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Law, Culture, and the Morality of Judicial Choice

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LAW, CULTURE, AND THE MORALITY OF JUDICIAL CHOICE

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Professor Carter has presented us with an interesting and provocative talk this afternoon.[1] I think we can all see that he is a very capable historian, one whose stellar academic reputation is very richly deserved. I, for my part, am not a historian, but nonetheless, it seems to me that there are two kinds of history. We can have a "living history"—a history that is with us, that informs our lives, that tells us what we ought to do today; or we can have a "dead history"—one that is over and no longer matters and has no real significance. I will give you an example of both of these forms of history, which are often contradictory, and can exist at the same time.

As Professor Berg told you in my introduction, I am visiting at the Washington and Lee School of Law this semester. Some of you may know that the "Lee" in Washington and Lee refers to Confederate General Robert E. Lee, and that he is buried there in a nice, resplendent tomb. As a matter of fact, his horse is buried there, too. Washington and Lee is a fine university. It has a beautiful campus and it is in a very nice town. The people at Washington and Lee are quite nice, too. They seem dignified and honorable, yet it is evident that they respect Robert E. Lee a great deal.

Well, when I found out I was going to Washington and Lee, I wanted to figure out my schedule so I could know when to return to Gainesville, Florida to see my family. Specifically, I wanted to know if they celebrated any Monday holidays so I could count on a three-day weekend. Now, the first Monday holiday on my calendar was Martin Luther King's birthday. So, I innocently asked, "Of course, you observe Martin Luther King's

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[1] *See* Dan T. Carter, *"Let Justice Be Done": Public Passion and Judicial Courage in Modern Alabama*, 28 CUMB. L. REV. 553 (1998).

birthday, don't you?" And they replied, "Of course *not*! We do not celebrate Martin Luther King's birthday here."

I don't know if any of you know anything about the history of Virginia, but they weren't too keen on recognizing any civil rights activist before they recognized the "sons of Ol' Virginia." So they established a new holiday—Jackson-King-Lee Day—to recognize Robert E. Lee and Stonewall Jackson on the day set aside to honor Martin Luther King, Jr.[2] That way, those who wanted to celebrate Martin Luther King's birthday would have to celebrate these other people, too.

In any event, Jackson-King-Lee Day was not an official holiday and the University did not recognize it, so I prepared to stay in Lexington and work. A week before Martin Luther King's birthday arrived, a strange thing happened. I was told there was going to be a change in class schedule. It seems the University was planning a convocation where they were going to talk about Robert E. Lee and what a great man he was. Now, they were not going to require all students to attend the convocation, but they wanted to make sure all had the opportunity to go, if they so desired. So, we had to change our class schedules. You have to understand that although this convocation was an official school program, there was not going to be any official effort to commemorate the life of Martin Luther King, Jr.

Initially, I was upset. First, they had told me there was not going to be a holiday for Martin Luther King, Jr.; then, they expected me to change my class schedule so they could honor Robert E. Lee. Ultimately, though, being the accommodationist that I am, I decided not to disrupt their plans. Instead, I decided to take a holiday. I canceled class and I told my students, "You all can celebrate whatever you want to celebrate; I'm going to celebrate Martin Luther King's birthday."

What is interesting about this little incident is that, in the succeeding days and weeks, a number of these nice, clean-cut, intelligent, white, middle-class, conservative, Washington and Lee students came to talk to me. They wanted to make sure that I was comfortable with the way things had turned out. More importantly, they wanted to let me know they were decent human beings, and not Klansmen, or racists, or irresponsible people. People in Virginia, perhaps wrongly, have been celebrating Robert E. Lee's life for over a century. And it never occurred to them to worry what Black folks thought about it. So, some things have changed in a generation. As a Northerner who has

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[2] *See* Leah Y. Latimer, *Hybrid Holiday Poses Problems for Celebrants*, WASH. POST, Jan. 19, 1987, at B1.

spent my entire academic life in the South, it often strikes me how much things have changed. I am pleased to see that there are people of African descent, such as myself, in this room. We all know that when this building was built, however, Blacks could not come in here to attend a program such as this. At that time, there was no expectation that we would ever come in this building, other than as maids and janitors. So, of course, a lot has changed in the South.

One of the most significant changes that has occurred in the South is that today it is important *not* to be perceived as a racist. A generation ago it was important to be a racist—and as a matter of fact, it was *required* that you be a racist if you were interested in public life. Today in public life, it is important to be viewed as a someone who does not have any problems with the color of a person's skin.[3]

This is a transformation that is both profound and superficial. It is profound because it is not often that you see social practices, that have existed for five hundred years, change in a span of a lifetime. This is very significant, and I think that we still do not fully appreciate the work of those, both Black and white, who struggled over the years in the civil rights movement to accomplish this.

Yet, while profound, this transformation is also superficial. It is superficial because my students at Washington and Lee, and I think many in our society, mistakenly believe that the changes that have occurred over the past forty years or so render race a factor of limited significance in our society.[4] They believe that the desire to latch on to the history, memory, and tradition that is centered around Robert E. Lee can be encouraged without implicating race at all. They think there is nothing troubling in honoring Robert E. Lee, who as a general risked his very life for the continued existence of slavery, and for a society that held people in bondage. They think this is a history that we need not connect to race and the complications that race creates in our society today. Perhaps it is true, and perhaps we need to acknowledge, that Robert E. Lee was a good leader of the Confederate troops, and a capable university president. But we also need to acknowledge what the Confederacy stood for, what values Robert E. Lee fought for, and how those values impact and

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[3] *See* JOE R. FEAGIN & HERNAN VERA, WHITE RACISM 142-43 (1995) (describing how whites seek to avoid the appearance of overt racism, although racist sentiments are widespread).

[4] *See id.* at 137-38 (asserting that most whites do not believe racial discrimination is of great significance and blame existing racial disparities on Black laziness).

inform the present.[5]

My students at Washington and Lee wanted to honor Lee without regard for the cultural meaning of their acts, without reflecting upon how their behavior furthered or retarded race relations, without a willingness to tell the whole story. When we honor Robert E. Lee in this unreflective way, it is an example of the treatment of history as dead history. It is done; it is over; it is past. It has no relevance to today. At the same time, this honoring of Robert E. Lee can be seen as living history, a history that speaks volumes about our past and about the present state of race relations in Virginia and throughout the nation.

The most significant thing about Professor Carter's speech is that it addresses the role that culture plays in developing and forming the law.[6] This is something that is a central part of my work as a scholar.[7] What we are talking about here, in reference to Professor Carter's talk, is the role that white power played in racial oppression in the thirties and forties.

Racial oppression in the South was not merely the consequence of statutes, or laws on the books, that said Blacks could not ride the bus, or serve on juries, or buy property, or testify against whites. Nor was it the fact that those statutes were enforced by clearly racist police officers, swinging clubs and directing vicious dogs, that made the American South the oppressive community that it was.

Quite often, it was social pressure. It was the desire to conform, the desire to fit in, that made the South such a hellish place, not only for Blacks, but for whites who wanted to follow the dictates of their consciences. So, we see that we can have a dictatorship without dictators, and we can have lawlessness in the presence of the law. We do not need to have a formal and obvious means of state repression for subjugation to take place.[8]

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[5] See Malcolm Suber, *White Supremacy Thinking Still Exists*, NEW ORLEANS TIMES-PICAYUNE, Jan. 13, 1998, at B6 Letter to the Editor, for a good presentation of the argument that honoring Robert E. Lee glorifies white supremacy, slavery, and the oppression of African Americans.

[6] *See* Carter, *supra* note 1, 557-58.

[7] *See* Kenneth B. Nunn, *Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743 (1995) (arguing culture shapes view of crime, the criminal law, and the criminal justice system) [hereinafter Nunn, *Trial as Text*]; Kenneth B. Nunn, *Illegal Aliens: Extraterrestrials and White Fear*, 48 FLA. L. REV. 397 (1996) (describing cultural studies and applying methodology of cultural studies to race relations law); Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 LAW & INEQ. J. 323 (1997) (arguing nature of law is determined by attributes of European culture).

[8] *See* Nunn, *Trial as Text*, *supra* note 7, at 764 (stating hegemony not imposed by power of state but by cultural consensus); Kimberle Williams Crenshaw, *Race, Re-*

It took courage to be a Judge Horton.[9] It took courage to be a Judge Vance. It took courage to be a Judge Johnson[10] in the South, because of this powerful need to conform, this powerful need to be one of the community, to find a place and a home in that community. It is what my wife and I often refer to as the desire to "eat lunch." You want to eat lunch in your community. You want to be accepted. You want people to like you. You want them to respect you. And this desire shapes our conduct in ways that preserve and extend the values of our chosen community.

Consequently, we should not just focus our efforts to interpret the law on those transformations that take place in the law as it is written on the books. We must also focus on those transformations that take place in the culture and in the society.[11] They are inseparable, law and opinion. Law is an extension of our culture and of our society. Although law may be a formality, it is not a "mere formality."[12] It is a formality that influences the development of our culture.

So, that having been said, what is the meaning of the Scottsboro Boys' case today? Does it have any influence on our way of life, the structure of our laws, and the decisions of our courts? I think it does. Of course, we can see the easy similarities between the Scottsboro Boys' case and the O.J. Simpson case.[13] This is not to say that O.J. Simpson was a person who was falsely accused, and that there was no evidence to suggest that

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form and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331, 1359-60 (1988) (showing how African Americans can be oppressed by the hegemonic consensus of the white majority).

[9] *See* Carter, *supra* note 1, at 558-62.

[10] *See id.* at 566-68.

[11] *See* Barbara Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture,* 98 YALE L.J. 1689, 1690 (1989) (describing a view of "the production of law as an ongoing process, dialectically linked to the production of community, which is both a vehicle for and an outcome of the invention of law").

[12] *See* Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text,* 77 MINN. L. REV. 1065, 1091 (1993) (arguing that legal texts, though formal, must be interpreted in their "extrinsic" context); Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence,* 3 PSYCHOL. PUB. POL'Y. & L. 184, 186 (1997) ("Law is not an artifact on display in a museum, it is a living, breathing, organism.").

[13] Both of these cases involved sexual assaults by Black men on white women. In the Scottsboro Boys case, the alleged crime was a rape. In the O.J. Simpson case, it was a sexually motivated murder. Both cases were enormous spectacles, in large part because they both implicated historically taboo interracial sexual relationships. *See generally* Cheryl I. Harris, *Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith—Spectacles of Our Times,* 35 WASHBURN L.J. 225 (1996) (discussing symbolism of Simpson and Smith trials); JAMES E. GOODMAN, STORIES OF SCOTTSBORO (1994) (describing media frenzy and cultural significance of Scottsboro Boys case).

he was involved in the case, and that people of good conscience did not have reason to believe he was indeed guilty. My inquiry focuses on the interaction of sex and race and the particularly strong passions and emotions this combination develops.[14] Regardless of one's opinion about the outcome of the Simpson case, one cannot say these factors were not present. The presence of these factors, and the way they were articulated and played out in the media, can be traced directly to a social pattern that was present in the Scottsboro Boys' case as well.[15]

Clearly this is evidence of the interaction of law and culture at work today. We saw this process of cultural transformation at work when we saw one of O.J. Simpson's defense attorneys "sell out," to put it lightly. At the end of the case he wrote a book and said "I didn't have anything to do with the defense strategy in this case. I only did it because I was forced to."[16] This attorney wanted to eat lunch. We understand this. But we also see the role of social intervention in the law when we consider some of the fallout of the O.J. Simpson case. When we hear talk that reflects a public attitude that criminal cases are not tried fast enough, that people are not put to death fast enough, that there is no finality in criminal cases, that we have given too much to criminal defendants,[17] this is evidence of the influence of culture on the law.[18]

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[14] Professor Harris argues these passions are based on the acceptance of fundamental myths about the "bestial and brutish nature of Black men" and "the inherent tragedy of interracial relationships." Harris, *supra* note 13, at 242. According to Harris, these myths "came into being and are reproduced as social categories under regimes designed to create and preserve white power." *Id.* at 234.

[15] The origin of this pattern may be traced to the institution of American slavery. "Exclusive control over sexual access to white women was a central organizing principle of white supremacy grounded in slavery." *Id.* at 236. The mythology and social practices which developed around this principle were used to justify the use of violence and terror to preserve white supremacy. *See id.* at 244. Thus, the subjugation of the Black community was assured through the mythic treatment of race and sex.

[16] Robert Shapiro, Simpson's initial attorney and the person who assembled the so-called "dream team," published a book on his role in the trial in 1996. *See* ROBERT L. SHAPIRO & LARKIN WARREN, THE SEARCH FOR JUSTICE: A DEFENSE ATTORNEY'S BRIEF ON THE O.J. SIMPSON TRIAL (1996). According to one reviewer, Shapiro "seems to have written this book in no small measure to convince readers—dare I say white readers in particular—that controversial defense tactics were not his idea and that someone else deserves the blame." Henry Weinstein, *Shapiro's Rehash of Trial Reads Like Defense of His Image*, ATLANTA J. & CONST., Apr. 28, 1996, at L14. I paraphrase Shapiro's comments here.

[17] *See, e.g.*, GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIM'S RIGHTS IN CRIMINAL TRIALS (1995) (arguing for these and other "victim oriented" reforms in the criminal justice system).

[18] There is significant evidence that draconian proposals in criminal law are driven by racial attitudes. *See* Nunn, *Trial as Text*, *supra* note 7, at 775-80 (describing connection between racial attitudes and perceptions of crime and as-

We can have laws on the books that say you need to have a speedy trial or a right to counsel. But then, at the same time, we can have a public arena that makes it difficult for a legislature to pay attorneys a rate higher than minimum wage to handle complicated death penalty cases. In these cases, your rights to a speedy trial and competent counsel go right out the window.[19] So, to understand the actual functioning of the law, we must take cultural influences into account.

Professor Carter said we should not impugn Supreme Court decisions by assuming the bad faith of the Justices of the Supreme Court. I cannot heed this warning. I think many of the decisions of the Supreme Court *are* in bad faith. It is difficult for me to see how the Court could not be aware of the reactionary nature of many of its recent decisions in the areas of criminal justice and race. It is hard to think that the Court acted in anything but bad faith when it ignored the segregationist history of the "Capital of the Confederacy" to strike down the Richmond, Virginia city council's minority set-aside plan in *Richmond v. Croson.*[20] Nor can the charge of bad faith be avoided when one considers the Court's opinions in *Adarand Constructors, Inc. v. Pena*[21] and *Whren v. United States,*[22] decisions that greatly, and

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serting this linkage helps produce repressive social policies); *see also* DORIS A. GRABER, CRIME NEWS AND THE PUBLIC 55 (1980) (reporting respondents of 1977 survey viewed crime largely as the work of young males from communities of color). The Simpson trial, then, is only one particularly nasty example of this phenomenon.

[19] *See* Bruce A. Green, *Legal Fiction: The Meaning of Counsel in the Sixth Amendment,* 78 IOWA L. REV. 433 (1993) (claiming that in light of practical realities, right to counsel is illusory).

[20] 488 U.S. 469 (1989). In *Croson,* the efforts of a Black majority city council to correct longstanding racial inequities in the local construction trade was dismissed as divisive racial politics by a plurality of Justices. The decision in *Croson* has been sharply criticized by affirmative action advocates. *See, e.g., id.* (Marshall, J., dissenting); Thomas Ross, *The Richmond Narratives,* 68 TEX. L. REV. 381 (1989).

[21] 515 U.S. 200 (1995). In *Adarand,* the Supreme Court overturned at least fifteen years of constitutional jurisprudence and applied the strict scrutiny standard of review to all constitutional challenges of race-based governmental programs. *See* Margaret A. Sewell, Adarand Constructors v. Pena*: The Armageddon of Affirmative Action,* 46 DEPAUL L. REV. 611, 614-22 (1997). This ruling endangers all affirmative action programs, because, as Gerald Gunther's oft-quoted maxim points out, "strict scrutiny is strict in theory, but fatal in fact." Gerald Gunther, *The Supreme Court 1971 Term—Foreword: In Search of an Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972). For case comments critical of the *Adarand* decision, see Sewell, *supra*; Michael L. Manuel, Adarand Constructors, Inc. v. Pena*: Is Strict Scrutiny Fatal in Fact for Governmental Affirmative Action Programs?,* 31 NEW ENG. L. REV. 975 (1997); Bryant S. Delgadillo, Recent Development, 69 TEMPLE L. REV. 1521 (1996); Sameer M. Ashar and Lisa F. Opoku, Recent Development, 31 HARVARD C.R. - C.L. L. REV. 223 (1996).

[22] 517 U.S. 806 (1996) (holding pretextual traffic stops are not violative of Fourth Amendment protection against unreasonable searches and seizures). The

predictably, harmed the ability of communities of color to survive and prosper in this nation.

One may be able to defend these decisions on a cold, hard balance sheet, that looks to the decision only as a matter of law. But we know these decisions have a cultural influence. We know they embolden people who are opposed to racial equality and racial justice. If we do not know that ourselves, all we need to do is pick up the newspapers and read the arguments made by such people. Take *McCleskey v. Kemp*,[23] in which the court said that the demonstrated disparity in the rate that African Americans are put to death in Georgia required no remedy, because it was important to preserve the discretion of prosecutors, the very discretion they were using to discriminate against Blacks. Can that opinion stand for anything other than a bald endorsement of the claim that Black lives are worth less than white lives?

Or, what can we say when we have case like *United States v. Armstrong*,[24] which dealt with the standard used to allow discovery in discriminatory prosecution cases? In that case, the Court set a standard of proof so high it is virtually impossible to meet *at trial*, let alone in the pretrial stages of a case.[25] A decision such as this says that the Supreme Court doesn't like discriminatory prosecution cases, and would rather be rid of them. By making it so difficult to allege racial discrimination in criminal cases, the Supreme Court has given prosecutors the green light to treat members of minority communities any way they want to.

These are all horrendous decisions. They are decisions that are transparently racist and that a Supreme Court committed to providing justice for all American citizens would never render. Decisions such as these make it difficult to for us to say that the

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Supreme Court's decision in *Whren* permits police departments to stop pedestrians and motorists at will, and allows well-documented and widespread discriminatory detentions of people of color to continue unchecked. *See* Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997).

[23] 481 U.S. 279 (1987).

[24] 517 U.S. 456 (1996).

[25] In order to obtain discovery in selective prosecution cases, litigants must show both a discriminatory effect and a discriminatory purpose. *Id.* at 468-70. To show a discriminatory purpose, *Armstrong* requires litigants to demonstrate that similarly situated individuals could have been prosecuted, but were not. *Id.* at 465. This is a difficult showing under most circumstances, but one that is extremely unlikely to be met prior to any discovery. *See* Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 337 n.22 (1998) (describing *Armstrong's* evidentiary burden as "heavy" and "strict"); Marc Michael, United States v. Armstrong: *Selective Prosecution—A Futile Defense and Its Arduous Standard of Discovery*, 47 CATH. U.L. REV. 675, 717 (1998) (describing the selective prosecution defense in light of *Armstrong* as "an illusory opportunity to defeat criminal charges open to those with good fortune to discover the necessary 'similarly situated' evidence").

progress that many of us would like to see has come very far at all. We deserve a better Supreme Court than this. We deserve a better judiciary than this. Judge Horton and others have set the example. Why are our judges and justices not following it?

We should recognize, as a community, that we all play a role in choosing the direction in which our law proceeds. It is nice, and I think just, for us to acknowledge the strength of character that strong judges have shown when faced with a moment of crisis and of conscience. I think it is important for us to do that. But we cannot simply rely on strong mavericks to stand for what is just. We have to play our role in creating those people, because they are created.

Toward the end of his lecture, Professor Carter described how meaningful it was for Judge Horton to do "the right thing," because of his concern for his children and his grandchildren.[26] The centrality of family in Judge Horton's explanation of his ruling tells us that it was family—his father, his mother, and his grandparents—that instilled those values in him. This was what made him the kind of man he was, so that he did not care whether he could "eat lunch" in his small Alabama town anymore. It is important for us to continue that tradition, and to continue to create judges that are independent and incorruptible. We must support our judges when they make tough decisions that are unpopular, but right. But we must also help them develop the moral sense, and the strength of character, to make them in the first place.

[26] Carter, *supra* note 1, at 560-61.