>120</sup> Notably, a discussion of race does not fit neatly into any of the four formalisms. Mainstream critical legal scholars have been legitimately criticized for failing to incorporate race into their critiques.<sup>121</sup> In fact, this foundational absence has spawned a CLS splinter group—critical race theorists. Professor Crenshaw argues for the necessity of including race in a CLS analysis:

[R]acism is a central ideological underpinning of American society. Critical scholars who focus on legal consciousness alone thus fail to address one of the most crucial ideological components of the dominant order. The CLS practice of delegitimizing false and constraining ideas must include race consciousness if the accepted object is to transcend oppressive belief systems.<sup>122</sup>

Given the interracial nature of the *McCleskey* case and the Baldus findings, an analysis of the role of race and legal decision making is worth a separate critique.

The "sociology of race relations" is offered here to describe a formalism which encompasses the belief that cases are decided in a race neutral manner, in compliance with the guarantees of the Equal Protection Clause. This formalism follows logically from determinism—the belief that legal doctrine is systematic, definitive, and operates

<sup>119</sup> *Id.*

<sup>120</sup> Tushnet & Jaff, *supra* note 19, at 376, make clear that their list of legal formalisms is not definitive. "[O]n any set of formalist premises . . . the [CLS] critique claims that if someone came up with another one, the proposition would follow as well—*Bordenkircher* was decided rightly, but it was also decided wrongly." *Id.*

<sup>121</sup> Crenshaw, *supra* note 9, at 1336.

<sup>122</sup> *Id.*

without regard to race. In a detailed and provocative discussion of color-blindness and the criminal law, Professor Gary Peller observes:

[O]pinions proceed in a color-blind frame, implying that race was not central to the decisions because the cases presented universal issues of the relations between the state and individuals rather [than] more particular issues of the relations between African Americans and whites.<sup>123</sup>

However, the criminal justice system, inexplicable in isolation, is realistically examined in its socio-political-historical context. With regard to race, the historically inequitable treatment of minorities in general<sup>124</sup> and Blacks in particular, by the criminal justice system is well documented.<sup>125</sup> This disparate treatment rings particularly true for Blacks and the application of the death penalty.<sup>126</sup> This history calls into question the sociology of race relations formalism. Specifically, it challenges the notion that capital cases can be examined on a case-by-case basis, without regard to historical facts.

An examination of *McCleskey* suggests that the Court's decision is not race-neutral. The Court clearly outlined its record of hearing racial discrimination challenges,<sup>127</sup> but remained unpersuaded by McCleskey's arguments. As noted, beyond the Baldus study, the Court was faced with the history of southern race relations and it was legally cognizant of the conditions which led to the Baldus findings—the turbulent history of racial conflict between Blacks and Whites, and the criminal justice system—for the south in general and for Georgia in particular.<sup>128</sup>

Professor Sherri Johnson's analysis of *McCleskey* offers a framework for critiquing the sociology of race relations formalism.<sup>129</sup> Johnson argues that issues of race permeate the majority's decision. Specifically, Johnson asserts that the Court's proffered rationale for denying relief reveals a blind spot in its equal protection analyses.<sup>130</sup>

<sup>123</sup> Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231, 2245 (1993).

<sup>124</sup> See, e.g., Frankie Y. Bailey, *Law, Justice, and "Americans": An Historical Overview*, in RACE AND CRIMINAL JUSTICE 10-21 (Michael J. Lynch & E. Britt Patterson eds., 1991).

<sup>125</sup> See, e.g., CORAMAE R. MANN, *UNEQUAL JUSTICE: A QUESTION OF COLOR* (1993).

<sup>126</sup> See, e.g., ZIMRING & HAWKINS, *supra* note 73.

<sup>127</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 293-94 (1987).

<sup>128</sup> See, e.g., SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* (1989). Georgia had the only post-*Furman* legislation which authorized the death penalty for rape. See, e.g., *Coker v. Georgia*, 433 U.S. 584 (1977) (finding that the death sentence for the crime of rape is grossly disproportionate, thereby violating the Eighth Amendment). Notably, "one of the more conspicuous things about the *Coker* opinion is the absence of any reference to race." GROSS & MAURO, *supra*, at 123.

<sup>129</sup> See Johnson, *supra* note 19.

<sup>130</sup> *Id.* at 1016-17; Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

Johnson labels this blindspot "unconscious racism."<sup>131</sup> She concludes that the "cognizance of the frequency with which racial stereotypes alter judgement should influence how 'stark' a statistical disparity must be to raise a presumption of a race-based decision, particularly where, as here [in *McCleskey*] noninvidious explanations have been exhausted."<sup>132</sup> Johnson's arguments deserve considered reflection.<sup>133</sup> It is almost unfathomable that the Court would have reached the same conclusion if the Baldus findings were reversed and revealed that in cases involving a Black victim, courts were more likely to impose the death penalty (by an 11:1 ratio); that cases involving a White offender and a Black victim were most likely to get a death sentence; and that prosecutors were most likely to request death in cases involving a White defendant and a Black victim. In sum, the Court might have held that in view of this country's generally troubled racial past and in light of Georgia's particular history of discriminatory treatment of racial minorities, *McCleskey* had a less onerous burden. It could have shown a heightened sensitivity to the Baldus findings given the history of death penalty law and its application to minorities.

The failure of the most recent attempt to enact a racial justice provision for the death penalty<sup>134</sup> raises several questions: Will the Supreme Court be more receptive to a *McCleskey*-type challenge? Was the Court simply unable to envision a remedy for the egregious Baldus findings—*i.e.*, that *McCleskey*-situated defendants have no constitutional recourse under the Eighth or Fourteenth Amendments?<sup>135</sup> Did the Court mean to suggest that it has no interest in using empirical data to establish an inference of discrimination, outside of the narrowly defined categories?<sup>136</sup>

## VI. CONCLUSION

CLS has largely ignored the criminal law. Given the movement's relative infancy, this absence may be simple oversight. However, a

<sup>131</sup> *Id.* at 1017. See, e.g., *U.S. v. Clary*, 846 F. Supp. 768, 774 (E.D. Mo.), *rev'd*, 34 F.3d 709 (8th Cir. 1994). The circuit court held that federal sentencing guidelines which provide a harsher penalty for crack cocaine possession than for the same amount of powder cocaine are without legal justification and are the result of 'unconscious racism'.

<sup>132</sup> Johnson, *supra* note 19, at 1019.

<sup>133</sup> See also Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 150-55 (1987) (discussing 'socialized blindness').

<sup>134</sup> The Racial Justice provision of the 1994 Crime Bill was defeated. Ann Devroy & Kenneth Cooper, *\$30 Billion Voted to Combat Crime*, WASH. POST, July 29, 1994, at A1, A10.

<sup>135</sup> It is no small irony that "[a] primary purpose of the equal protection clause was to undo the Black Codes. These codes were enacted in southern states after the Civil War in an effort to preserve white supremacy." GROSS & MAURO, *supra* note 128, at 119.

<sup>136</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 293-94 (1987).

continued failure to focus upon criminal law—the substantive area of law with arguably the greatest impact upon everyday lives<sup>137</sup>—will call into question the breadth and scope of impact of the CLS critique. A focus upon the criminal law will help shift the CLS analysis from the ivory tower of academia to the real world. Further, CLS analyses of criminal law may reveal some parallels with criminology and criminal justice research and thereby provide new opportunities for comparative critiques.<sup>138</sup>

The CLS failure to address criminal law is most evident in its virtually non-existent analyses of legal reasoning in criminal cases. The formalisms employed by Tushnet and Jaff's analysis of *Bordenkircher*, as well as this article's analysis of *McCleskey*, support the CLS principles of indeterminacy and anti-formalism in the law. Similarly, an examination of the sociology of race relations formalism reveals that there was no obvious, predetermined legal result in *McCleskey*. Future criminal law case critiques should also attempt to rein in abstract principles of criminal law.<sup>139</sup> An examination of the decision in *McCleskey* shows that the Court could have reached the opposite conclusion. However, a universe of two cases cannot be used to make any comprehensive pronouncement about the value of deconstructing legal reasoning in criminal cases. Whether critical deconstruction of criminal law doctrine will "advance a radical understanding of criminal law"<sup>140</sup> will remain unknown until a sizeable body of deconstructed case law doctrine has been undertaken.

Beyond an examination of individual cases, the CLS critique of criminal cases could analyze the formalisms invoked by a particular United States Supreme Court—*i.e.*, Rehnquist, Burger, or Warren—and compare them with one another. Further, CLS scholars should analyze the legal reasoning employed in varying types of criminal cases. The critical legal analysis, which allows for a demystification of the law and legal reasoning, provides a breath of fresh air over staid and insular legal critiques. This critique, however, must be expanded to fully embrace the criminal law.

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<sup>137</sup> Nelken, *supra* note 16, at 112, states that criminal law is "the form of law in closest touch with the public, which reinforces their belief in the need for 'law.'" *Id.*

<sup>138</sup> One natural area of cross-over could be empirical research on sentencing.

<sup>139</sup> Goldfarb, *supra* note 10, observes:

[D]espite its focus on a single case, this article [Tushnet & Jaff] cannot be described as a case study . . . in the literal sense of 'the study of a case.' Instead, the article builds a conceptual schema that uses the vehicle of a criminal case to illustrate highly abstract notions. In this sense, the article exhibits the same tendencies as the Supreme Court opinions that the authors [Tushnet & Jaff] would likely view as so centrally linked to the maintenance of liberal legalism.

*Id.* at 739.

<sup>140</sup> Friedrichs, *supra* note 3, at 19.