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Bernard E. Harcourt

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ARTICLES

IMAGERY AND ADJUDICATION IN THE CRIMINAL LAW: THE RELATIONSHIP BETWEEN IMAGES OF CRIMINAL DEFENDANTS AND IDEOLOGIES OF CRIMINAL LAW IN SOUTHERN ANTEBELLUM AND MODERN APPELLATE DECISIONS*

Bernard E. Harcourt[†]

INTRODUCTION

Criminal law opinions often project a distinct image of the accused. Sometimes, she is cast in a sympathetic light and may appear vulnerable or impressionable: a single mother, whose husband has died, struggling to raise her two, loving children;¹ an impoverished, nineteen-year-old African-American with a fifth-grade education, "mentally dull and 'slow to learn,'"² or a defenseless "obedient servant," protecting himself from an "adversary armed with a deadly weapon."³ On other occasions, the defendant may appear threatening, savage or even diabolical: a cold-blooded recidivist that escapes from a prison work-crew, brutally stabs, rapes and murders a woman, and returns for a hot lunch with his fellow inmates;⁴ a six-foot-tall "black

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† Senior Fellow, Graduate Program, Harvard Law School. J.D. 1989, Harvard Law School; A.B. 1984, Princeton University. I am grateful for the financial support provided by the Mark DeWolfe Howe Fund at Harvard Law School and especially grateful to Jorge Esquirol, Terry Fisher, A. Leon Higginbotham, Juliette Kayyem, David Kennedy, Mia Ruyter, Dan Simon and Carol Steiker for their invaluable comments.

¹ *Lynumn v. Illinois*, 372 U.S. 528 (1963).

² *Payne v. Arkansas*, 356 U.S. 560, 562 n.4 (1958).

³ *The State v. Abram*, a slave, 10 Ala. 928, 929, 932 (1847).

⁴ *Mu'Min v. Virginia*, 500 U.S. 415 (1991).

male" rapist wearing a black jacket with "Big Ben" printed on the back;⁵ a "brute creation" or a run-away, "lurking in swamps, woods, and other obscure places, killing hogs, and committing other injuries to . . . inhabitants."⁶

During certain historical periods, the images are remarkably consistent and identifiable. Southern antebellum opinions, for instance, consistently project an image of the slave criminal defendant as a chameleon—shifting from the harmless and obedient servant to the threatening and rebellious slave, and vice versa. The opinions of the Warren Court reflect a consistent image of the defendant as a vulnerable young person, poor, and uneducated, at the mercy of overbearing police officers. The Rehnquist Court, in contrast, consistently projects an image of the criminal defendant as deeply threatening, cold-blooded and recidivist.

During these historical periods, the texts also reveal remarkably consistent, distinct and identifiable ideologies of criminal law. The southern antebellum slave cases, for instance, reflect a consistent effort to place discretion in the hands of slaveholders. In Alabama, slaves accused of capital crimes were tried by juries that were composed of at least two thirds slaveholders; and the slaveholder was a competent witness at his slave's trial.⁷ The Warren Court made its mission in criminal law to even the scales of justice in favor of the uneducated, impoverished and unknowing defendant. The landmark decisions of the Warren Court provided counsel to the poor, like Clarence Earl Gideon;⁸ warnings to the unknowing, like Ernesto Miranda;⁹ safeguards for the fourteen-year-old, like Robert Gallegos;¹⁰ and protections for African-Americans, like Robert Swain.¹¹ In sharp contrast, the Rehnquist

⁵ *New York v. Quarles*, 467 U.S. 649, 651 (1984).

⁶ *Abram*, 10 Ala. at 932; ACT OF 1805 § 13, in C.C. CLAY, A DIGEST OF THE LAWS OF THE STATE OF ALABAMA CONTAINING ALL THE STATUTES OF A PUBLIC AND GENERAL NATURE, IN FORCE AT THE CLOSE OF THE SESSION OF THE GENERAL ASSEMBLY IN FEBRUARY, 1843 (1843), *Slaves, and Free Persons of Color* § 541 (hereinafter "CLAY'S DIGEST").

⁷ *Spence, a slave v. State*, 17 Ala. 192 (1850); see also ALA. CODE § 3317 (1852).

⁸ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁰ *Gallegos v. Colorado*, 370 U.S. 49 (1962).

¹¹ *Swain v. Alabama*, 380 U.S. 202 (1965). Although the *Swain* decision today

Court has made its mission to even the scales of justice in favor of the victim, the police officer and the state. The landmark decisions of the Rehnquist Court allow victim-impact evidence at the penalty phase of capital trials,¹² testimony of victimized children by closed-circuit television,¹³ public-safety exceptions to *Miranda*,¹⁴ and state-rights limitations on the writ of habeas corpus.¹⁵

Traditionally, the relationship between imagery and ideology has been interpreted through the lens of causality. The ideology of criminal law, it is said, expresses itself in the construction of fact patterns, time-framing and images that control the outcome of the litigation. From this perspective, images are the product of ideology, in part¹⁶ or in whole,¹⁷ and are the means of ideological persuasion. This view is illustrated well in some discussions of racial imagery in the antebellum and Reconstruction periods:

In some periods, society needed to suppress a group, as with blacks during Reconstruction. Society coined an image to suit that purpose—that of primitive, powerful larger than life blacks, terrifying and barely under control. At other times, for example during slavery, society needed reassurance that blacks were docile, cheerful, and content with their lot. Images of sullen, rebellious blacks dissatisfied with their condition would have made white society uneasy. Accordingly, images of simple, happy blacks, content to do the master's work, were disseminated.¹⁸

is generally viewed as restrictive, at the time of its release it was perceived as safeguarding the rights of minorities.

¹² *Payne v. Tennessee*, 501 U.S. 808 (1991).

¹³ *Maryland v. Craig*, 497 U.S. 836 (1990).

¹⁴ *New York v. Quarles*, 467 U.S. 649 (1984).

¹⁵ See, e.g., *McCleskey v. Zant*, 499 U.S. 467 (1991) (restricting availability of writ on successive petition); *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (restricting right to evidentiary hearing on petition for writ of habeas corpus in federal court); *Coleman v. Thompson*, 501 U.S. 722 (1991) (restricting availability of writ where counsel erred in state post-conviction proceedings); *Teague v. Lane*, 489 U.S. 288 (1989) (restricting retroactive applicability of new rules of law).

¹⁶ See Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 670 (1981) (one account of interpretive constructions is that they "correspond to the political program of a social class").

¹⁷ See J.M. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197 (1990); J. M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133 (1991) (discussing how ideology constrains structure).

¹⁸ Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systematic Social Ills?*, 77 CORNELL L. REV. 1258, 1276 (1992). Delgado and Stefancic do not limit their analysis to the

In this Article, I suggest a more dynamic relationship between images and ideologies. My thesis is that images of criminal defendants and ideologies of criminal law relate in a mutually transformative manner that exerts centrifugal force in the adjudicative process. Images and ideologies feed back on each other: ideologies shape and sharpen images, but images also sharpen and transform ideologies. The images of the criminal defendant that are projected into the adjudicative process acquire a force of their own that reinforces, radicalizes and transforms the related ideology of criminal law, and, in this process, breaks down communication between the parties. As a result of competing images of the criminal defendant, the parties gradually begin to speak about entirely different individuals. This process ultimately creates an unbridgeable distance in criminal law adjudication.

The purpose of this Article, then, is to explore how the use of imagery in the criminal law affects the adjudicative process.¹⁹ A dynamic understanding of the relationship explains more fully the power of images. Images of the defendant are forceful devices in politics and adjudication.²⁰ Hidden from the

traditional, causal relationship between images and ideology. The authors clearly recognize that there is more to this relationship. They explicitly state that "we are our current stock of narratives, and they us." *Id.* at 1280. According to Delgado and Stefancic, images "begin[] to shape and determine us, who we are, what we see, how we select, reject, interpret and order subsequent reality." *Id.*

¹⁹ Other studies of imagery and its role in law and politics include Delgado & Stefancic, *supra* note 18; Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739 (1993); Vicky Munro-Bjorklund, *Popular Cultural Images of Criminals and Prisoners Since Attica*, 18 SOC. JUST. 48 (1991); Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945 (1993); and the essays contained in Symposium, *Changing Images of the State*, 107 HARV. L. REV. 1179 (1994). Works that chronicle images of African-Americans in popular culture include CATHERINE SILK & JOHN SILK, *RACISM AND ANTI-RACISM IN AMERICAN POPULAR CULTURE* (1990); *SPLIT IMAGE: AFRICAN AMERICANS IN THE MASS MEDIA* (J. L. Dates & W. Barlow eds.) (1990); and the works listed in "Resources for the Study of Ethnic Depiction in the United States—African-Americans," appended to Delgado & Stefancic, *supra* note 18, at 1292-94.

²⁰ In fact, in our visually-oriented culture, the visual often controls the political debate. See Rosalind Pollack Petchesky, *Fetal Images: The Power of Visual Culture in the Politics of Reproduction*, 13 FEMINIST STUD. 263, 264 (1987). This is demonstrated well in the abortion context, where ultrasound images of the fetus, as well as photographs of the dead fetus, have mobilized many anti-abortionists and empowered the pro-life movement. *Id.* It was also made evident during the 1988 presidential campaign, when the image of Willie Horton galvanized public opinion and contributed to the demise of presidential hopeful Michael Dukakis. See Paul

decisionmaking process, the images exert subtle influence on the reader. Their power derives in large part from the fact that they are so often veiled,²¹ hidden not from the text or the reader, but from the decisionmaking process.

In order to expose the role of imagery in criminal adjudication, this Article critically examines the criminal law texts from three periods in American legal history—the southern antebellum period, the Warren Court, and the Rehnquist Court. The analysis of the antebellum period focuses on southern court cases involving slave criminal defendants. Because the states in the Deep South, particularly Alabama, have earned a reputation among legal historians of having had more enlightened criminal procedures for slave defendants than their mid-Atlantic counterparts, this Article pays particular attention to the decisions from the state of Alabama.²² The

Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2063-64 (1993) ("The image of Willie Horton was effective in the 1988 presidential campaign because it reflected a pervasive belief in America that blacks are a dangerous class"); Peter Margulies, "Who Are You to Tell Me That?": *Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213, 220 n.23 (1990) ("The brutal crimes committed by Horton ingrained themselves in the public imagination, which also seemed to latch on to the fact, brought home by a photograph in one of the ads, that Horton was black. The saliency of the image of Horton, his crimes, and his white victims eclipsed all reasonable talk about Dukakis's and other furlough programs around the country."). See generally Johnson, *supra* note 19.

²¹ According to Jacques Lacan, the phallus, as the symbol of power, "can play its role only when veiled." Jacques Lacan, *The Signification of the Phallus*, ECRITS: A SELECTION 288 (A. Sheridan trans., 1977).

²² Helen Tunnicliff Catterall, the editor of the multi-volume compilation on the laws of slavery, wrote in 1928 that "[a] liberal spirit pervades the Alabama decisions down to 1859." 3 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 126 (Helen Tunnicliff Catterall ed., reprint 1968). Catterall especially praised the slave criminal procedure decisions writing that "[t]he number of cases in which slaves convicted of crimes were granted new trials is remarkable, all the resources of the law being invoked in their favor." *Id.* at 128. A. E. Keir Nash, who has written extensively about the criminal process afforded slaves in the antebellum South, reports an "apparent libertarianism" in the treatment of slaves accused of crimes by state appellate judges in the Deep South—"an overlooked antebellum tradition of solicitude for the black defendant." A.E. Keir Nash, *Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South*, 56 VA. L. REV. 64, 65-66 (1970). A number of other scholars have similarly praised the appellate courts of the Deep South. See, e.g., Daniel J. Flanigan, *Criminal Procedure in Slave Trials in the Antebellum South*, 40 J. S. HIST. 537 (1974); Reuel E. Schiller, *Conflicting Obligations: Slave Law and the Late Antebellum North Carolina Supreme Court*, 78 VA. L. REV. 1207 (1992); but see Judith Schafer, *The Long Arm of the Law: Slave Criminals and the Supreme Court in*

analysis of the Warren Court focuses on the majority opinions issued by the Supreme Court during the tenure of Chief Justice Earl Warren that the Chief Justice wrote or in which he joined. In order to distill the imagery of the Warren Court, the Article places special attention on majority opinions written by Warren.²³ The analysis of the Rehnquist Court focuses on the opinions written by Chief Justice William Rehnquist, opinions written by members of the Supreme Court during the tenure of Chief Justice Rehnquist in which Rehnquist joined, as well as the decisions written by former Justice Rehnquist during the tenure of Chief Justice Warren Burger.

In Part I, the Article provides a theoretical context for the inquiry and proposes a working paradigm from the field of cognitive psychology. Part II describes the imagery of criminal defendants during the three historical periods. Part III discusses the ideologies of criminal law prevalent during these historical periods. Part IV explores the relationship between the images of criminal defendants and the ideologies of criminal law. Part V discusses some generalizations that can be drawn from the analysis. In conclusion, the Article explores the implications for criminal adjudication.

I. A THEORETICAL BACKGROUND AND A WORKING PARADIGM FROM THE FIELD OF COGNITIVE PSYCHOLOGY

A. *The Theoretical Context*

The inquiry into the role of imagery in human judgment traces its source to antiquity.²⁴ For purposes of contemporary

Antebellum Louisiana, 60 TUL. L. REV. 1247 (1986). Terry Fisher recently concluded that "in Alabama, Florida, Mississippi, North Carolina, and Tennessee, the courts could claim with some plausibility that, whenever life is involved, the slave stands upon as safe ground as the master." William W. Fisher, III, *Ideology and Imagery in the Law of Slavery*, 68 CHI.-KENT L. REV. 1051, 1053 (1993) (quoting *Cato v. State*, 9 Fla. 163, 173-74 (1860)). Because of its reputation as having more enlightened appellate courts, this Article pays particular attention to the decisions from the state of Alabama.

²³ In majority opinions, "the author is more anxious to attract others to join his actual opinion (as opposed to just voting the same way)" and those opinions may reflect more clearly the shared images and ideology of the court. Craig M. Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquist Revolution Begun?*, 62 IND. L. J. 273, 274 n.6 (1987).

²⁴ In the "pre-scientific" period of mental imagery, there were, broadly

American jurisprudence, however, the trunk stream was formed in the early part of the twentieth century during the realist challenge to classical legal thought. For it is then that scholars like Jerome Frank and Karl Llewellyn began to question the importance of mental imagery in the judicial decisionmaking process.²⁵

In contrast to the classical tradition, which emphasized the role of abstract principles in adjudication,²⁶ Frank, Llewellyn and others²⁷ emphasized the personal experiences

speaking, three theories about the role of mental images in knowledge. The imagist theory, which traces its genealogy to Aristotle and became dominant in the British Empiricist tradition exemplified by Berkeley, held "that mental images, and especially *visual* images, are the primary symbols of thinking and that thought consequently has images as its base." GEIR KAUFMANN, *IMAGERY, LANGUAGE AND COGNITION: TOWARD A THEORY OF SYMBOLIC ACTIVITY IN HUMAN PROBLEM SOLVING* 14 (1980). Thus, according to Berkeley, words and concepts "have meaning, but only indirectly, in relation to images." *Id.* at 14. The linguistic theory, associated with Cassirer, asserts in its extreme form that "verbal thinking is the only 'real' thinking" and that there are no mental images. *Id.* at 17. A third theory, conceptualist theory, which traces its origins to Plato, Socrates, Descartes and Kant, suggests that "thinking is held to be a unique type of cognitive activity which may accompany and be expressed (or formulated) in language, imagery or relevant action, and may also occur in the *absence* of these Language and imagery are, thus, placed in a purely external and adventitious relation to the act of thinking, and assigned a secondary auxiliary function." *Id.* at 19.

²⁵ See JEROME FRANK, *LAW AND THE MODERN MIND* (1930); Jerome Frank, *What Courts Do In Fact*, 26 ILL. L. REV. 645 (1932); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). Although these scholars will be discussed together, this is not to suggest that they did not have significant differences of opinion. See EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* 82-83, 87 (1973).

²⁶ Classical legal thought, which is associated with the period roughly from 1860 to 1937, offered a formal style of judicial reasoning. Classical legal theory claimed that reasoning proceeded syllogistically from rules and precedents that had been clearly defined historically and logically, through the particular facts of a case, to a clear decision. The function of the judge was to discover analytically the proper rules and precedents involved and to apply them to the case as first premises. Once he had done that, the judge could decide the case with certainty and uniformity.

PURCELL, JR., *supra* note 25, at 74-75; see also WILLIAM W. FISHER III, ET AL., *AMERICAN LEGAL REALISM* xii (1993).

²⁷ See, e.g., Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843 (1935) ("[a] truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, as concomitantly and even more importantly a function of social forces, that is to say, as a product of social determinants and an index of social consequences."); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 881 (1930) ("Since a choice implies motives, it is obvious that, somewhere, somehow, a judge is impelled to make his selection—not quite freely, as we have seen, but within

of the judge. In his work, *Law and the Modern Mind*, originally published in 1930, Jerome Frank argued that "biases and prejudices and conditions of attention affect the judge's reasoning as they do the reasoning of ordinary men."²⁸ According to Frank, these biases led the judge to form tentative conclusions, or "hunches,"²⁹ about cases that often were outcome determinative.³⁰

"What, then, are the hunch-producers?"³¹ Frank asked. In part, they included the mental images of the judge. Thus, Frank explained:

[The judge's] own past may have created plus or minus reactions to women, or blonde women, or men with beards, or Southerners, or Italians, or Englishmen, or plumbers, or ministers, or college graduates, or Democrats. A certain twang or cough or gesture may start up memories painful or pleasant in the main. Those memories of the judge, while he is listening to a witness with such a twang or cough or gesture, may affect the judge's initial hearing of, or subsequent recollection of, what the witness said, or the weight or credibility which the judge will attach to the witness's testimony.³²

These mental images and memories were, for Frank, the "hid-

generous limits as a rule—by those psychical elements which make him the kind of person that he is.”).

²⁸ FRANK, *supra* note 25, at 145 (Echoing the famous introductory passages of OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881) that “[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”).

²⁹ FRANK, *supra* note 25, at 113; see also Joseph Hutchinson, *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L. Q. 274, 285 (1929) (“The vital, motivating impulse for the decision, is an intuitive sense of what is right or wrong for that case”); FISHER ET AL., *supra* note 26, at 165; PURCELL JR., *supra* note 25, at 83.

³⁰ FRANK, *supra* note 25, at 101. The American Legal Realists were not, of course, the first to observe that personal experiences played a role in decisionmaking. Generations before them, Puritans in England remarked of courts of equity that “Tis all one as if they should make the standard for measure a Chancellor's foot.” See Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, reprinted in *LAW IN AMERICAN HISTORY* 257, 260 (Donald Fleming & Bernard Bailyn, eds., Boston: Little, Brown and Company 1971); David Thomas Konig, *Community Custom and the Common Law: Social Change and the Development of Land Law in Seventeenth-Century Massachusetts*, 18 AM. J. LEGAL HIST. 137, 171 (1974).

³¹ FRANK, *supra* note 25, at 104.

³² FRANK, *supra* note 25, at 106.

den factors" that gave depth, individuality, and complexity to the other, cruder "hunch-producers" like the "political, economic and moral biases" of the judge.³³ The exact relationship, however, between mental imagery and ideology was left somewhat ambiguous. Although the memories often were consistent with and possibly shaped ideology,³⁴ Frank also left open the possibility of unexpected consequences.³⁵ In the final analysis, the exact relationship remained murky.

In the field of criminal law, Mark Kelman picks up where Jerome Frank left off and addresses the role of mental imagery in his article entitled *Interpretive Construction in the Substantive Criminal Law*.³⁶ Kelman's goal, like that of Frank, is to challenge "the falsely complacent sense that the [standard doctrinal arguments routinely made by judges and commentators on the substantive criminal law], while grounded in politically controversial purposes, are deduced or derived in a rational and coherent fashion once the purposes are settled."³⁷ Kelman attempts to demonstrate that decisionmakers use conscious and unconscious interpretive constructs—such as mental imagery and the time-framing of fact patterns—to reach the result they want.

Like Frank, however, Kelman ultimately remains noncommittal about the relationship between images and ideology. At points, he argues that interpretive constructs unconsciously determine the outcome of appellate decisions. He states that the constructs operate non-rationally to allow the decisionmaker to avoid dealing with difficult political problems.³⁸ At other times, however, Kelman offers a second inter-

³³ FRANK, *supra* note 25, at 105.

³⁴ FRANK, *supra* note 25, at 106 ("[a] man's political or economic prejudices are frequently cut across by his affection for or animosity to some particular individual or group, due to some unique experience he has had").

³⁵ FRANK, *supra* note 25, at 106 ("a racial antagonism which [the judge] entertains may be deflected in a particular case by a desire to be admired by some one who is devoid of such antagonism").

³⁶ Kelman, *supra* note 16.

³⁷ Kelman, *supra* note 16, at 591.

³⁸ Kelman, *supra* note 16, at 600; see also Kelman, *supra* note 16, at 642 ("[c]onscious interpretive constructs, like the unconscious ones, operate to avoid fundamental political problems"); Kelman, *supra* note 16, at 652 ("What is fascinating is that writers like Williams can so blithely dismiss deterministic accounts in general, while adopting them wholeheartedly, without explanation, when it suits some particular program. Once more, the point is not the ultimate result, but the

pretation—what he calls a “plausible”³⁹ reading of his work—that suggests a causal relationship between ideology and image. Under this reading, the interpretive construct manifests class conflict: “each construction might correspond to the political program of a social class.”⁴⁰ Kelman calls this view “construction determinism,” by which he means “a belief that the interpretive technique an analyst uses is itself a *product* of the social class he politically supports.”⁴¹ In this second sense, ideology produces images.

J. M. Balkin develops Kelman’s second interpretation in his article entitled *The Rhetoric of Responsibility*.⁴² For Balkin, though, the causal relationship is far clearer than for Kelman: whereas Kelman saw structure in legal argument and, according to Balkin, mistakenly interpreted it as non-rational, Balkin sees structure and concludes that it is dictated by ideology. Balkin writes, “For me, the central issue in the study of factual characterizations begun by Kelman is not rationality but ideology. We reason about legal issues, but we always do so within an ideological framework that gives coherence and meaning to our debates.”⁴³ For Balkin, then, the relationship between ideology and image is one of causation: ideology constrains images. “Ideology . . . is reflected by how people choose characterizations of responsibility in different social settings.”⁴⁴ Balkin develops his theory further in his article *Ideology as Constraint*,⁴⁵ where he writes that his “theory can be summed up in three words: ‘Ideology Is Constraint.’” Balkin argues there that “[r]egularities in legal thought and belief are not due merely to the existence of objective social rules or legal doctrine, but also to the contributions of shared ideology.”⁴⁶

Ideology as constraint, however, does not give full expression to the effect that images can have on ideologies—to the

nonrationality of method in a purportedly rationalistic discourse.”).

³⁹ Kelman, *supra* note 16, at 670.

⁴⁰ Kelman, *supra* note 16, at 670.

⁴¹ Kelman, *supra* note 16, at 670 (emphasis added).

⁴² J. M. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197 (1990).

⁴³ *Id.* at 199.

⁴⁴ *Id.* at 262.

⁴⁵ J. M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133, 1138 (1991).

⁴⁶ *Id.* at 1138.

fact that images may also constrain. Rosalind Petchesky contributes the crucial next step in the debate with her article entitled *Fetal Images: The Power of Visual Culture in the Politics of Reproduction*.⁴⁷ In her article, Petchesky attempts to demonstrate how the pro-life movement has appropriated the visual terrain in the abortion debate by using images of fetuses and by visualizing the abortion process. According to Petchesky, anti-abortionists have learned that the image of "a dead fetus is worth a thousand words."⁴⁸ Petchesky focuses on ultrasound imaging and, in particular, on the television production *The Silent Scream* which "purports to show a medical event, a real-time ultrasound imaging of a twelve-week-old fetus being aborted."⁴⁹ According to the medical narrator in *The Silent Scream*, this enables the viewer to witness an abortion "from the victim's vantage point."⁵⁰ The screen shows "[t]he suction cannula [as it] is 'moving violently' toward 'the child' . . . The fetus 'does sense aggression in its sanctuary,' attempts to 'escape' (indicating more rapid movements on the screen), and finally 'rears back its head' in 'a silent scream.'"⁵¹

The image, combined with the explanation, is powerful. Petchesky recognizes that the image is the product of an ideology: "the fetal image [is] a symbol that condenses a complicated set of conservative values—about sex, motherhood, teenage girls, fatherhood, the family."⁵² Yet, Petchesky also shows how the image can *transform* ideology. The use of ultrasound imaging has altered radically our general perception of abortion. According to studies, "early fetal ultrasound tests result[] in 'maternal bonding' and possibly 'fewer abortions.'"⁵³ Moreover, according to Petchesky, the "panoptics of the womb" have degraded the pregnant woman: "She now becomes the 'maternal environment,' the 'site' of the fetus, a passive spectator in her own pregnancy."⁵⁴ The image has affected the use of technolo-

⁴⁷ Petchesky, *supra* note 20.

⁴⁸ Petchesky, *supra* note 20, at 263.

⁴⁹ Petchesky, *supra* note 20, at 266.

⁵⁰ Petchesky, *supra* note 20, at 266.

⁵¹ Petchesky, *supra* note 20, at 266-67.

⁵² Petchesky, *supra* note 20, at 281.

⁵³ Petchesky, *supra* note 20, at 265.

⁵⁴ Petchesky, *supra* note 20, at 277. Petchesky recognizes that this may be true for some pregnant mothers, but not for all, and that decoupling the power relations from the technologies may entail retaining ultrasound technologies.

gies, privileging fetus-oriented technologies at the expense of mother-oriented ones.⁵⁵

It is here that we can see how image and ideology relate in a dynamic way. The fetus, as an independent being, has achieved viability through the imaging process. The image of the fetus has become independent, a being no longer tied to the mother. It has become more real than the fetus itself. In this sense, the image is now reality.⁵⁶ It cannot be dismissed as a mere "distortion," or a mere "surface impression[]."⁵⁷ In the abortion debate, there is now an "it" (fetus or baby) in the privacy of the womb that somehow has connected to people in society independently of its relationship with its mother. In this way, the image interferes in the ideological debate, shifts its focus, and amplifies the disagreement. Images of dead fetuses are waved in front of images of coat-hangers, creating centrifugal force in the political debate and propelling the two movements further and further apart.

Petchesky's article thus reflects the transformative potential of images and their powerful effect in creating centrifugal force in the debate. In many ways, Petchesky's focus on images and ideologies—as well as Kelman's and Balkin's similar interests—reflects a sensibility heavily influenced by Clifford Geertz's essays written in the mid-1960s and collected in *The Interpretation of Cultures*.⁵⁸ In those essays, Geertz explored the role of ideologies and the relationship between images, as symbols, and ideology. In *Religion As a Cultural System*,⁵⁹ for

⁵⁵ Petchesky, *supra* note 20, at 271. Petchesky notes "the correlation some researchers have observed between increased use of electronic fetal monitoring and ultrasound and the threefold rise in the cesarean section rate in the last fifteen years." Petchesky, *supra* note 20, at 274.

⁵⁶ This is the precession of the simulacra. See Jean Baudrillard, *The Precession of Simulacra*, in *ART AFTER MODERNISM: RETHINKING REPRESENTATION* 253 (Brian Wallis ed., 1984).

⁵⁷ Petchesky, *supra* note 20, at 264. Petchesky argues that the image is a distortion: "[f]etal imagery epitomizes the distortion inherent in all photographic images: their tendency to slice up reality into tiny bits wrenched out of real space and time." Petchesky, *supra* note 20, at 268. Along with Roland Barthes, Petchesky suggests that the appearance of the photographic image as reality "obscures the fact that that image is heavily constructed, or coded." Petchesky, *supra* note 20, at 269.

⁵⁸ CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973).

⁵⁹ Clifford Geertz, *Religion As a Cultural System*, in *THE INTERPRETATION OF CULTURES* 87 (1973).

instance, Geertz offered a definition of religion as a "system of symbols" which "acts to establish powerful, pervasive, and long-lasting moods and motivations in men."⁶⁰ Geertz suggested an interpretation of religious rituals as symbols that reinforce the religion itself. Thus, the spectacular theatrical performance of the masked dance of Rangda (the witch) and Barong (the monster) in the religious culture of Bali is described by Geertz as producing an ethos that reinforces religious belief.⁶¹ It is, for the believing Balinese, "both the formulation of a general religious conception and the authoritative experience which justifies, even compels, its acceptance."⁶² The cultural concept of symbols is a system of "inherited conceptions" that allow men and women to communicate, "and develop their knowledge about and attitudes toward life."⁶³ The symbol transforms, reinforces and shapes religious belief. Similarly, in his essay *Ideology As a Cultural System*,⁶⁴ Geertz advanced a conception of ideology as a symbolic structure whose power draws from the symbols' ability to "formulate, and communicate social realities that elude the tempered language of science."⁶⁵ Ideological symbols, though they may appear overly simplified, are able to give special meaning to social phenomena, motivate action and affect people's lives. In this way, the symbol has a positive feedback on our beliefs—just as, in our context, the image has a transformative effect on legal ideology.⁶⁶

It is within this context that this Article offers one answer to the question, what is the relationship between images of criminal defendants and ideologies of criminal law? In light of the realist antecedents of the problematic, it is fitting to seek guidance from recent discoveries in the experimental sciences.⁶⁷

⁶⁰ *Id.* at 90.

⁶¹ *Id.* at 114-18.

⁶² *Id.* at 118.

⁶³ *Id.* at 89.

⁶⁴ *Id.* at 193.

⁶⁵ *Id.* at 210.

⁶⁶ Geertz's use of the word "ideology," however, differs slightly from my use of the term in this Article. While Geertz used the term to describe the set of ideas held by society, I am using the term more specifically to refer to the set of ideas embodied in the criminal law.

⁶⁷ The role of social sciences in the development of, and articulation of the

B. *A Working Paradigm from Cognitive Psychology*

Two fields of cognitive psychology provide a helpful way to conceptualize the dynamic, feed-back relationship between image and ideology and its centrifugal effect on the adjudicative process. The first field, image theory, is a relatively new, experimental discipline that takes the problem of mental imagery as its main domain.⁶⁸ Mental imagery is the mental representation of nonpresent objects or events.⁶⁹ It is, for instance, the mental image of the criminal defendant that comes to mind when we put down the morning newspaper containing a photograph of the defendant. The process of mentally visualizing the image raises a number of questions about how we store images in memory and how we call up mental images. The discipline of mental imagery has been the source of its own ideological debate⁷⁰ and has generated a number of competing theories that address how the mind processes images.⁷¹ There is now,

tenets of the Legal Realists is well documented. See PURCELL, *supra* note 25, at 15-28 (describing the rapid growth and institutionalization of the social sciences during the early twentieth century) and at 85-88 (describing the role of the social sciences in the Legal Realist movement). Jerome Frank, for instance, exclaimed in *Law and the Modern Mind* that "[o]ur law schools must become, in part, schools of psychology applied to law in all its phases." FRANK, *supra* note 25, at 145-46.

⁶⁸ See Allan Paivio, MENTAL REPRESENTATIONS: A DUAL CODING APPROACH 3 (1986). A concise overview of theories of mental representations can be found in Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 332-42 (1995).

⁶⁹ ROBERT L. SOLSO, COGNITIVE PSYCHOLOGY 242 (2d ed. 1988); see also JOHN R. ANDERSON, COGNITIVE PSYCHOLOGY AND ITS IMPLICATIONS 91 (3d ed. 1990).

⁷⁰ There is no dispute that we form mental images. This is illustrated well in the following example. "Consider . . . this problem: how many windows are there in the house you live in? In all likelihood the way you answer this question is to form a mental image of your home and then mentally count the windows." SOLSO, *supra* note 69, at 242; see also Stephen Michael Kosslyn, *The Medium and the Message in Mental Imagery: A Theory*, 88 PSYCHOL. REV. 46-66, 47 (1981). The controversy arises when we ask how images are stored and represented in the mind.

⁷¹ It is interesting that the scientific debate is "polarized around an old philosophical issue" about the role of imagery in knowledge. Paivio, *supra* note 68, at 3; see *supra* note 24. To simplify the debate somewhat, there are three basic theories about how the mind processes and recalls images. Under one theory, called the radical-imagery hypothesis, images are stored in the mind as images: "visual information is coded in terms of an internal 'picture' that can be reactivated by calling up the picture, as one might in looking at an album." SOLSO, *supra* note 69, at 245. The idea here is not that we store actual pictures in our mind, but

however, "substantial agreement" that visual images are processed differently in the mind from thoughts.⁷² Recent eyewitness identification studies provide evidence in support of this view and, more generally, provide an interesting way to conceptualize the relationship between image and ideology.

One recent study on eyewitness identification⁷³ reveals that accurate facial recognition is associated with rapid, automated operations. Persons making an accurate identification of the perpetrator of a staged crime are "more likely than their inaccurate counterparts to state that their judgments resulted from automatic recognition (e.g. 'His face just "popped out" at me')."⁷⁴ Accurate witnesses are relatively unable to explain how they made their identification, or to describe any explicit

rather a pattern of, say, electrical charges that corresponds to the visual. "[I]mages are not languagelike 'symbolic' representations but bear a nonarbitrary correspondence to the thing being represented . . . [I]mages are a special kind of representation that depicts information and occurs in a spatial medium . . . " Kosslyn, *supra* note 70, at 46. Under a second theory, called the conceptual-propositional hypothesis, images are stored as thoughts: "visual information is filtered and summarized and stored as abstract 'statements' about the image. Reactivation of the memory then would consist of recalling the abstract code, which in turn would conjure up the subjective image associated with it." SOLSO, *supra* note 69, at 245. Under a third theory, called the dual-coding hypothesis, "there are two classes of phenomena handled cognitively by separate subsystems, one specialized for the representation and processing of information concerning nonverbal objects and events [imagery system], the other specialized for dealing with language [verbal system]." Paivio, *supra* note 68, at 53-54; SOLSO, *supra* note 69, at 245. The dual-coding hypothesis was developed during the 1960s by Allan Paivio and represents the starting point for the debate.

The imagery-versus-propositional controversy heated up during the 1970s, leading to mature statements of the radical-imagery and conceptual-propositional hypotheses in the late 1970s and early 1980s. See Kosslyn, *supra* note 70; Zenon W. Pylyshyn, *The Imagery Debate: Analogue Media Versus Tacit Knowledge*, 88 PSYCHOL. REV. 16-45 (1981). Since that time, there has been little progress in resolving the debate. If anything, the dual-coding theory has gained ground, in part because of the prolific nature of its chief proponent. See Paivio, *supra* note 68; ALLAN PAIVIO, *IMAGES IN MIND: THE EVOLUTION OF A THEORY* (1991). Thus, it is fair to say today that "[w]hile researchers still debate the nature of the representation of [visual and verbal codes], there is now substantial agreement that some components of visual memories cannot be put into words." Jonathon W. Schooler & Tonya Y. Engstler-Schooler, *Verbal Overshadowing of Visual Memories: Some Things Are Better Left Unsaid*, 22 COGNITIVE PSYCHOL. 36-71, 37 (1990).

⁷² Schooler & Engstler-Schooler, *supra* note 71, at 37.

⁷³ David Dunning & Lisa Berth Stern, *Distinguishing Accurate From Inaccurate Eyewitness Identifications Via Inquiries about Decision Processes*, 67 J. PERSONALITY & SOC. PSYCHOL. 818, 819 (1994).

⁷⁴ *Id.* at 818.

cognitive strategy that led them to the identification.⁷⁵ In contrast, inaccurate witnesses more often use a deliberative process of elimination and take longer to identify.⁷⁶ More often, they "report that they pursued explicit, deliberative procedures when reaching their judgments, usually expressed in the form of a process of elimination (e.g., 'I compared the photos to each other to narrow the choices')."⁷⁷ Thus, the study concludes that "[a]ccurate eyewitness identifications can be distinguished from erroneous ones in part by asking witnesses to describe the decision processes that led to their judgments."⁷⁸ What this study suggests is that mental images, such as images of faces, are processed and stored separately than thoughts about those images. "Faces are stored in memory in a visual pattern, not in words."⁷⁹

Other recent experimental studies on eyewitness identification⁸⁰ reveal that verbal thoughts and visual images can interfere with each other. One study refers to this as "verbal overshadowing" of visual memories. In essence, the study reports that when people are asked to provide verbal descriptions of faces, it degrades their ability to recognize the faces accurately, "demonstrat[ing] that verbalizing memory for the appearance of a face can actually impair subsequent recognition."⁸¹ A review of several eyewitness studies similarly concludes that visual recollections can be changed by subsequent, verbal, misleading messages or questions.⁸² In one study it was found that misleading questions about the existence of an object that the subjects did not see "increased by a factor of six the likelihood that the subject would later report having seen the nonexistent [object]."⁸³

⁷⁵ *Id.* at 830.

⁷⁶ *Id.* at 831.

⁷⁷ *Id.* at 819.

⁷⁸ *Id.* at 818.

⁷⁹ Daniel Goleman, *Studies Point to Flaws in Lineups of Suspects*, N.Y. TIMES, Jan. 17, 1995, at C7 (quoting Dr. David Dunning); see also *id.* ("Images like a face are stored in memory differently than are thoughts about that face").

⁸⁰ Schooler & Engstler-Schooler, *supra* note 71; David F. Hall, et al., *Postevent Information and Changes in Recollection for a Natural Event*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 124 (Gary L. Wells & Elizabeth F. Loftus eds., 1984).

⁸¹ Schooler & Engstler-Schooler, *supra* note 71, at 61.

⁸² D. F. Hall, et al., *supra* note 80, at 129.

⁸³ D. F. Hall, et al., *supra* note 80, at 126.

The second field of cognitive psychology, the study of heuristics,⁸⁴ focuses on how we form beliefs concerning the likelihood of uncertain events, such as the guilt of a criminal defendant.⁸⁵ Amos Tversky and Daniel Kahneman have conducted a number of studies which reveal that people rely on a limited number of heuristic principles. One such principle is called the "representativeness heuristic": our belief about the outcome of any particular case will depend upon the resemblance of that case to a class of other cases. Studies suggest, for instance, that we form opinions about a person by the degree to which that person is representative of a stereotype of a class of people.⁸⁶ Tversky and Kahneman provide the following illustration:

consider an individual who has been described by a former neighbor as follows: "Steve is very shy and withdrawn, invariably helpful, but with little interest in people, or in the world of reality. A meek and tidy soul, he has a need for order and structure, and a passion for detail." How do people assess the probability that Steve is engaged in a particular occupation from a list of possibilities (for example, farmer, salesman, airline pilot, librarian, or physician)? . . . In the representativeness heuristic, the probability that Steve is a librarian, for example, is assessed by the degree to which he is representative of, or similar to, the stereotype of a librarian.⁸⁷

Another heuristic device is called "the availability heuristic": we form opinions about the probability of an uncertain event "by the ease with which instances or occurrences can be brought to mind."⁸⁸ Thus, for instance, we may form an opinion about the guilt of a defendant based on our familiarity

⁸⁴ A heuristic is defined as:

a strategy, usually a simplifying strategy, which provides aid and guidance in solving a problem. A heuristic is the opposite of an algorithm. In deciding what move to make in a chess game, one could systematically consider and evaluate every possible move. This would be an algorithmic strategy. Or one could evaluate only the positions of pieces in the center of the board and the most important pieces. That would be a heuristic strategy.

Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC'Y. REV. 123, 131 n.11 (1980-81).

⁸⁵ See Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3 (Daniel Kahneman et al. eds., 1982).

⁸⁶ *Id.* at 4.

⁸⁷ *Id.* at 4.

⁸⁸ *Id.* at 11.

with, say, the escalation of domestic violence; or we "may assess the risk of heart attack among middle-aged people by recalling such occurrences among one's acquaintances."⁸⁹

These heuristic principles are generally useful, but can be very misleading at times. They may cause serious errors because they fail to take into account probability theory and other more reliable scientific accounts. The intuitive, common-sense judgments made with these heuristic principles often depart markedly from actual probabilities.⁹⁰ In the case of Steve, for instance, the fact that there are many more farmers than librarians should be factored into the analysis, even though it does not affect the similarity of Steve to the stereotype of a librarian.⁹¹ In simple terms, then, the inferences that we draw in our daily experiences may be based on stereotypes, biases and familiarities that can easily lead us astray.

Taken together, these two fields of cognitive psychology provide a useful model for understanding the dynamic relationship between image and ideology. The record in a criminal case contains descriptions and facts about the criminal defendant. These word descriptions trigger, in the mind of the reader, a mental image of the defendant. The mental image that we associate with the written description may not necessarily be related one-to-one to the word description, but instead may relate to other experiences that the reader may have had previously. It may resemble someone that the reader knows or saw on television, in the newspaper, or on the street. For instance, the trial record may describe "a young, widowed woman with two loving children" and this description may trigger, in the mind of the reader, an image of the reader's sister, neighbor or of a television character. The record may describe a "black male" and this may trigger a mental image of the reader's brother, colleague, or of that recurrent police composite sketch of a young black man in a wool cap.⁹² In this sense,

⁸⁹ *Id.* at 11.

⁹⁰ See Saks & Kidd, *supra* note 84, at 127.

⁹¹ Tversky & Kahneman, *supra* note 85, at 4.

⁹² For instance, Susan Smith, who killed her children but blamed the crime on an imaginary carjacker, described her "assailant" as "a black man, 20 to 30 years old, of medium build, 5 feet 9 inches to 6 feet tall, and wearing jeans, a plaid jacket or shirt and a dark blue knit ski cap." The newspaper account of the event further reported:

the mental image may be part stereotype.

The resulting mental image of the defendant becomes the available data that the reader, as decisionmaker, uses in the process of resolving the case. This mental image displaces or overshadows the trial record—even though it may ignore some word descriptions and embellish others through the process of mental imagery. The mental image provides a facile heuristic device from which the decisionmaker infers certain conclusions about the defendant. In this way, the mental image can feed back and distort thoughts about the defendant. If, for instance, the reader's mental image of the "young widowed woman with two loving children" resembles the reader's neighbor, then additional facts or traits concerning that neighbor may be mapped onto the decisionmaking process. Similarly, if the reader's mental image of the "black male" resembles the threatening composite police sketch, extraneous facts and emotions may be injected into the thinking process.

Just like, in Tversky and Kahneman's example, the mental image of a librarian may distort our thoughts about what occupation Steve is engaged in, the mental images of the criminal defendant may distort the process of resolving a criminal dispute. Ultimately, mental images can create distance in the adjudicative process because the parties to the dispute may have entirely different mental images of the defendant. The competing mental images may displace or overshadow the record. Hidden from the decisionmaking process, the competing mental images are not subject to full rational debate and scrutiny. In this way, image and ideology relate in a dynamic manner that exerts centrifugal force in the adjudicative process.

These two fields of cognitive psychology provide insightful parallels to the adjudicative process in the criminal law. Just as thoughts about a face can distort the mental image in image

The man's race is important, investigators and residents said. It is a reality of life here that a black man with two wailing white children would draw attention to himself, said residents, both white and black.

The incident has put to a test the uneasy racial peace that exists in this town and others like it. Two young white children are believed to have been abducted by a black man, and a vague generic drawing is taped to the window of every store.

Rick Bragg, *Sense of Dread Now Pervades Frantic Search*, N.Y. TIMES, Oct. 31, 1994, available in LEXIS, News Library, NYT file.

theory, ideology can shape and distort mental images in the adjudicative process. Similarly, just as mental images can distort thought in heuristic theory, mental images can shape and distort ideology in the judicial decisionmaking process. As these parallels suggest, the study of criminal law adjudication may benefit from critical insights from the experimental sciences.⁹³

II. IMAGES OF THE ACCUSED IN THE OPINIONS OF THE ANTEBELLUM PERIOD, THE WARREN ERA AND THE REHNQUIST COURT

In order to demonstrate the dynamic relationship between imagery and ideology, and its effect on the adjudicative process, it is necessary first to isolate the images of criminal defendants. In this part, this Article examines the different images of the accused projected during three periods in American legal history.

A. *Images from the Southern Antebellum Period*

The opinions of the southern antebellum period project a wide range of images of slave defendants, from the obedient and faithful servant to the rebellious and treasonous slave. What the opinions have in common, however, is the chameleon-like nature of the slave: slaves who appear obedient can reveal themselves to be rebellious; slaves who have committed a crime—even a crime against a white person—can reveal

⁹³ Very promising work in this vein is currently being done by Dan Simon. Simon is exploring a psychological perspective on judicial decisionmaking, emphasizing what he calls the "bi-directionality" of judicial reasoning and relying on cognitive consistency theories. See Dan Simon, S.J.D. (dissertation in progress, Harvard Law School); see also Blasi, *supra* note 68 at, 317. Blasi writes:

I suggest in this essay that as a consequence of developments over the past decade in cognitive science, legal scholars now have the means to consider empirically and systematically a fuller range of lawyering knowledge and practice, including topics until now considered either simply unknowable or suitable only for speculation and bare assertion: judgment, wisdom, expertise, and the relation of theory to lawyering practice.

themselves to be faithful. The shifting nature of the slave defendant is the consistent and distinct image of the antebellum period.

The range of slave images is, in part, the product of two fundamental tensions in the law of slavery. The first is a tension between the slave as property and the slave as person. This tension traces its roots far back. It is reflected well in the *Federalist Papers* where James Madison wrote that "[t]he Federal Constitution . . . decides with great propriety on the case of our slaves, when it views them in the mixt character of persons and of property."⁹⁴ Much has been written about this tension in the law of slavery.⁹⁵ A consensus has emerged that it was essentially resolved in the criminal law and that slaves were perceived as persons for purposes of the penal codes.⁹⁶ Many of the Southern appellate courts gave just that impression. The Alabama Supreme Court, for instance, held that "[a] slave is a person, in the eye of the criminal law . . ."⁹⁷ The South Carolina Supreme Court stated that "Negroes . . . have wills of their own—capacities to commit crimes; and are responsible for offenses against society."⁹⁸ Even Chief Justice Taney, writing as circuit judge in Virginia, ruled that a slave was a "person" for purposes of the criminal laws of the United

⁹⁴ James Madison, *The Federalist No. 54*, in *THE FEDERALIST* 366, 368 (J. Cooke ed., 1961); see also *id.* at 367 ("we must deny the fact that slaves are considered merely as property, and in no respect whatever as persons. The true state of the case is, that they partake of both these qualities; being considered by our laws, in some respects, as persons, and in other respects, as property").

⁹⁵ See, e.g., A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only As An Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 971 (1992); Fisher, *supra* note 22, at 1054-55; Ariela Gross, "Pandora's Box": *Slave Character on Trial in the Antebellum South*, at 1 (unpublished manuscript, on file with author) (citing THOMAS R. R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA* 83 (New York: Negro Universities Press, 1968; reprint of 1858 ed.)); Terrence F. Kiely, *The Hollow Words: An Experiment in Legal Historical Method as Applied to the Institution of Slavery*, 25 DEPAUL L. REV. 842 (1976); Wilbert E. Moore, *Slave Law and the Social Structure*, 26 J. NEGRO HIST. 171, 191-202 (1941).

⁹⁶ "[T]he 'double character of person and property' . . . generally meant that slaves were persons when accused of a crime, and property the rest of the time." Gross, *supra* note 95, at 1.

⁹⁷ *Mose*, a slave v. The State, 36 Ala. 211, 225 (1860). In *Mose*, the Attorney General similarly argued that "[w]hen a slave is charged with a crime, he loses the character of a chattel, and is viewed as a person." *Id.* at 224.

⁹⁸ *State v. Simmons*, 3 S.C.L. 5, (1 Brev.) 6, 8 (S.C. 1794).

States, even though he is "the property of the master" and "not a citizen."⁹⁹

This apparent resolution is an oversimplification, however. Particularly with regard to images of slave defendants, there still remained a significant tension in the criminal law between the slave as inanimate object and as human being. The case of *Flora, a slave v. The State*,¹⁰⁰ for instance, reflects vividly the image of the defendant as property. Flora was accused of murdering her master, Willis Sanford. There is, however, no description of what happened or why she allegedly killed him. The opinion in the case never humanizes Flora, and does not discuss the facts in human terms. Flora is identified merely as "the property of Allen and Richard Sanford, administrators of the estate of Willis Sanford."¹⁰¹

The reason is that *Flora* is a case about the institution of chattel slavery. The criminal justice system in Alabama was intimately interwoven with the institution of slavery and performed a market function. Under Alabama law, whenever a slave was found guilty of a capital offense and sentenced to death, the same jury had to assess the value of the slave and determine what portion the master should receive—which could, in no case, exceed one-half of the value of the slave.¹⁰² If it was determined that the master shared blame for the slave's conduct, then his portion of the slave's value would be proportionally reduced.¹⁰³ Upon execution, the owner of the slave was entitled to receive payment from the state treasury for the assessed value. All the owner had to do was produce a transcript of the trial record and a sheriff's certificate that the slave had been executed.¹⁰⁴ The comptroller of public accounts was bound by the documents and had no power to inquire who the owner was.¹⁰⁵ Accordingly, ownership had to appear on the face of the indictment and be proven at tri-

⁹⁹ *United States v. Amy*, 24 F. Cas. 792, 809-10 (C.C.D. Va. 1859) (No. 14,445).

¹⁰⁰ 4 Port. 111 (Ala. 1836).

¹⁰¹ *Id.* at 111.

¹⁰² Act of 1824, §§ 1, 6, in J. AIKIN, A DIGEST OF THE LAWS OF THE STATE OF ALABAMA CONTAINING ALL STATUTES OF A PUBLIC AND GENERAL NATURE, IN FORCE AT THE CLOSE OF THE SESSION OF THE GENERAL ASSEMBLY, IN JANUARY 1833 (2d ed. 1836), *Criminal Law* §§ 60, 64, at 124 (hereinafter "AIKIN'S DIGEST").

¹⁰³ AIKIN'S DIGEST, *supra* note 102, *Criminal Law* §§ 60, 64, at 124.

¹⁰⁴ *Flora*, 4 Port. at 112-13.

¹⁰⁵ *Id.* at 113.

al—otherwise, someone else could later claim an interest in the slave from the treasurer.¹⁰⁶

At Flora's trial, no evidence was presented as to who her owner was.¹⁰⁷ The Supreme Court of Alabama reversed her conviction and sentence of death, ruling that there was a fatal variance between the proof at trial and the indictment. The court explained:

If the name of the owner had been omitted in the indictment, the record would afford no evidence of the right of any person to receive a part of the value of the slave . . . As [that] right . . . must appear from the record, the fact of ownership on which the personal right depends, as well as the fact of guilt, upon which the demand of public justice is made, ought to be put in issue by the indictment, and found by the jury.¹⁰⁸

Of course, what is missing entirely from this discussion is the person, Flora. She figures in the caption, but we see her nowhere in the opinion. This is the image of the slave as property.¹⁰⁹

Where slaves are portrayed as persons, a second fundamental tension riveted the law of slavery—a tension between the slave that was not morally culpable (the vulnerable servant) and the morally indifferent slave (the cold-blooded murderer). "An accepted premise of the times which we are studying was that Negroes generally had a comparatively low standard of morals."¹¹⁰ Moral deprivation, however, can cut two ways. On the one hand, if the slave is by nature morally infe-

¹⁰⁶ *Id.* at 114 ("As the owner may acquire rights from the trial of such an indictment, his name, if it be known, must be stated in it, and proved on the trial. The same principle applies, we think, to an indictment of a slave for a capital offence.").

¹⁰⁷ No evidence was presented "that administration upon the estate of Willis Sanford had ever been granted to [Allen and Richard Sanford]." *Id.* at 112.

¹⁰⁸ *Id.* at 113-14.

¹⁰⁹ Numerous other opinions portray this same image of the slave as property. The slave in *Ned, a slave v. The State*, 7 Port. 187, 188 (Ala. 1838), for example, is described merely as "the property" of his master. "[H]is value was assessed at eight hundred dollars." *Id.* at 189. Ned does not receive the protection of the declaration of rights. *Id.* at 214. He is neither fully person, nor fully non-person: Ned is property. The same is true of the slave in *The State v. Marshall, a slave*, 8 Ala. 302 (1845). Marshall's identity as property is magnified in that particular opinion by his own act of requesting his master "to purchase him." *Id.* at 309 (Collier, C. J., concurring).

¹¹⁰ JAMES BENSON SELLERS, *SLAVERY IN ALABAMA* 242 (1950).

rior, then her culpability for criminal activity is diminished. The slave's weak moral fiber renders her less responsible for breaking the law. On the other hand, the lack of moral conscience can also project an image of a cold-blooded criminal. Lack of remorse renders the criminal act more heinous, and the perpetrator more threatening. This tension resulted in a spectrum of images of the slave defendant, ranging from, at one extreme, the slave defendant as obedient and faithful yet ignorant servant to, at the other extreme, the slave defendant as savage and highly threatening.

At the two extremes are what Terry Fisher describes as "Sambo" and "Nat"—the two competing images of the slave that vied for prominence in the literature and folklore of the antebellum period. "The first was the childlike and undependable but loyal and unthreatening Sambo. 'Indolent, faithful, humorous, . . . dishonest, superstitious, improvident, and musical, Sambo was inevitably a clown and congenitally docile.'"¹¹¹ The second image was the "fierce, rapacious, cunning, rebellious, and vindictive" slave—Nat.¹¹² "Sambo, in short, was the

¹¹¹ Fisher, *supra* note 22, at 1057-58 (1993) (quoting JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* 225 (rev. ed. 1979)); see also ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH* 96 (1982) ("[t]he key to Sambo . . . is the total absence of any hint of 'manhood,' which in turn is a perfect description of the dishonored condition"). The persistence of these images is documented by Richard Delgado and Jean Stefancic in their article *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, *supra* note 18. Reviewing racial depictions over the past two centuries, Delgado and Stefancic observe the "shocking parade of Sambos, mammies, coons, uncles—bestial or happy-go-lucky, watermelon-eating—African Americans." Delgado & Stefancic, *supra* note 18, at 1259. Delgado and Stefancic similarly discern both the Sambo and the Nat images, noting that the images depict on the one hand blacks "so incompetent, shuffling, and dim-witted that it is hard to see how they survived to adulthood" and on the other hand "primitive, terrifying, larger-than-life black men in threatening garb and postures, often with apparent designs on white women." Delgado & Stefancic, *supra* note 18, at 1260. According to Delgado and Stefancic, "[t]he first appearance of Sambo, a 'comic Negro' stereotype, occurred in 1781 in a play called *The Divorce*. This black male character, portrayed by a white in blackface, danced, sang, spoke nonsense, and acted the buffoon." Delgado & Stefancic, *supra* note 18, at 1262.

¹¹² Fisher, *supra* note 22, at 1058. The rebellious slave is presumably named after Nat Turner, the leader of a slave rebellion executed in 1831. See HERBERT APTHEKER, *NAT TURNER'S SLAVE REBELLION* (1966). Curiously, Delgado and Stefancic date the emergence of the "brutish and bestial" image to the Reconstruction period. Delgado & Stefancic, *supra* note 18, at 1264. As Fisher and the cases *infra* demonstrate, however, the image of the slave as traitor was projected during the nineteenth century pre-Civil War period as well.

central figure in white Southerners' fantasies of safety; Nat was the central figure in their fantasies of rebellion."¹¹³

The faithful and obedient slave surfaces recurrently in the criminal laws and opinions of antebellum Alabama. It is the obedient slave that the legislature had in mind when it enacted laws for the manumission of slaves. Under Alabama law, a master could emancipate a slave "in consideration of long, faithful and meritorious services performed."¹¹⁴ This image of the obedient slave is illustrated well in the case of *State v. M'Donald*.¹¹⁵ M'Donald, a free man, was charged with encouraging a slave rebellion by trying to persuade Moses, a slave, to rise against his master and plot an escape to Texas. Moses, however, informed his master of the plot early on and, by drawing the traitor to a designated spot within earshot of his master, assumed the role of confidential informant. The reporter of decisions recounts that, at the trial, the master described Moses as "faithful and obedient," and "the instrument of his master."¹¹⁶ The judge emphasized in his opinion that "[t]he master of Moses stated that he was faithful and obedient; and that he gave him the earliest information of the advances of the prisoner;"¹¹⁷ and concluded that "Moses never participated in any criminal design of the prisoner."¹¹⁸

The image of the obedient slave is also illustrated in *The State v. Abram, a slave*.¹¹⁹ Abram was convicted and sentenced to death for biting off a small portion of the ear of his white overseer during a struggle. In an astonishing opinion, the court ruled that Abram's mutilation was not willfully committed, and therefore did not constitute the capital offense of mayhem, because he was engaged in mortal strife. Prominent in the reporter's statement of fact was the fact that "Abram sustained a good character, as an obedient servant."¹²⁰ As a

¹¹³ Fisher, *supra* note 22, at 1059.

¹¹⁴ AIKIN'S DIGEST, *supra* note 102, at 647 (Supp. 1834); *see also* ACT OF 1834 § 1, in CLAY'S DIGEST, *supra* note 6, *Slaves and Free Persons of Color* § 37, at 545 (emancipation "in consideration of long, faithful and meritorious services performed").

¹¹⁵ 4 Port. 449 (Ala. 1837).

¹¹⁶ *Id.* at 453.

¹¹⁷ *Id.* at 461.

¹¹⁸ *Id.*

¹¹⁹ 10 Ala. 928 (1847).

¹²⁰ *Id.* at 929.

result, Abram, the obedient servant, was not placed on the scaffold:

Slave though he be, and as such bound to obedience, and forbidden to resist those having lawful authority over him, he is nevertheless a human being, and when engaged in mortal strife, his adversary armed with a deadly weapon, and he defenceless, the law, in compassion to the infirmity of our nature, and to the instinctive dread of death, common alike to the bond and the free, would attribute such a mutilation of the person of a white man to the instinct of self defence, in which the will did not co-operate . . . To hold otherwise, would indeed be to reduce the slave, to a level with the brute creation.¹²¹

Another aspect of the obedient slave image is ignorance. Slave defendants are repeatedly referred to as "ignorant."¹²² A good illustration of the image of ignorance can be seen in the case of *Bob, a slave v. The State*.¹²³ Bob was a slave accused of assault with intent to kill a white person. Throughout the opinion, Bob is repeatedly referred to as "an ignorant negro" and "an ignorant slave."¹²⁴ The opinion evinces a clear image of a pitiful slave at the mercy of the court:

An ignorant slave, knowing nothing of judicial proceedings, perhaps not even understanding the nature of the duties discharged by the different persons engaged in his trial, and confused by the unaccustomed presence into which he was brought, and by the scenes transpiring around him, might witness an offer of testimony against him, and hear an argument upon its admissibility, without knowing that the testimony was really offered to procure his conviction.¹²⁵

This image of the ignorant, but docile slave contrasts sharply with the picture of the cold-blooded, evil slave at the other end of the spectrum. This is the image of the run-away,

¹²¹ *Id.* at 932.

¹²² See, e.g., *Bob, a slave v. The State*, 32 Ala. 560, 567 (1858); *Seaborn and Jim v. The State*, 20 Ala. 15, 17 (1852) ("[t]he facts that [the defendants] were slaves, and ignorant . . ."). And, the law was designed to keep slaves uneducated. In Alabama, for instance, the education of slaves was made a criminal offense. See ACT OF 1832 § 10, in AIKIN'S DIGEST, *supra* note 102, at *Slaves and Free Persons of Color* § 31, at 397 ("any person or persons who shall attempt to teach any free person of color, or slave, to spell, read, or write, shall, upon conviction thereof by indictment, be fined in a sum not less than two hundred and fifty dollars, nor more than five hundred dollars").

¹²³ 32 Ala. 560 (1858).

¹²⁴ *Id.* at 567.

¹²⁵ *Id.* at 567-68.

the rebellious slave who instigates slave insurrection. "[M]any times slaves run away and lie out, hid, and lurking in swamps, woods, and other obscure places, killing hogs, and committing other injuries to the inhabitants of this state."¹²⁵ These are the slaves that are "the brute creation,"¹²⁷ and not human beings.

The case of *Godfrey, a slave v. The State*¹²⁸ projects this image of a conniving, manipulative slave. Godfrey, a slave only ten or eleven years of age, was accused of killing a four-year-old child with a hatchet. The testimony at trial offered conflicting images of the young slave. Some described him as "a smart, intelligent boy; 'heap smarter than boys of twelve years generally are.'"¹²⁹ Others said, "he did not seem to be very smart . . ."¹³⁰ What sealed Godfrey's fate, however, was that he tried to pin the blame on "an Indian"—and, in this sense, was conniving. Justice Walker's opinion for the court is subtle. He does not explicitly state that Godfrey is deceitful. Yet, he accedes to this image by juxtaposing Godfrey's case to those of evil children:

A girl, thirteen years of age, was executed for killing her mistress . . . A boy of eight years of age, who had malice, revenge, and cunning, was hanged for firing two barns. A boy of ten years old, who showed a mischievous discretion, was convicted of murdering his bed-fellow. . . . In [another] case . . . , a negro slave, of less than twelve years, was convicted of murder; and the report of the case informs us, that the defendant was executed.¹³¹

Godfrey, the young slave, revealed himself to be like these other children—"cunning," "mischievous," and deceitful. Ultimately, his image drips with the blood of his victim, "bloody, on his shoulder, and on the back of his legs and feet."¹³² This is the image of the cold-blooded traitor. His moral deprivation is an aggravating circumstance, not a mitigating factor.

¹²⁵ Act of 1805 § 13 in CLAY'S DIGEST, *supra* note 6, *Slaves, and Free Persons of Color* § 15, at 541.

¹²⁷ *The State v. Abram, a slave*, 10 Ala. 928, 932 (1847).

¹²⁸ 31 Ala. 323 (1858).

¹²⁹ *Id.* at 325.

¹³⁰ *Id.* at 326.

¹³¹ *Id.* at 328-29.

¹³² *Id.* at 324.

B. Imagery in the Warren Court Opinions

The decisions of the Warren Court, in contrast, project a consistent image of the defendant as an impressionable and vulnerable young adult, poor and uneducated, in need of protection from an overbearing police force. Special emphasis is almost always placed on the traits that render the defendant disadvantaged: poverty, race, lack of education, youth or mental deficiency. "Elmer Davis is an impoverished Negro with a third or fourth grade education. . . . Police first came in contact with Davis while he was a child when his mother murdered his father."¹³³ Danny Escobedo is "a 22-year-old of Mexican extraction with no record of previous experience with the police."¹³⁴ Amos Reece is "a semi-illiterate Negro of low mentality."¹³⁵ Beatrice Lynumn is a single mother of two children on ADC, threatened with the removal of her children if she does not cooperate.¹³⁶ These are the defendants of the Warren Court. The consistency and unitariness of the image is remarkable.

The recurring theme is vulnerability. Chief Justice Warren, writing for the Court in *Fikes v. Alabama*,¹³⁷ describes the defendant as "a Negro, 27 years old in 1953, who started school at age eight and left at 16 while still in the third grade . . . His mother testified that he had always been 'thick-headed.'"¹³⁸ There was evidence he was "highly suggestible."¹³⁹ Warren portrays him as "weaker," "more susceptible,"¹⁴⁰ "weak of will or mind."¹⁴¹ In *Spano v. New York*,¹⁴²

¹³³ *Davis v. North Carolina*, 384 U.S. 737, 742 (1966) (reversing conviction and sentence of death because of improper admission of coerced confession obtained during 16-day detention and interrogation).

¹³⁴ *Escobedo v. Illinois*, 378 U.S. 478, 482 (1964) (reversing conviction where defendant was denied opportunity to consult with counsel).

¹³⁵ *Reece v. Georgia*, 350 U.S. 85, 89 (1955) (reversing conviction where no African-American had served on the grand jury in Cobb County, Georgia, for the previous 18 years).

¹³⁶ *Lynumn v. Illinois*, 372 U.S. 528 (1963) (reversing conviction for unlawful possession and sale of marijuana because of involuntary confession).

¹³⁷ 352 U.S. 191 (1957) (holding that confession obtained after five days in isolation and extensive interrogation was involuntary).

¹³⁸ *Id.* at 193.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 197.

¹⁴¹ *Id.* at 198.

Warren describes the defendant as "a foreign-born young man of 25 with no past history of law violation . . . He had progressed only one-half year into high school and . . . had a history of emotional instability."¹⁴³ The defendant in *Payne v. Arkansas*¹⁴⁴ is described as "a 19-year-old Negro with a fifth-grade education."¹⁴⁵ Emil Reck, the defendant in *Reck v. Pate*¹⁴⁶ is described as "a nineteen-year-old youth of subnormal intelligence,"¹⁴⁷ "young and ignorant".¹⁴⁸

Emil Reck at the age of twelve was classified as a "high grade mental defective" and placed in an institution for mental defectives. He dropped out of school when he was sixteen. Though he was retarded he had no criminal record, no record of delinquency. At the time of his arrest, confession, and conviction he was nineteen years old.¹⁴⁹

The opinions also consistently emphasize youth and, more importantly, treat youth as a mitigating circumstance. Youth commands leniency and understanding. This is illustrated well in Justice Douglas' opinion in *Gallegos v. Colorado*.¹⁵⁰ The defendant there, Robert Gallegos, was only fourteen-years old at the time of the commission of his offense. He was implicated in a gruesome crime—one that many would regard as an adult offense.¹⁵¹ Yet, Robert is portrayed as a mere child. Justice

¹⁴² *Spano v. New York*, 360 U.S. 315 (1959) (reversing conviction due to involuntary confession obtained after eight hours of continuous questioning while being repeatedly denied the assistance of counsel).

¹⁴³ *Id.* at 321-22.

¹⁴⁴ 356 U.S. 560 (1958) (holding confession involuntary where it was obtained under threat of lynching after defendant was held incommunicado for three days, with very little food).

¹⁴⁵ *Id.* at 562.

¹⁴⁶ 367 U.S. 433 (1961).

¹⁴⁷ *Id.* at 441 (holding confession involuntary where defendant was held virtually incommunicado for nearly four days, was deprived of food, was sick and faint and subjected to relentless interrogation).

¹⁴⁸ *Id.* at 443.

¹⁴⁹ *Id.* at 444-45 (Douglas, J., concurring).

¹⁵⁰ 370 U.S. 49 (1962) (holding confession involuntary where 14-year-old boy was held for five days without seeing a lawyer, parent or other friendly adult); *see, also*, *Swain v. Alabama*, 380 U.S. 202, 231 (1965) (Goldberg, J., dissenting) (defendant was "a 19-year-old Negro"); *Washington v. Texas*, 388 U.S. 14, 15 (1967) (defendant described as "an 18-year-old youth"); *Townsend v. Sain*, 372 U.S. 293, 297 (1963) ("Townsend was 19 years old at the time, a confirmed heroin addict and a user of narcotics since age 15").

¹⁵¹ According to the state, Robert Gallegos and his cousin followed an elderly, 80-year-old man to a hotel, gained access to his room by ruse, and beat him about the head and face with a shoe brush. They held a knife to his throat and took his

Douglas describes him alternately as "a child of 14,"¹⁵² "only 14 years old,"¹⁵³ and as "a 14-year-old boy."¹⁵⁴ Justice Douglas quotes at length from a 1948 opinion involving a fifteen-year-old defendant,¹⁵⁵ in which the defendant is called alternately a "15-year-old lad," a "15-year-old-boy," and "a lad in his early teens."¹⁵⁶ According to Douglas, "when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race."¹⁵⁷ Douglas emphasizes that "a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police."¹⁵⁸

Poverty and race also feature prominently in the portraits of criminal defendants. Warren characterizes the poor defendant as "the person most often subjected to interrogation."¹⁵⁹ Poor defendants are the most vulnerable: "the vast majority of confession cases with which we have dealt in the past involve those unable to retain counsel."¹⁶⁰ The focus on indigence—what some members of the Court called the "new fetish for indigency"¹⁶¹—symbolized vulnerability. In most decisions, race also plays a leading role. The defendant in *Payne v. Arkansas* is repeatedly defined as a "19 year-old Negro;"¹⁶² the defendant in *Escobedo v. Illinois* is described as "a 22-year-old of Mexican extraction;"¹⁶³ and the defendants in *Miranda v.*

billfold, containing only 13 dollars. The elderly victim died several days later.

¹⁵² *Gallegos*, 370 U.S. at 49.

¹⁵³ *Id.* at 53.

¹⁵⁴ *Id.* at 54.

¹⁵⁵ *Id.* at 53 (quoting *Haley v. Ohio*, 332 U.S. 596 (1948) (reversing conviction of 15-year-old defendant on the ground of an involuntary confession)).

¹⁵⁶ *Id.*

¹⁵⁷ *Gallegos*, 370 U.S. at 53 (quoting *Haley*, 332 U.S. at 599-600).

¹⁵⁸ *Id.* at 54.

¹⁵⁹ *Miranda v. Arizona*, 384 U.S., 436, 473 (1966). See *id.* at 472 n.40 ("Estimates of 50-90% indigency among felony defendants have been reported."). During oral argument in *Gideon v. Wainwright*, 372 U.S. 335 (1963), Chief Justice Warren asked the state's attorney: "I suppose out of those fifty-two hundred prisoners now in your jails who were not represented by counsel, that a vast majority of them are not only poor but are illiterate. Would that be a fair observation?" MAY IT PLEASE THE COURT 191 (Peter Irons & Stephanie Guitton eds., 1993).

¹⁶⁰ *Miranda*, 384 U.S. at 472.

¹⁶¹ *Douglas v. California*, 372 U.S. 353, 359 (1963) (Clark, J., dissenting).

¹⁶² *Payne v. Arkansas*, 356 U.S. 560, 561-62 (1958).

¹⁶³ *Escobedo v. Illinois*, 378 U.S. 478, 482 (1958).

Arizona are described as an "indigent Mexican defendant"¹⁶⁴ and "an indigent Los Angeles Negro."¹⁶⁵

Criminal defendants are also portrayed as impressionable. Douglas, concurring in *Mapp v. Ohio*, introduces the defendant like a character in a novel: "She lived alone with her fifteen-year-old daughter in the second-floor flat of a duplex in Cleveland."¹⁶⁶ Douglas explains how the police officers broke into her home and, in response to her request to see a search warrant, waved a paper in front of her face. "She grabbed it and thrust it down the front of her dress."¹⁶⁷ She was handcuffed, manhandled, and "forced to sit on the bed."¹⁶⁸ As the officers "ransacked" through her apartment, she was "a prisoner in her own bedroom."¹⁶⁹ The literary style of the opinion—mixed with subtle sexual connotations—creates a picture of a vulnerable woman rendered defenseless by brutal police officers.

Remarkably, these images of the defendant in the Warren era remain constant across a spectrum of variables—in landmark decisions¹⁷⁰ as well as in the more remote per curiam opinions,¹⁷¹ and across the spectrum of legal issues.¹⁷² What

¹⁶⁴ *Miranda v. Arizona*, 384 U.S. 436, 457 (1966).

¹⁶⁵ *Id.* The fact that the Warren Court used race to portray the defendant as vulnerable is paternalistic toward the individual defendant and toward black people in general. It contrasts sharply with the Rehnquist Court's use of race to portray the defendant as threatening. See *infra* notes 213-228 and accompanying text. By focusing on the racial imagery of the criminal defendant, I am not suggesting that either court was "enlightened" about racism in the criminal justice system. The use of racial imagery by both courts only aggravated racial bias in the criminal justice system. See Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1798 (1993) (proposing a racial imagery shield law on the model of rape shield laws).

¹⁶⁶ *Mapp v. Ohio*, 367 U.S. 643, 667 (1961) (Douglas, J., concurring).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 668.

¹⁶⁹ *Id.*

¹⁷⁰ See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 457 (1966) (an "indigent Mexican defendant" and "an indigent Los Angeles Negro who had dropped out of school in the sixth grade"); *Escobedo v. Illinois*, 378 U.S. 478, 482 (1958) ("a 22-year-old of Mexican extraction with no record of previous experience with the police").

¹⁷¹ See, e.g., *Sims v. Georgia*, 389 U.S. 404, 407 (1967) (per curiam) (defendant is "an illiterate, with only a third grade education, whose mental capacity is decidedly limited") (holding confession involuntary where illiterate defendant was held incommunicado for eight hours, not fed and possibly subjected to physical abuse; also sustaining challenge to grand and petit jury pools for underrepresentation of blacks).

¹⁷² See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 441 (1966) (right against self-incrimination); *Swain v. Alabama*, 380 U.S. 202, 231 (1965) (Goldberg, J., dissenting)

is equally remarkable is that these cases involve gruesome crimes. The crime in *Davis* was an "atrocious" case of rape-murder,¹⁷³ involving a rape in a cemetery by an escaped convict.¹⁷⁴ The victim in *Payne* was an elderly, working man who was found in his office "dead or dying from crushing blows inflicted upon his head."¹⁷⁵ The *Reck* case involved the "savage murder"¹⁷⁶ of a Chicago physician. Nevertheless, the image of the defendant remains that of the vulnerable and weak individual.

The Image of the Police Officer

Acting as a foil to this image, the police officer is portrayed as overbearing, brutal and manipulative, far more interested in extracting unreliable confessions than in investigating crimes. The tools of his trade are trickery, deceit, seclusion, fatigue, and, often, physical brutality. The opinions of the Warren Court consistently refer to "overbearing" police officers¹⁷⁷ and depict the police "manhandling" female suspects,¹⁷⁸ "ransacking" apartments,¹⁷⁹ and "[r]unning roughshod" over rights.¹⁸⁰ The typical police officer has a "perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets."¹⁸¹ In the confession ar-

(jury challenge); *Townsend v. Sain*, 372 U.S. 293, 297 (1963) (habeas corpus); *Escobedo v. Illinois*, 378 U.S. 478, 491 (1958) (right to presence of counsel during interrogation); *Reece v. Georgia*, 350 U.S. 85, 89 (1955) ("a semi-illiterate Negro of low mentality") (jury composition challenge).

¹⁷³ *Davis v. North Carolina*, 384 U.S. 737, 738-39 (1966).

¹⁷⁴ *Id.* at 742.

¹⁷⁵ *Payne v. Arkansas*, 356 U.S. 560, 562 (1958).

¹⁷⁶ *Reck v. Pate*, 367 U.S. 433, 448 (1961) (Clark, J., dissenting).

¹⁷⁷ See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 442 (1966) (defendant's rights in *Escobedo* "were put in jeopardy in that case through official overbearing"); *Haynes v. Washington*, 373 U.S. 503, 519 (1963) ("[o]fficial overzealousness of the type which vitiates the petitioner's conviction below has only deleterious effects"); *Reck*, 367 U.S. at 442 ("it is equally true that Reck's youth, his subnormal intelligence, and his lack of previous experience with the police make it impossible to equate his powers of resistance to overbearing police tactics with those of the defendants in [other cases]").

¹⁷⁸ *Mapp v. Ohio*, 367 U.S. 667, 668 (1961) ("putting their hands on appellant").

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 645.

¹⁸¹ *Terry v. Ohio*, 392 U.S. 1, 15 n.11 (quoting L. TIFFANY, ET AL., DETECTION

ea in particular, the Court repeatedly rebuked police officers for trying to coerce confessions instead of independently investigating cases.¹⁸² The constant refrain is that "confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence

...¹⁸³

A fascinating, recurring image of the police officer is that of the Communist authority figure. Justice Goldberg, writing for the Court in *Escobedo v. Illinois*, compares interrogation without counsel to trial in the former Soviet Union: "[t]he Soviet criminal code does not permit a lawyer to be present during the investigation. The Soviet trial has thus been aptly described as 'an appeal from the pretrial investigation.'"¹⁸⁴ Similarly, Justice Douglas compares incommunicado police detention in the United States to "the secret of successful interrogation in Communist countries."¹⁸⁵ Douglas explains how, "[i]n the Leninist period," extended interrogation by persons ascribing to Marxist doctrine often resulted in a conversion by the subject "to the ideas and beliefs of the interrogator."¹⁸⁶

Not all Justices acceded to these images of the police. Justice White, dissenting in *Escobedo v. Illinois*, accused the majority of "a deep-seated distrust of law enforcement officers everywhere . . ."¹⁸⁷ Nevertheless, the image of the overbear-

OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 47-48 (1967)).

¹⁸² Prosecutors were also not immune. Justice Goldberg sketches in *Escobedo v. Illinois* the following portrait of a prosecutor: "One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial.'" *Escobedo*, 378 U.S. at 488 (quoting *Ex parte Sullivan*, 107 F. Supp. 514, 517-18 (C.D. Utah 1952)).

¹⁸³ *Haynes v. Washington*, 373 U.S. 503, 519 (1963); see also *Escobedo*, 378 U.S. at 488-89 ("[w]e have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation").

¹⁸⁴ *Escobedo v. Illinois*, 378 U.S. 482, 488 n.9 (1958) (quoting FEIFER, JUSTICE IN MOSCOW 86 (1964)).

¹⁸⁵ *Reck v. Pate*, 367 U.S. 433, 446 (1961) (Douglas, J., concurring).

¹⁸⁶ *Id.* at 447 (quoting KENNEDY, THE SCIENTIFIC LESSONS OF INTERROGATION, PROC. ROY. INSTN. 38, No. 170 (1960)).

¹⁸⁷ *Escobedo*, 378 U.S. at 498 (White, J., dissenting); see also *United States v.*

ing and bullying officer acted as a constant foil to that of the vulnerable and impressionable criminal defendant. The contrast is nowhere sharper than in *Beecher v. Alabama*.¹⁸⁸ Beecher, "a Negro convict," escaped from "a road gang" operating out of Camp Scottsboro, Alabama—a rich word description if there ever was one. The next day, a white woman's "lifeless body" was found near the prison camp.¹⁸⁹ Beecher was hunted down and captured in Tennessee, and made to confess, literally, at gunpoint:

Tennessee police officers saw the petitioner as he fled into an open field and fired a bullet into his right leg. He fell, and the local Chief of Police pressed a loaded gun to his face while another officer pointed a rifle against the side of his head. The Police Chief asked him whether he had raped and killed a white woman. When he said that he had not, the Chief called him a liar and said, "If you don't tell the truth I am going to kill you." The other officer then fired his rifle next to the petitioner's ear, and the petitioner immediately confessed.¹⁹⁰

Beecher did not receive proper medical care and his leg was later amputated. But before that, his leg had "become so swollen and his wound so painful that he required an injection of morphine every four hours."¹⁹¹ While he was still in that condition, five days after his capture, the medical assistant in charge left Beecher with two state investigators for a ninety-minute interrogation, telling them to inform him if Beecher did not "tell them what they wanted to know."¹⁹² During that interrogation—"in a 'kind of slumber' from his last morphine injection, feverish, and in intense pain"—Beecher signed written confessions that were admitted at trial over objection.¹⁹³

The graphic imagery in *Beecher* is striking¹⁹⁴ and it re-

Wade, 388 U.S. 218, 252 (1966) (White, J., dissenting in part and concurring in part) ("I do not share this pervasive distrust of all official investigations").

¹⁸⁸ 389 U.S. 35 (1967).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 36.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Beecher*, 389 U.S. at 37.

¹⁹⁴ The same term, the Court decided *Brooks v. Florida*, 389 U.S. 413 (1967), another graphic case. Bennie Brooks was also a state convict, this time accused of participating in a riot in a Florida prison. After the riot, Brooks was ordered confined to a "windowless sweatbox" for 35 days. *Id.* at 413-14. Stripped naked, Brooks was confined to a tiny cell, with two other inmates, without a bed or any

flects the recurring themes of powerless criminal defendants and overbearing police officers that pervaded the criminal law opinions of the Warren Court.

C. *Imagery In The Rehnquist Court Opinions*

In sharp contrast, the Rehnquist Court opinions consistently project an image of the criminal defendant as a deeply threatening, cold-blooded and, most often, recidivist individual.¹⁹⁵ The opinions are rich with depictions of heinous crimes and gory crime scenes. What used to be mitigating characteristics—youth, poverty, race—are now turned against the defendant. Youth makes the crime worse; it reveals, prematurely, the defendant's inherently savage nature. Poverty is associated with frivolous appeals. Race projects the threatening specter of the "black male."

The masterful use of imagery in Chief Justice Rehnquist's opinion in *Payne v. Tennessee*¹⁹⁶ illustrates well the radical change. Rehnquist's use of imagery is particularly interesting

furnishings or facilities "except a hole flush with the floor which served as a commode." *Id.* He was fed "peas and carrots in a soup form"—as the Court described, "a daily fare of 12 ounces of thin soup and eight ounces of water." *Id.* at 414. After two weeks in the sweatbox, Brooks confessed and his confession was admitted at trial. *Id.* The Court described the conditions in *Brooks* as "a shocking display of barbarism." *Id.* at 415.

¹⁹⁵ This shift in imagery coincides with a fundamental shift in the criminal docket of the Supreme Court. It would be wrong, however, to attribute to the shift in the criminal docket responsibility for the shift in imagery. To be sure, the Warren Court labored intensely over issues such as coerced confessions, jury composition, and the rights of indigent defendants, whereas the Rehnquist Court has changed the focus of the criminal docket toward *inter alia* federal habeas corpus, the harmless error doctrine, and exceptions to the Fourth Amendment. This shift in the criminal docket, however, does not account for the difference in imagery. Coerced confession cases do lend themselves well to vivid depictions of the criminal defendant. However, that fact can cut both ways: the defendant could be characterized as vulnerable, but she could also be characterized as manipulative. The consistency of the imagery in the coerced confession cases of the Warren era reflects the predominance of the theme of vulnerability. If the Warren Court had a different image of the defendant, the coerced confession cases would have emphasized different attributes. What is missing from the gallery of Warren Court decisions is an image of the defendant as manipulative, evil and cold-blooded. This fact is particularly significant given the number of confession cases the Warren Court reviewed—cases which, as noted, lend themselves to detailed descriptions of the criminal defendant.

¹⁹⁶ 501 U.S. 808 (1991).

because it goes so much further than the legal analysis would require. Pervis Tyrone Payne was convicted of brutally murdering a young mother and her two-year-old daughter, and assaulting her three-year-old son, Nicholas, who miraculously survived.¹⁹⁷ At the jury sentencing trial, Nicholas's grandmother testified about how badly he missed his mother and sister.¹⁹⁸ The prosecutor argued that the murder was especially heinous because of the harm to Nicholas, urging the jury to return a death verdict so that Nicholas would some day know that justice was done.¹⁹⁹ The legal question presented was whether this "victim-impact evidence" detracted from the central mission of the death penalty phase.²⁰⁰

Chief Justice Rehnquist, writing for the court, paints a graphic image of a particularly gruesome crime and "a horrifying scene."²⁰¹ "Blood covered the walls and floor throughout the unit."²⁰² The mother, twenty-eight-year-old Charisse Christopher, died of bleeding from eighty-four knife wounds "caused by 41 separate thrusts of a butcher knife."²⁰³ Her daughter, Lacie, "suffered stab wounds to the chest, abdomen, back and head. The murder weapon, a butcher knife, was found at her feet."²⁰⁴ As for three-year-old Nicholas:

Nicholas, despite several wounds inflicted by a butcher knife that completely penetrated through his body from front to back, was still

¹⁹⁷ *Id.* at 812-13.

¹⁹⁸ *Id.* at 814.

¹⁹⁹ *Id.* at 815.

²⁰⁰ *Id.* at 817.

²⁰¹ *Payne*, 501 U.S. at 812. The Court's focus on the crime scene—like the Warren Court's focus on coercive measures—represents conscious or unconscious interpretive constructs of timeframing: "[a]n interpreter can readily focus solely on the isolated criminal incident, as if all we can learn of value in assessing culpability can be seen with that narrower time focus." Kelman, *supra* note 16, at 594; see also John O. Cole, *Thoughts from the Land of And*, 39 MERCER L. REV. 907, 914-16 (1988) (by choosing from shifting "frames" of reference the author can create the criminal defendant guilty or innocent). These image constructs have also been interpreted as narratives that focus on the story of the crime. See Robin West, *Narrative, Responsibility and Death: A Comment on the Death Penalty Cases from the 1989 Term*, 1 MD. J. CONTEMP. LEGAL ISSUES 161 (1990) (describing how the conservative members of the Rehnquist Court use narratives of the crime and the defendant's participation in the crime to project an image of the guilty and blameworthy defendant).

²⁰² *Payne*, 501 U.S. at 812.

²⁰³ *Id.* at 813.

²⁰⁴ *Id.* at 813.

breathing. Miraculously, he survived, but not until after undergoing seven hours of surgery and a transfusion of 1,700 cc's of blood—400 to 500 cc's more than his estimated normal blood volume.²²⁵

It is impossible to read these stirring words and not be overwhelmed by sorrow for the victims and anger at Pervis Tyrone Payne. In very subtle ways, the opinion fuels this anger. Whereas most modern judicial opinions refer to the "assailant" (or some other neutral noun that does not identify who actually committed the crime) when describing the crime, Rehnquist refers directly to "Payne" when recounting the criminal incident.²²⁶ Moreover, throughout the opinion, Rehnquist refers to the victims by their first names—Charisse, Lacie and Nicholas—though he refers to the defendant by his last name only. This is a device typically used by litigators to humanize their client, and dehumanize the opponent.

Payne is portrayed as a monster. When he left the crime scene, he was "so covered with blood that he appeared to be 'sweating blood.'"²²⁷ The afternoon of the crime, he was injecting cocaine, drinking beer, and reading pornographic magazines.²²⁸ When he was apprehended, he was described as having "a wild look about him. His pupils were contracted. He was foaming at the mouth, saliva. He appeared to be very nervous. He was breathing real rapid."²²⁹ Although Rehnquist reviews the mitigating evidence presented at the penalty phase, somehow it does not wash. Perhaps as a result of ineffective trial counsel, poor witnesses, or more likely an unreceptive court, the mitigating evidence is not portrayed with any compelling force. Rehnquist rattles off the evidence with little persuasive effect.²³⁰ Its narrative effect pales in

²²⁵ *Id.* at 812.

²²⁶ See, e.g., *id.* at 812 ("Charisse resisted and Payne became violent").

²²⁷ *Payne*, 501 U.S. at 812.

²²⁸ *Id.* at 812.

²²⁹ *Id.* at 813 (citation omitted).

²³⁰ Rehnquist recites the mitigating evidence as follows:

The capital sentencing jury heard testimony from Payne's girlfriend that they met at church; that he was affectionate, caring, and kind to her children; that he was not an abuser of drugs or alcohol; and that it was inconsistent with his character to have committed the murders. Payne's parents testified that he was a good son, and a clinical psychologist testified that Payne was an extremely polite prisoner and suffered from a low IQ. None of this testimony was related to the circumstances of Payne's brutal crimes.

comparison to the image of Nicholas' blood transfusions, or, for that matter, to the image of Payne "sweating blood."

In a surprising tour-de-force, Rehnquist appropriates the image of the vulnerable criminal defendant from the Warren Court, and projects it onto the real victim, the victim of the crime. Charisse, Nicholas's deceased mother, is the one portrayed as vulnerable, disadvantaged, all too human: "[t]he evidence showed that the victim was an out-of-work, mentally handicapped individual, perhaps not, in the eyes of most, a significant contributor to society, but nonetheless a murdered human being."²¹¹ The decision reflects how the earlier image of the vulnerable defendant is redeployed in a radically different context.

Rehnquist's opinion in *Mu'Min v. Virginia*²¹² projects a similar image of a cold-blooded, highly threatening, recidivist criminal. Mr. Mu'Min was "an inmate at the Virginia Department of Corrections' Haymarket Correctional Unit serving a 48-year sentence for a 1973 first-degree murder conviction."²¹³ He would have been eligible for the death penalty on the 1973 murder conviction had it not been for the Supreme Court decision declaring the death penalty unconstitutional in 1972.²¹⁴ The reader can surmise from a voir dire question that Dawud Mjid Mu'Min is Muslim and black.²¹⁵ Mr. Mu'Min was transferred to a work detail supervised by the Virginia Department of Transportation ("VDOT"), from which he escaped.²¹⁶ Using "a sharp instrument that he fashioned at the VDOT shop," he stabbed, robbed, sexually assaulted and murdered a woman at a retail carpet store in a shopping center near the VDOT facility.²¹⁷ After the brutal murder—"a

Id. at 825-26.

²¹¹ *Id.* at 823-24.

²¹² 500 U.S. 415 (1991) (holding that due process does not require content-based voir dire regarding exposure to pretrial publicity).

²¹³ *Id.* at 418.

²¹⁴ *Id.* at 418.

²¹⁵ *Id.* at 421.

²¹⁶ *Id.* at 418.

²¹⁷ *Mu'Min*, 500 U.S. at 418. The victim was "discovered in a pool of blood, with her clothes pulled off and semen on her body." *Id.* at 436 (Marshall, J., dissenting). Mu'Min confessed to having stabbed the victim "twice with a steel spike, once in the neck and once in the chest." *Id.*

macabre act of senseless violence²¹⁸—Mr. Mu'Min returned and ate a hot lunch at his unit.²¹⁹ Mr. Mu'Min had been rejected for parole six times before the second murder and had numerous prior prison infractions.²²⁰ His case engendered much publicity because it occurred during the 1988 presidential campaign and the controversy over Willie Horton.²²¹ The imagery, again, conveys an evil nature.

The defendant in *New York v. Quarles*²²² is described through the eyes of the victim, a woman who says she has just been raped. Quarles is "a black male, approximately six feet tall, who was wearing a black jacket with the name 'Big Ben' printed in yellow letters on the back"²²³—a graphic word description if there ever was one. Mr. Quarles was found in the possession of an empty holster. It is unclear from the opinion why this image—and no other—is portrayed. The defendant in *Quarles* was not charged or convicted of rape, but instead was charged with possession of a weapon. Justice Marshall's dissenting opinion makes clear that an equally valid recitation of facts avoids any reference to the "threatening" features of the defendant or to the alleged rape.²²⁴ In this sense, the image of Quarles articulated by the majority is somewhat gratuitous. Although it mirrors and serves to legitimate the legal holding of the case—which creates a public-safety exception to *Miranda*—the image is not, strictly speaking, necessary to the legal analysis.

The opinions of the Rehnquist Court also give different meaning to youth and poverty. Youth is no longer a vulnerability; to the contrary, the youth of an offender can be a mark against him. Committing a heinous crime as a child exposes the evil nature of the offender. In fact, the Rehnquist Court explicitly recognizes that "a juror might view the evidence of youth as aggravating, as opposed to mitigating."²²⁵ Poor de-

²¹⁸ *Id.* at 432 (O'Connor, J., concurring).

²¹⁹ *Id.* at 418.

²²⁰ *Id.* at 418.

²²¹ *Id.* at 429.

²²² 467 U.S. 649 (1984) (Rehnquist, J.) (creating a public safety exception to the requirement that *Miranda* warnings be given).

²²³ *Id.* at 651.

²²⁴ See *id.* at 674 (Marshall, J., dissenting).

²²⁵ *Johnson v. Texas*, 113 S. Ct. 2658, 2669 (1993) (ruling that the Texas "special issues" death penalty instructions do not violate the Eighth Amendment with

fendants are portrayed as a public nuisance. Indigence is associated with frivolous certiorari petitions, meritless habeas corpus applications, and frivolous section 1983 prisoner's rights cases.²²⁶ Indigent prisoners raise "fantastic or delusional scenarios, claims with which federal district judges are all too familiar."²²⁷

The Image of the Police Officer

Like the Warren Court opinions, the images of the police officer in the opinions of the Rehnquist Court act as a foil. The police are described as trustworthy public servants. Police officers are presumed to have healthy instincts and to act in good faith. This is illustrated well in *Quarles* where the court writes that "[t]he exception which we recognize today [to *Miranda v. Arizona*] . . . will simply free [police officers] to follow their legitimate instincts when confronting situations presenting a danger to the public safety."²²⁸

*Illinois v. Perkins*²²⁹ reflects the Court's deference to police methods. In *Perkins*, an undercover police officer is placed in a jail cell with the defendant, Perkins. The defendant is suspected of murder, but awaiting trial on another offense, and confesses to the undercover officer. The contrast between the majority opinion, written by Justice Kennedy, and the opinions of Justices Brennan and Marshall, reveals a fundamental difference in attitudes toward the police. Brennan describes the police activity in a manner resembling the opinions of the Warren Court: "The deliberate use of deception and manipulation by the police appears to be incompatible 'with a system that presumes innocence and assures that a conviction will not

regard to the consideration of youth as a mitigating circumstance); see also *Graham v. Collins*, 506 U.S. 461 (1993).

²²⁶ In *Denton v. Hernandez*, 504 U.S. 25, 32 (1992), the Court went so far as to allow district courts to "pierce the veil of the complaint's factual allegations" in forma pauperis complaints and dismiss the complaint where the facts appear fanciful—even though there has been no testing of the facts whatsoever.

²²⁷ *Id.* at 32 (citing *Neitzke v. Williams*, 490 U.S. 319, 328 (1989)); see also *id.* at 33 ("we are confident that the district courts, who are 'all too familiar' with factually frivolous claims . . . are in the best position to determine which cases fall into this category").

²²⁸ *New York v. Quarles*, 467 U.S. 649, 659 (1984).

²²⁹ 496 U.S. 292 (1990).

be secured by inquisitorial means . . . ²³⁰ Marshall emphasizes the coercive nature of incarceration: "the pressures unique to custody allow the police to use deceptive interrogation tactics to compel a suspect to make an incriminating statement."²³¹ Kennedy, however, has no qualms about the police method: the defendant was merely "convers[ing] with someone who happen[ed] to be a government agent."²³² Jailhouse deception is not coercion, it is "mere strategic deception [that takes] advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner."²³³

The competing imagery produces two very different portraits of the defendant. For the Rehnquist majority, Lloyd Perkins is an armed and dangerous, cold-blooded, recidivist killer with no redeeming features. He "boast[s]"²³⁴ about having "done"²³⁵ somebody, is anxious to escape jail, and is prepared to "smuggle in a pistol."²³⁶ For Brennan and Marshall, however, Perkins is an impressionable defendant, scared, and prepared to engage in "jailhouse bravado"²³⁷ to escape sexual or physical assault. These two pictures capture well the distinct imagery of the Warren and Rehnquist Courts.

III. IDEOLOGIES OF CRIMINAL LAW DURING THE SOUTHERN ANTEBELLUM PERIOD, THE WARREN ERA AND THE REHNQUIST COURT

The opinions from the three historical periods also evince remarkable internal consistency regarding their respective ideologies of criminal law. In this part, the Article will focus on the ideologies prevalent during these three periods.

²³⁰ *Id.* at 303 (Brennan, J., concurring).

²³¹ *Id.* at 308 (Marshall, J., dissenting).

²³² *Id.* at 297.

²³³ *Id.* at 297.

²³⁴ *Perkins*, 496 U.S. at 298.

²³⁵ *Id.* at 295 (i.e., killed someone).

²³⁶ *Id.* at 295.

²³⁷ *Id.* at 303 (Brennan, J., concurring).

A. *The Southern Antebellum Period*

During the antebellum period, the price of field-hand slaves rose almost in proportion to the decline in the price of cotton.²³⁸ The cost of an errant slave was even higher. If executed, the slaveholder stood to lose at least half the value of the slave. The owner of a slave charged with a capital offense was required to retain counsel for the slave at his own expense.²³⁹ The owner of a slave convicted on a noncapital offense was responsible for the costs of prosecution; if the owner did not pay the costs within ten days, the slave could be sold by the sheriff to cover the expenses.²⁴⁰ When a slave was ac-

²³⁸ Andrew Fede, *Legitimized Violent Slave Abuse in the American South, 1619-1865: A Case Study of Law and Social Change in Six Southern States*, 29 AM. J. LEGAL HIST. 93, 108 (1985). The price of a prime field hand in Georgia in 1800 was \$450 and the average New York price of upland cotton was 30 cents. In 1859, the price of a slave averaged \$1,650 and the price of cotton had fallen to 11 cents.

²³⁹ Throughout the nineteenth century antebellum period, slaves charged with a capital offense in Alabama were afforded legal counsel at trial at their owner's expense. As early as 1807, a slave could not be condemned unless he or she was allowed "counsel in his or her defence, whose fee, amounting to ten dollars, shall be paid by the owner of the slave." Act of 1807 § 57, in H. TOULMIN, A DIGEST OF THE LAWS OF THE STATE OF ALABAMA CONTAINING THE STATUTES AND RESOLUTIONS IN FORCE AT THE END OF THE GENERAL ASSEMBLY IN JANUARY, 1823 (1823), *Courts Inferior*, ch. 4 § 57, at 182 (hereinafter "TOULMIN'S DIGEST"). The slave's right to counsel at his owner's expense survived the adoption of the Alabama Constitution of 1819, although it was not incorporated therein. The criminal procedure laws enacted after the Constitution uniformly provided for appointed counsel at capital trials. See, e.g., Act of 1819 § 2, in TOULMIN'S DIGEST, *Courts Inferior*, *supra*, ch. 7 § 2, at 186. (right to counsel, "whose fee, amounting to ten dollars, shall be paid by the owner of the slave"); Act of 1824 § 4, in AIKIN'S DIGEST, *supra* note 102, *Criminal Law, Trial of Persons of Color* § 62, at 124 ("[i]f the owner of any slave charged with a capital offence, shall fail to employ good and sufficient counsel, on behalf of said slave, it shall be the duty of the presiding judge, before whom such slave may be tried, to assign counsel learned in the law to defend said slave, who shall be entitled to receive from the owner the sum of twenty dollars for his services"); Act of 1832 § 5, in AIKIN'S DIGEST, *supra* note 102, *Criminal Law, Trial of Persons of Color* § 70, at 125 (court appointed counsel at owner's expense); Penal Code of 1843, ch. 15, in CLAY'S DIGEST, *supra* note 6, *Of Slaves and Free Negroes* § 13, , at 473 ("[i]f the owner of any slave should neglect or refuse to employ counsel to defend the prisoner, the court shall assign counsel for that purpose, who shall be authorized to demand from the owner ten dollars for this service"); Ala. Code of 1852, § 3329 ("[i]n all trials of slaves for capital offenses, if the owner refuses or neglects to employ counsel for his defence, the court must assign counsel for that purpose, who must be paid twenty dollars therefor, to be taxed as costs, for which execution may issue").

²⁴⁰ Act of 1843 § 2, in CLAY'S DIGEST, *supra* note 6, *Penal Code of Slaves and Free Negroes* § 28, at 476; Act of 1852, § 3331.

cused of crime, the slaveholder faced sure financial loss.²⁴¹

A close reading of the judicial opinions and criminal laws from antebellum Alabama reveals that the courts and legislatures resolved this dilemma by placing wide discretion in the hands of slaveholders. The trial process was, by and large, turned over to the slaveholders. The overarching ideological thread in the criminal law was that slaveholders were best suited to judge slaves. Because of the ambiguous relationship between slavery and the criminal process—a process that had the potential of draining slaveholders' time, resources and (human) capital—the penal laws and procedures were not inflexibly repressive, but, to the contrary, were designed to allow slaveholders the flexibility to use the criminal process as an arm of the institution of chattel slavery. This is demonstrated in a number of different ways.

First, slaveholders participated in the slave criminal process via the slave's right to a jury trial. This represented a gradual evolution in the law of slavery in Alabama and reflects well the interests of the slaveholders. Before Alabama gained statehood in 1819, the general assembly of the Mississippi Territory passed a succession of criminal procedure laws that denied slaves the procedural rights associated with trial by jury. One of the first such laws, passed in 1807, established special tribunals for the trial of slaves without juries.²⁴² The Act of 1807 provided that the justices of the county court—a

²⁴¹ As the Alabama Supreme Court explained, the slaveholder had an "interest to prevent a conviction, the consequence of which would be, the certain loss of one half his value, and the possible loss of his entire value." *The State v. Marshall*, a slave, 8 Ala. 302, 307 (1845). In fact, the financial loss associated with the execution of a slave was viewed as the only way to ensure that owners made sure that their slaves received a fair trial. During the 1842-43 legislative session, the general assembly passed a bill providing for full compensation for executed slaves. The Governor, Benjamin Fitzpatrick, vetoed the provision because it eliminated any incentive to guarantee slaves a fair trial. In a veto message to the general assembly, the Governor wrote that "[h]umanity alone, as the statute now stands, is the only inducement to the master to take that interest which is essential to insure his slave a fair and impartial trial when implicated." *Flag of the Union*, December 7, 1842 (cited in *SELLERS*, *supra* note 110, at 244). That was not enough.

²⁴² An Act for the Punishment of Crimes and Misdemeanors, passed February 6, 1807 § 5757, in *TOULMIN'S DIGEST*, *supra* note 239, at 182. The Act provided for the right to counsel for slaves and required that counsel's fee "amounting to ten dollars, shall be paid by the owner of the slave." An Act for the Punishment of Crimes and Misdemeanors, passed February 6, 1807 § 5757, in *TOULMIN'S DIGEST*, *supra* note 239, at 182.

court inferior to the circuit court, where white defendants were tried—would be “justices of oyer and terminer for trying slaves, charged with treason, felony, or other crimes or misdemeanours” and would do so “without juries.”²⁴³ In 1812, the general assembly did enact procedures for the trial of slaves in county court by petit juries.²⁴⁴ However, this act dispensed with many formalities of trial by jury, including presentment or indictment before a grand jury,²⁴⁵ the right to confront witnesses, to have compulsory process for obtaining witnesses, or to be free from self-incrimination.²⁴⁶

Once Alabama gained statehood in 1819, slaves were guaranteed trial by jury in felony cases. The Alabama Constitution of 1819 explicitly guaranteed slaves the right to “an impartial trial by a petit jury” in the prosecution for crimes of a higher grade than petit larceny.²⁴⁷ Nevertheless, repeated attempts were made to diminish the trial rights of slaves and to streamline the slave adjudicatory process until the middle part of the century. Three days after Alabama gained statehood, the legislature passed a criminal procedure law for slaves which provided a summary mode of trial in the inferior court.²⁴⁸ Similarly, by an Act of 1832, “to provide for the speedy trial of slaves and free persons of color,”²⁴⁹ the legislature reverted jurisdiction to the inferior county courts to try slaves without the benefit of indictment or presentment.²⁵⁰ A petit jury, counsel and compulsory process were guaranteed, but few other protections were afforded the slave.²⁵¹ This act of 1832 was repealed in

²⁴³ TOULMIN'S DIGEST, *supra* note 239.

²⁴⁴ An Act prescribing a Summary Mode for the Trial of Slaves passed December 21, 1812 § 1, in TOULMIN'S DIGEST, *supra* note 239, at 183.

²⁴⁵ TOULMIN'S DIGEST, *supra* note 239, at 183-84.

²⁴⁶ The county court was permitted to take as legal evidence in such cases “the confession of the offender, the oath of one or more credible witnesses, or such testimony of negroes or mullattoes, bond or free, with pregnant circumstances, as to them shall seem convincing.” TOULMIN'S DIGEST, *supra* note 239, at 182 (Act of 1807 § 59).

²⁴⁷ Ala. Const. of 1819, art. 6, *Slaves* § 2, in AIKIN'S DIGEST *supra* note 102, at 391.

²⁴⁸ An Act to Amend the several Acts concerning the Trial of Slaves, passed December 17, 1819 § 2, in TOULMIN'S DIGEST, *supra* note 239, at 185-86.

²⁴⁹ State v. Abram, 4 Ala. 272, 275 (Ala. 1842).

²⁵⁰ AIKIN'S DIGEST, *supra* note 102, *Criminal Law, Trial of Persons of Color* § 69, at 125.

²⁵¹ See AIKIN'S DIGEST, *supra* note 102, at 125.

1841, reverting jurisdiction to the circuit courts and essentially creating a three-tier system that governed until the Civil War.²⁵²

By and large, from 1841 to 1865, slaves in Alabama would receive different trial procedures depending on the severity of the offense. For any offense of a grade less than petit larceny, slaves would be tried by a justice of the peace without a jury.²⁵³ For non-capital offenses greater than petit larceny, slaves would receive a trial by petit jury in an inferior court and in a summary fashion, without presentment or indictment or counsel.²⁵⁴ In capital cases, slaves had trial rights substantially similar to those of white defendants.²⁵⁵

Second, slaveholders were guaranteed a certain number of votes at the slave's trial. This too represented a process of evolution in the law of slavery over the course of the early nineteenth century. One of the first attempts to stack the jury with slaveholders was in 1805 when the general assembly of the Mississippi Territory passed an ordinance requiring that the jury in felony or capital trials of slaves be composed of at least two-thirds slave owners.²⁵⁶ That provision was, of course, nullified when slaves lost the right to jury trials in 1807. Then, by an Act of 1814, the general assembly condi-

²⁵² See, *Abram*, 4 Ala. at 273.

²⁵³ See, e.g., Ala. Code of 1852, § 3317 ("For the offence of petit larceny, or any other offence of the same or less grade, any slave may be tried by a justice of the peace . . . but no justice is authorized to inflict more than thirty-nine stripes, unless he associates with him two respectable freeholders, who concur in the propriety of the sentence.")

²⁵⁴ See, e.g., Ala. Code of 1852, §§ 3316-3327 (trial by the judge of the probate court and two justices of the peace; no indictment or presentment; compulsory process, but no other rights such as counsel).

²⁵⁵ Thus, under the Alabama Code of 1852,

[t]he trial of all slaves for capital offences must, except in the cases provided for by this chapter, be by the circuit court of the county having jurisdiction, and in the mode provided by law for the trial of white persons, except that the slave is allowed but twelve peremptory challenges, and the state but four, and at least two-thirds of the jury must be slaveholders.

Ala. Code of 1852, § 3319; see also Penal Code, ch. 15, *Of Slaves and Free Negroes*, § 10, in CLAY'S DIGEST, *supra* note 6, at 473.

²⁵⁶ Act of 1805 § 20, in AIKIN'S DIGEST, *supra* note 102, at *Slaves, and Free People of Color* § 21, at 394-95. See also AIKIN'S DIGEST, *supra* note 102, *Criminal Law, Trial of Persons of Color* § 67, 125 (by an Act of 1832, slaves were to be tried in special tribunals in county court; the sheriff had to summon twenty-four jurors, "one-half of whom shall be slaveholders").

tioned certain punishments on consent from the slaveholder community: "no slave shall be sentenced to receive more than thirty-nine lashes, unless two respectable slaveholders to be summoned by the justice for the purpose of trying said slave, concur with him in the sentence."²⁵⁷ The Act of 1832, discussed earlier, required a petit jury "one-half of whom shall be slaveholders."²⁵⁸ Eventually, the idea of a two-thirds slaveholder majority gained foothold again and became well entrenched.

Thus, the law in Alabama from the 1840s until the Civil War required that the jury in the trial of a slave charged with a capital offense consist of at least eight slaveholders.²⁵⁹ Moreover, those slaveholders that sat on juries were required to have *actual experience* owning slaves. The mere possibility of becoming a slaveholder was not adequate.²⁶⁰ The legislature

meant that the pa[r]ty himself, or by his bailiff, should have *possession* of a slave or slaves in which he had an interest. It is then he is supposed to possess the *sympathies* and *qualifications* required by the spirit of the enactment, and [is] prepared to sit as a juror upon a trial involving the life of the slave.²⁶¹

Third, slaveholders were competent witnesses at the trial of their slaves—even though they were interested parties. The Alabama Supreme Court did not address this issue until 1850, but, in a classic example of "bricollage"—drawing from the laws of other states, the law of villeinage, and from "analogies at the common law"—the court ruled that the master of a slave was a competent witness for or against his slave.²⁶² The court concluded that "on grounds of public policy, of common humanity, of absolute necessity, the master must be held to be compe-

²⁵⁷ See An Act to amend "An Act prescribing a Summary Mode for the Trial of Slaves," passed January 15, 1814 § 1, in TOULMIN'S DIGEST, *supra* note 239, at 184; AIKIN'S DIGEST, *supra* note 102, *Criminal Law, Trial of Persons of Color* § 58, at 123-24.

²⁵⁸ See AIKIN'S DIGEST, *supra* note 102, *Criminal Law, Trial of Persons of Color* § 67, at 125.

²⁵⁹ *Spence, a slave v. The State*, 17 Ala. 192 (1850); see also Ala. Code of 1852 § 3317 (same).

²⁶⁰ *Spence*, 17 Ala. at 192-94.

²⁶¹ *Id.* at 194 (second and third emphases added).

²⁶² *Id.* at 196-97.

tent either for or against his slave."²⁶³ This too reflected the interest of the slaveholders in controlling the trial process by, literally, shaping the evidence at trial.

Fourth, the discretion of the slaveholder jurors was often nonreviewable. In Alabama, certain statutes required the speedy execution of slaves sentenced to death. These statutes made it often impossible, as a practical matter, to perfect an appeal before the execution. The Act of 1832 provided that "if any slave or free person of color shall be found guilty of any capital crime, there shall not be less than five nor more than ten days, between the day of passing sentence and the day of execution"²⁶⁴ The Act of 1836 provided that the short time frame could only be suspended where the trial court certified questions for appeal.²⁶⁵

One major exception to appellate review involved slaves accused of insurrection. Throughout the nineteenth century antebellum period, Alabama statutes uniformly provided an exception "in cases of conspiracy, insurrection, or rebellion, when the sentence [of death] of the court may be executed forthwith."²⁶⁶ Thus, for example, the Act of 1852 provided that "in case of a conviction for conspiracy, insurrection or rebellion, the court . . . may sentence him to be executed forthwith; and in such case the sentence must be executed accordingly."²⁶⁷

In the area of appellate review, however, the trend during the nineteenth century was toward more judicial review rather than less—which undermined somewhat the ultimate discretion of the slaveholder jurors. Whereas the appellate process for slaves was severely limited during the early part of the century, appellate procedure was reformed in the 1840s and eventually allowed for greater review of slave convictions.

²⁶³ *Id.* at 194.

²⁶⁴ Act of 1832 § 7, in AIKIN'S DIGEST, *supra* note 102, *Criminal Law, Trial of Persons of Color* § 72, at 125-26; see also *Penal Code, of Slaves and Free Negroes* § 16, in CLAY'S DIGEST, *supra* note 6, at 474 (execution to be done within 10 to 20 days of sentence).

²⁶⁵ See *John, a slave v. The State*, 2 Ala. 290, 292 (1841).

²⁶⁶ Act of 1832 § 7, in AIKIN'S DIGEST, *supra* note 102, *Criminal Law, Trial of Persons of Color* § 72, at 126; see also Act of 1807 § 57 in TOULMIN'S DIGEST, *supra* note 240, at 182; Act of 1819, § 2 in TOULMIN'S DIGEST, *supra* note 239, at 186.

²⁶⁷ Ala. Code of 1852, § 3330.

During the early years of statehood, from 1819 through 1822, slaves were tried in the inferior courts and, as a result, could not appeal their convictions or death sentences to the Alabama Supreme Court. The first reported decision of the Supreme Court involving a slave appellant, *Humphrey, a slave v. The State*,²⁶⁸ was in fact dismissed for want of jurisdiction. Humphrey had been convicted of burglary, a capital offense, in the county court of "oyer and terminer" under legislation passed in 1819 and 1821. Although the legislation allowed "an appeal or writ of error . . . in the same manner as upon judgments of the circuit courts,"²⁶⁹ the Alabama Supreme Court ruled that it had no jurisdiction of a criminal case coming from county court. The only way the appellate court could review a criminal conviction was if a circuit court referred a question of law as being novel and difficult.²⁷⁰ Thus, slaves like Humphrey, convicted of capital offenses in county court, would receive no appellate review. Slaves were tried in county court from 1819 to December 1822, from 1832 to 1841 and, of course, during the earlier territorial era.

Litigants in Alabama—both white and black²⁷¹—had very limited access to the appellate courts in criminal cases during

²⁶⁸ 1 Minor 64 (Ala. 1822). The first term of the Alabama Supreme Court began on the second Monday in May, 1820. See 1 Minor 1 (Ala. 1820). The first reported decision of the Alabama Supreme Court involving a slave convicted of a criminal offense was released two years later, in the June Term of 1822, and was entitled *Humphrey, a slave v. The State*, 1 Minor 64 (Ala. 1822).

²⁶⁹ An act to repeal in part and amend an Act entitled "An Act to regulate the proceedings in the courts of Law and Equity in this State," passed June 14, 1821, § 23, in TOULMIN'S DIGEST, *supra* note 239, at 199.

²⁷⁰ The Court held in *Humphrey*, Minor at 65 that "[t]he Statutes of this State have provided but one way in which a criminal case can come before this Court. In cases of novelty and difficulty, the Circuit Court, after the rendition of final judgment or sentence, can refer the question of Law to the Supreme Court."

²⁷¹ Although the privilege of appeal was, as a technical matter, similarly restricted for both whites and blacks, slaves received less process than white defendants. Writs of error were very rarely bestowed on slaves. During the period from 1820 through 1835, at least 19 slaves were hung in execution of sentences imposed by courts. See List of Alabama executions prior to 1927, compiled by Watt Espy of the Capital Punishment Research Project (on file with author). Yet during that twelve year period, there are only four reported opinions involving slave appellants—including the Humphrey case where the Court declined jurisdiction. The other cases are *The State against Moses*, 1 Minor 393 (Ala. 1825); *The State v. Phil*, 1 Stewart 31 (Ala. 1827); and *The State v. Peter*, 1 Stewart 38 (Ala. 1827). In contrast, during that period, there are thirty-two reported opinions involving white defendants.

the subsequent period, 1823 to 1843. The early cases involving white defendants established that there was only one way to obtain appellate review of a criminal conviction: to have the circuit court render judgment and refer a matter of law as "novel and difficult"²⁷² to the supreme court.²⁷³ Nevertheless, the appellate procedures were reformed during the 1840s and eventually allowed for bills of exceptions on the defendant's behalf.²⁷⁴ Thus, during the period 1843 to 1865, slave defendants had greater access to the appellate courts. Most appellate decisions reflect that slaves were represented

²⁷² See, e.g., *The State v. Shelton*, 3 Stewart 343, 344 (Ala. 1831) (court can only hear issues referred as "novel and difficult" by the circuit court under Act of December 1820); *The State v. Cawood*, 2 Stewart 360 (Ala. 1830); *Collier v. The State*, 2 Stewart 388, 389 (Ala. 1830); *The State v. Seay*, 3 Stewart 123, 124 (Ala. 1830).

²⁷³ See *The State against Reece*, 1 Minor 266 (Ala. 1824). In *Reece*, the defendant was charged in circuit court with stealing horses and receiving stolen property. The Alabama Supreme Court held that it did not have jurisdiction over the matter until final judgment was rendered by the circuit court and the circuit court referred a matter as "novel and difficult" to the court. The opinion in *The State v. Shelton*, 3 Stewart 343 (Ala. 1831) illustrates that the privilege of appeal belonged to the circuit court and not the defendant. In *Shelton*, the parties tried to assign errors in the record regarding matters that had not been referred by the circuit court. The Alabama Supreme Court refused to hear these additional matters. The court explained that "[t]his case has not reached this Court at the instance of the defendant, but was sent here for the purpose of satisfying the presiding judge below, that the conviction is legal; and the relationship of the parties upon the record, is not changed by a reference of the cause." *Id.* at 344. Another severe limitation on the appellate process was the fact that the matter referred had to be "novel." If a trial court ruling was clearly erroneous under well-settled precedent, it would not qualify as "novel." Cf. *Ned, a slave v. The State*, 7 Port. 187, 201 (Ala. June 1838) (court intimates that issue with precedent would not be novel). Thus, there was no review for clearly erroneous, but ordinary rulings.

²⁷⁴ Act of 1843 § 10, in *CLAY'S DIGEST*, *supra* note 6, at 471. Prior to that, in 1841, the judges on the Alabama Supreme Court were granted the authority to award a writ of error to bring up for review the proceedings in a criminal case. However, the practice of the court remained to review only issues referred by the circuit court. If there was an additional matter that the court wanted to review, it would send the case back for a reference. As the court explained in *The State v. Abram*, 4 Ala. 272, 275 (1842):

Anterior to the act of 1841, it was the settled practice of this Court, never to reverse a judgment where a case was referred to us, unless the error was shown by the points reserved. [The 1841 statute] it is conceived does not effect such a change in the law as to warrant a departure from a practice coeval with the State government. If the record discovers errors, which the order of reference does not bring to our view, the correct course of procedure is, to ask for a writ of error, that they may be adjudicated.

by counsel on appeal, although there does not appear to be any codified right to appellate counsel in the penal laws of that period.²⁷⁵

Accordingly, slaves acquired greater opportunities for judicial review over in Alabama the course of the nineteenth century. In this one respect, then, the evolution of slave law ran counter to the predominant ideology of slave criminal procedure. Naturally, there were other forces at play, including the development of judicial review and, with it, the struggle between constitutional branches in the emerging state. But overall, the ideology of the criminal law in antebellum Alabama placed discretion squarely in the hands of slaveholders. They controlled the jury box, had access to the witness stand, and determined not only guilt, but punishment, value and reimbursement. Through these mechanisms, slaveholders turned the criminal law into an arm of the institution of chattel slavery.

B. *Methodological Interlude*

It is impossible to discuss the ideology of slave criminal law without mentioning methodology. The study of American slavery is, today, a contentious enterprise because of the numerous methodological approaches that have been applied during the nineteenth and twentieth centuries.²⁷⁶ Scholars have approached the field from a number of different angles, including judicial idiosyncrasy theories that explain inconsistencies in the laws of slavery by recourse to the varying personalities, backgrounds and demographic traits of southern judges;²⁷⁷ functional approaches that interpret change in the

²⁷⁵ Slaves were afforded legal counsel at trial. See *supra* note 239.

²⁷⁶ See, e.g., Fede, *supra* note 238, at 99; Fisher *supra* note 22, at 1056-57; Schiller, *supra* note 22.

²⁷⁷ This method—called “judicial idiosyncrasy” theory (Fisher, *supra* note 22, at 1057 n.34) or “judicial personality theory” (Schiller, *supra* note 22, at 1212)—attempts to explain the inconsistencies of slave law by developing “a link between behavior on the bench and a number of social and political characteristics of the judges.” Nash, *supra* note 22, at 93. The works of A.E. Keir Nash and David J. Langum illustrate this approach. See A.E. Keir Nash, *Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution*, 32 VAND. L. REV. 7 (1979); A.E. Keir Nash, *The Texas Supreme Court and the Trial Rights of Blacks, 1845-1860*, 58 J. AM. HIST. 622 (1971); A.E. Keir Nash, *A More Equitable Past?*

law of slavery in light of the interests of the slaveowner class;²⁷⁸ scientific Marxist and hegemonic theories that de-

Southern Supreme Courts and the Protection of the Antebellum Negro, 48 N.C. L. REV. 197 (1970); A.E. Keir Nash, *Negro Rights, Unionism, and Greatness on the South Carolina Court of Appeals: The Extraordinary Chief Justice John Belton O'Neill*, 21 S.C. L. REV. 141 (1969); David J. Langum, *The Role of Intellect and Fortuity in Legal Change: An Incident from the Law of Slavery*, 28 AM. J. LEGAL HIST. 1 (1984). Nash believed that the appellate courts of the Deep South demonstrated "an overlooked antebellum tradition of solicitude for the black defendant." Nash, *supra* note 22, at 65. Nash attempted to document the favorable treatment bestowed on blacks by a statistical analysis regarding the rates of reversal in criminal opinions. Nash surveys the reversal rates from the appellate courts of eight Southern states between 1830 and 1860 and concludes that the rate of reversal for black defendants was substantially higher than for white defendants convicted of inflicting injuries on blacks. Nash, *supra* note 22, at 77. "While prosecutions of blacks were numerous—there were 238 appeals taken during this period—defendants secured reversals in 136 instances. Thus, blacks won reversals in more than half the cases that reached the appellate level." Nash, *supra* note 22, at 79. In order to explain disparities and differences in treatment, Nash focused on the social and political characteristics of the judges, including age, socio-economic status, dates of appointment, place of birth, education, and party affiliation. Nash concluded that conservative and centrist judges "came in greater numbers from Upper and Upper Middle family environments" and had more education than did the more liberal judges. Nash, *supra* note 22, at 95 and 96.

²⁷⁸ Scholars such as A. Leon Higginbotham and Andrew Fede propose a methodology that explains the evolution of legal doctrine in terms of the domination of the white masters over their black slaves. Under this method,

inconsistencies and contradictions are only apparent; careful analysis will show that all aspects of slave law were shrewdly designed to serve the interests of slave owners—specifically, to enable masters to extract as much labor as possible from their slaves, to enhance masters' ability to discipline their slaves, and to protect masters' property interests in their slaves.

Fisher, *supra* note 22, at 1056. Thus, in an article on the slave criminal laws of Virginia, Higginbotham exposes how Virginia's colonial and antebellum criminal justice system helped maintain blacks' powerlessness and submissiveness in order to ensure the dominance of the master and perpetuate slavery. Higginbotham & Jacobs, *supra* note 95, at 1067-68. Similarly, the legal historian Andrew Fede maintains that the law of slavery was molded to further the interests of the white slaveholders: "The logic of slave law is . . . consistent and rational and presents no dilemma at all; it was the process of stripping slaves of their legal rights (defining them as property) and burdening them with special legal duties (calling them 'people')." Andrew Fede, *Toward a Solution of the Slave Law Dilemma: A Critique of Tushnet's 'The American Law of Slavery'*, 2 LAW & HIST. REV. 301, 314 (1984). In his article, Fede focuses on the ever-changing laws regarding crimes against black slaves, in particular violent white abuse of black slaves, in six southern states. Fede demonstrates how the "liberalizing" trend in the law—for instance, the trend toward criminal sanctions against overseers for excessive punishment of submissive slaves—was nothing more than a shifting accommodation of the white slave-holding class. Criminal penalties were imposed because the masters and the lawmakers came to the conclusion that the civil remedies against

scribe the evolution of the law of slavery in terms of the fundamental tension between plantation-based modes of production and the growth of commercial capitalism;²⁷⁹ and structuralist approaches that identify the numerous antecedents of American slave law in the laws and customs of foreign jurisdictions.²⁸⁰ As a result of these varying methodologies, the ante-

overseers were inadequate. "[T]he scope of legalized white slave mistreatment was limited when, and only to the extent that, it conflicted with the interests of other whites that the southern lawmakers perceived to be of superior import, and therefore deserving the law's protection." Fede, *supra* note 238, at 150.

²⁷⁹ This method—called "scientific Marxism," Fisher, *supra* note 22, at 1057 n.34—relies on Marxist legal analysis and is illustrated by the work of MARK TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY & INTEREST* (1981), and, to a lesser extent, Eugene Genovese & Elizabeth Fox-Genovese, *Slavery, Economic Development and the Law: The Dilemma of the Southern Political Economists, 1800-1860*, 41 WASH. & LEE L. REV. 1 (1984). Tushnet describes in the antebellum period a number of dichotomies and argues that these dichotomies are reflected in the law of slavery. Slave owners belonged to a mature bourgeois society that treated workers purely as producers; however, slave owners also belonged to a slave society that inevitably dealt with all aspects of the slaves' lives. This principal dichotomy is reflected in the law of slavery: the law regulated commercial dealings (law), whereas unwritten practices associated with the master's codes controlled the lives of the slaves (sentiment). TUSHNET, *supra*, ch. 1; see, e.g., TUSHNET, *supra*, at 62. Genovese & Fox-Genovese describe the "bifurcation of southern law, as if to render the economy unto Caesar and social relations unto God." Genovese & Fox-Genovese, *supra*, at 2. They conclude that "the relation between southern political economy and southern law rests upon the judgment that, ultimately, the dominant social relations of southern slave society blocked the development of southern political economy, while compelling the bifurcation of southern law identified by Mark Tushnet." Genovese & Fox-Genovese, *supra* at 3.

²⁸⁰ This method relies on the theory of metaphor developed by Claude Lévi-Strauss, and argues that southern judges were not crafting new doctrines from scratch, but instead piecing together the law of slavery from the bits and pieces of past legal orders. Scholars such as Alan Watson, *SLAVE LAW IN THE AMERICAS* (1989), *Slave Law: History and Ideology*, 91 YALE L. J. 1034 (1982), and Arnold Sio, *Interpretations of Slavery: The Slave Status in the Americas*, 7 COMP. STUD. IN SOC'Y & HIST. 289 (1965),

proceed[] on the assumption that the bulk of all legal systems is borrowed from the laws of other jurisdictions; to explain the American law of slavery, consequently, one must identify the ingredients from which it was made—a dash of villenage, a splash of Roman law (strained through the civil law tradition), a sizable dollop from the slave code of Barbados, and a large portion of the common law and equitable principles in force in England.

Fisher, *supra* note 22, at 1056. There are ample illustrations of "recollage" and "bricolage" in the slave criminal law of Alabama. The appellate courts of Alabama relied heavily on the English law of villenage and the common law of England to resolve criminal law issues regarding slaves. See, e.g., Spence, a slave v. State, 17 Ala. 192, 196 (1850); Ned, a slave v. State, 7 Port. 187, 202-17 (Ala. 1838) (relying

bellum law of slavery has been described, at one extreme, as exhibiting an "apparent libertarianism,"²⁸¹ and, at another, as "designed to keep blacks as powerless and submissive as possible."²⁸²

Most recently, scholars have proposed to enrich these various methodologies with a cultural and contextual approach that focuses on the ideas, morals, justifications, religious beliefs and images held by Southerners²⁸³—an approach heavily influenced by the discussion of symbols and ideologies in the work of Clifford Geertz.²⁸⁴ One such scholar, Terry Fisher, suggests that the way white Southerners defined and justified themselves and their society "affected the rhetoric and content of the law of slavery."²⁸⁵ After meticulously reviewing the literature, media, narratives, and traditions of the antebellum South, Fisher concludes that "the content of southern antebellum ideology helps account for the remarkable degree of inconsistency and instability in the law of slavery. . . . [W]hite Southerners were ambivalent or divided. Those divisions and uncertainties fostered corresponding divisions and uncertainties in legal doctrine."²⁸⁶ Another scholar, Reuel Schiller, similarly focuses on "community standards," and suggests that these standards determined the bounds of judicial decisionmaking. According to Schiller, "The various assumptions North Carolinians had about slavery (e.g., slaves are prone to rebellion or slaves have the mental capacities of children and must be treated as such) and law (e.g., it is impartial or it follows precedent) provided the context in which judicial decisions were handed down."²⁸⁷

This Article advances an interpretation of the criminal

on Roman law, English law (including Lord Coke, Blackstone, and Lord Hale), and decisions from New York, Pennsylvania, and North Carolina).

²⁸¹ Nash, *supra* note 22, at 66.

²⁸² Higginbotham & Jacobs, *supra* note 95, at 1067-68.

²⁸³ Fisher, *supra* note 22, Schiller, *supra* note 22, at 1219.

²⁸⁴ See *supra* note 59 and accompanying text.

²⁸⁵ Fisher, *supra* note 22, at 1057. Fisher traces some of the roots of his method to the works of non-legal historians, such as JOHN BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* (1972), GEORGE FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY* (1971), and EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1974).

²⁸⁶ Fisher, *supra* note 22, at 1081.

²⁸⁷ Schiller, *supra* note 22, at 1219.

laws of slavery that is influenced both by this cultural-contextual approach and by what may be called refined functionalism. As discussed more fully in Part IV, this interpretation shares Geertz's sensibility about the role of images and symbols in the shaping of ideas. At the same time, it also borrows from the functional approach a sensitivity to the political design of criminal laws; however, instead of focusing on powerlessness, it focuses on the allocation of discretion in the criminal process and thereby refines the analysis to accommodate conflicting interests—in particular the conflicting and ambiguous relationship between slaveholders and the criminal justice system. This methodological approach will also prove helpful in comparing the ideologies of the Warren and Rehnquist Courts.

C. *The Warren and Rehnquist Courts*

Like the decisions of the southern antebellum courts, the criminal law opinions of the Warren Court project a consistent, identifiable, and distinct ideology of criminal law. The court's mission was to even the scales of justice in favor of the uneducated, the impoverished and the unknowing defendant. The landmark decisions provide counsel to the poor,²⁸⁸ warnings to the unknowing,²⁸⁹ safeguards for the young,²⁹⁰ and (some) protections for African-Americans.²⁹¹ Beginning in 1954 with the case of *Hernandez v. Texas*,²⁹² the Warren Court attempted to redress racial and ethnic inequities in jury service.²⁹³ "As Charles Ogletree has suggested, much of the Warren Court's 'criminal procedure' reform more properly

²⁸⁸ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²⁸⁹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

²⁹⁰ *Gallegos v. Colorado*, 370 U.S. 49 (1962).

²⁹¹ *Swain v. Alabama*, 380 U.S. 202 (1965).

²⁹² 347 U.S. 475 (1954) (systematic exclusion of persons of Mexican descent from service as jury commissioners, grand jurors, and petit jurors violates equal protection clause).

²⁹³ See, e.g., *Swain*, 380 U.S. at 224 (1965) (recognizing a cause of action for pervasive discriminatory jury strikes by the prosecutor); *Arnold v. North Carolina*, 376 U.S. 773 (1964) (murder convictions reversed for systematic exclusion of blacks from grand jury which returned indictments); *Eubanks v. Louisiana*, 356 U.S. 584 (1958) (murder conviction reversed for systematic exclusion of blacks from grand jury, where only one Negro had served accidentally on grand jury within memory in the Parish of Orleans).

should be understood as constituting a branch of race law.²²⁴ In landmark cases like *Griffin v. Illinois*, *Gideon v. Wainwright*, and *Douglas v. California*, the Warren Court attempted to redress discrimination against the poor.²²⁵ Throughout, the Warren Court "read into the Constitution a philosophy of leveling"²²⁶

In contrast, the landmark decisions of the Rehnquist Court even the scales in favor of the victim, by allowing victim-impact evidence in a capital sentencing trial;²²⁷ in favor of the state's witness, by allowing testimony by closed-circuit television for child victims of sexual assault;²²⁸ in favor of the police officer and the public, by allowing a public-safety exception to *Miranda*;²²⁹ and in favor of the state, by restricting the federal writ of habeas corpus.²³⁰ The Rehnquist Court has

²²⁴ Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231, 2245 (1993) (citing Charles Ogletree, Lecture at the American Association of Law Schools Annual Meeting (Jan. 1990)).

²²⁵ "While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice." *Miranda v. Arizona*, 384 U.S. 436, 472 (1966) (referring in footnote 41 to the Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 9 (1963)). See, e.g., *Williams v. Illinois*, 399 U.S. 235 (1970) (indigent defendant cannot be subjected to extra incarceration beyond statutory maximum solely by reason of indigence); *Roberts v. LaVallee*, 389 U.S. 40 (1967) (indigent defendant entitled to transcript of preliminary hearing); *Draper v. Washington*, 372 U.S. 487 (1963) (indigent defendant has right to transcript or sufficient record of trial proceedings on first state appeal as of right); *Lane v. Brown*, 372 U.S. 477 (1963) (indigent defendant has right to transcript on appeal from state writ of error coram nobis); *Douglas v. California*, 372 U.S. 353 (1963) (indigent defendant has right to appellate counsel on first state appeal as of right); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (indigent defendant has right to counsel in state court); *Griffin v. Illinois*, 351 U.S. 12 (1956) (indigent defendant has right to transcript or sufficient record of trial proceedings on first state appeal as of right).

²²⁶ *Douglas*, 372 U.S. at 362 (Harlan, J., dissenting).

²²⁷ *Payne v. Tennessee*, 501 U.S. 808 (1991).

²²⁸ *Maryland v. Craig*, 497 U.S. 836 (1990).

²²⁹ *New York v. Quarles*, 467 U.S. 649 (1984).

²³⁰ See, e.g., *McCleskey v. Zant*, 499 U.S. 467 (1991) (restricting availability of writ on successive petition); *Coleman v. Thompson*, 501 U.S. 722 (1991) (restricting availability of writ where counsel erred in state post conviction proceedings); *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (restricting right to evidentiary hearing on petition for writ of habeas corpus in federal court); *Teague v. Lane*, 489 U.S. 288 (1989) (restricting retroactive applicability of new rules of law). See generally Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 303-05 (1993) (discussing and cataloguing the recent decisions narrowing the reach of

limited and restricted many of the equalizing principles of the Warren Court. It has consistently refused to extend protections for indigent defendants, and has, in certain areas, limited their access to the courts.³⁰¹ As Charles Ogletree writes:

Although the Rehnquist Court has yet to overrule the cornerstone Warren Court precedents—*Miranda v. Arizona*, *Gideon v. Wainwright*, and *Mapp v. Ohio*—the extension of the harmless error analysis to constitutional errors in the landmark case of *Chapman [v. California]* has allowed the Court to dilute the practical effect of many of these important protections.³⁰²

All in all, the decisions of the Rehnquist Court reflect the “growing sentiment that too much emphasis is placed on the ‘rights’ of criminals, and that victims, and law abiding citizens, have few rights.”³⁰³ In an interview with the New York Times in 1985, Justice Rehnquist admitted these sentiments:

I came to the court sensing, without really having followed it terribly closely, that there were some excesses in terms of constitutional adjudication during the era of the so-called Warren Court . . . And I felt that I probably would disagree with some of those decisions. . . . So I felt that at the time I came on the Court, the boat was kind of heeling over in one direction. Interpreting my oath as I saw it, I felt that my job was, where those sort of situations arose, to kind of lean the other way.³⁰⁴

Justice Rehnquist acknowledged that “[i]n the area of constitutional rights of accused criminal defendants, the Court has called a halt to a number of the sweeping rulings that were made in the days of the Warren Court.”³⁰⁵ Overall, the

the writ of habeas corpus, in the context of arguing that the consistent thread throughout habeas corpus jurisprudence has been a federal common law approach of equitable discretion).

³⁰¹ See, e.g., *Denton v. Hernandez*, 504 U.S. 25 (1992) (district court may pierce the veil of the complaint's factual allegations in an in forma pauperis complaint and dismiss the complaint where the facts appear fanciful); *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (right to appointed counsel does not extend to indigent defendant challenging her conviction in state post-conviction proceedings); *Ross v. Moffitt*, 417 U.S. 600 (1974) (right to appointed counsel does not extend to indigent defendant on his discretionary appeal to the state supreme court).

³⁰² Charles J. Ogletree, Jr., *Arizona v. Fulminante: The Harm of Applying Harmless Error To Coerced Confessions*, 105 HARV. L. REV. 152, 157-58 (1991).

³⁰³ *Id.* at 171.

³⁰⁴ John A. Jenkins, *The Partisan*, N.Y. TIMES, Mar. 3, 1985 (magazine), available in LEXIS, Allnews Library, NYT file.

³⁰⁵ *Id.* at *9 (quoting Justice Rehnquist).

Rehnquist Court has made the criminal justice system more responsive to the needs of victims, police, and states. Its refrain has been that "justice, though due to the accused, is due to the accuser also . . . We are to keep the balance true."³⁰⁶

Scholars have offered a number of different ways to explain the shift in ideology from the Warren Court to the Rehnquist Court. This Article will explore three of these approaches, as informed by the methodological discussion from the slavery context.

The first approach to the modern cases—what might be called raw functionalism—contrasts the ideologies along the defendant-state axis. Whereas the opinions of the Warren Court are often described as "pro-defendant," the opinions of the Rehnquist Court can be characterized as "pro-state" or "anti-defendant." Craig Bradley, a professor and former law clerk³⁰⁷ of Rehnquist, describes the Chief Justice as "unquestionably the most conservative member of the Court, that is, *the most likely to vote against a criminal defendant*"³⁰⁸ Erwin Chemerinsky argues that the Rehnquist Court consistently "accepts and endorses conservative views" and "narrow[s] the rights of criminal defendants."³⁰⁹ David Shapiro suggests that a basic proposition guiding Rehnquist is that "[c]onflicts between an individual and the government should, whenever possible, be resolved against the individual."³¹⁰ Charles Ogletree contends that, for Rehnquist, "the judicial imperative is to 'lock criminals up.'"³¹¹

These characterizations, though caustic, do reflect the voting patterns of the Rehnquist Court. In the 1988 term, for instance, the Rehnquist Court "sided with the government in

³⁰⁶ *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.)).

³⁰⁷ Craig Bradley testified on behalf of Justice Rehnquist at the Senate Judiciary Hearings on the Nomination of William Rehnquist to be Chief Justice of the United States (July 31, 1986). See *Nomination of William Rehnquist as Chief Justice of the United States: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 2d sess. (1986); Bradley, *supra* note 23, at 273 n.*.

³⁰⁸ Bradley, *supra* note 23, at 274 (emphasis added).

³⁰⁹ Erwin Chemerinsky, *Is the Rehnquist Court Really that Conservative?: An Analysis of the 1991-92 Term*, 26 CREIGHTON L. REV. 987 (1993).

³¹⁰ David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 294 (1976).

³¹¹ Ogletree, *supra* note 302, at 173.

twenty-seven out of thirty-five criminal procedure cases."³¹² In nonunanimous criminal cases from 1985 to 1992, Rehnquist voted against the individual (criminal defendant or prisoner) ninety-one percent of the time; Scalia eighty-six percent of the time; and Kennedy, O'Connor and Thomas, seventy-eight, seventy-eight and seventy-five percent of the time, respectively.³¹³ In this sense, the numbers support the first approach; nevertheless, it seems overly simplistic. It is hard to believe that criminal defendants are going to be denied relief simply because they are criminal defendants. By focusing on the powerless—rather than on the allocation of discretion—this approach lacks the refinement necessary to explain the cases where the defendant prevails.

A second approach compares the competing ideologies from the perspective of an intentionalist versus determinist account of human conduct.³¹⁴ Intentionalism describes human conduct as the product of free will and autonomous choice.³¹⁵ Determinism describes human conduct as causally related to antecedent factors, such as education, environment, or culture.³¹⁶ Mark Kelman suggests that these two competing accounts of human nature represent "conscious interpretive constructs" that "function as unreasoned presuppositions that solve cases while obscuring the dissonant, fundamentally nondeductive nature of legal discourse."³¹⁷

³¹² Jennifer L. Hurley, *Has the Supreme Court "Wrench[ed]" the Sixth Amendment From its Proper Context?* 24 U. TOL. L. REV. 967, 988 n.232 (1993) (citing Robert J. Giuffra, Jr., *Introduction—The Rehnquist Court*, 22 U. TOL. L. REV. 521, 550 (1991)); see also Erwin Chemerinsky, *The Supreme Court 1988 Term—Forward: The Vanishing Constitution*, 103 HARV. L. REV. 43, 57 (1989).

³¹³ Christopher E. Smith, *Justice Antonin Scalia and Criminal Justice Cases*, 81 KY. L.J. 187, 193 (1992-93).

³¹⁴ See Kelman, *supra* note 16, at 596-97; MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 86 (1987) (hereinafter "KELMAN, CLS GUIDE"); Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245, 2246 (1992); Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091 (1985); Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 LAW & CONTEMP. PROBS. 47 (1986).

³¹⁵ See Kelman, *supra* note 16, at 597; KELMAN, CLS GUIDE, *supra* note 314, at 86; Boldt, *supra* note 314, at 2246.

³¹⁶ See Kelman, *supra* note 16, at 597; KELMAN, CLS GUIDE, *supra* note 314, at 86; Boldt, *supra* note 314, at 2246 & n.1.

³¹⁷ Kelman, *supra* note 16, at 597. Kelman also suggests that there is little consistency in the adoption of either framework, and that the intentionalist model generally holds sway in the criminal law. See Kelman, *supra* note 16, at 598

The criminal law ideology of the Warren Court is located more on the determinist side. Although the court does not go so far as to deny criminal culpability because of "harsh background circumstances"³¹⁸—and therefore does not carve out a full deterministic excuse³¹⁹—the court does take account of background circumstances such as poverty and lack of education, and attempts to compensate for those circumstances through criminal justice. In contrast, the ideology of the Rehnquist Court places its emphasis on individual responsibility and free choice—what could be characterized as intentionalism. Whereas the opinions of the Warren Court focus on the environmental factors that render the criminal defendant vulnerable to committing crimes, the opinions of the Rehnquist Court treat the criminal defendant's act in isolation, as the product of his free will.³²⁰ The Rehnquist Court does not appear interested in understanding crime in a way that would reduce the defendant's freedom of choice. The role of the criminal justice system is, instead, to "keep the balance true" and vindicate the rights of the victim and society.

The shift from a determinist to an intentionalist outlook also provides a good fit with the images of criminal defendants described in Part II. The image of the vulnerable, impressionable, uneducated defendant corresponds well to the ideology of leveling, equalizing and educating. Similarly, the image of the

("[m]ost basic issues of the criminal law are issues of the applicability of an intentionalist model"); see also Boldt, *supra* note 314, at 2247 ("[t]he thesis of this article is that the criminal law—indeed, the legal system generally—does more than simply express an intentionalist perspective. Rather, it is a vital societal mechanism by which that perspective is created and maintained, and the causal or objective perspective obscured"). This Article takes a slightly different view of the matter.

³¹⁸ Kelman, *supra* note 16, at 645.

³¹⁹ This would be the extreme position: that harsh background circumstances are an excuse to criminal liability. This issue was debated between David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976) and Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976); see also Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 L. & INEQ. J. 9 (1985).

³²⁰ Though this outlook is called "intentionalist" here, it also produces a sort of determinism in the sense that the criminal defendant becomes his criminal act and therefore becomes, in his essence or genetically, "just plain mean." This single-minded focus on the criminal act ultimately deprives the defendant of arguing for his reduced culpability.

cold-blooded, recidivist, unredeeming defendant corresponds well to the ideology of limited federal review of state convictions. This approach has the additional advantage of incorporating the prior comparative approach. It accounts for the pro-defendant/pro-state dichotomy. Nevertheless, it too has shortcomings, due, again, to its emphasis on the criminal defendant. It fails to explain decisions that address the legitimate scope of law enforcement and the proper allocation of power between state and federal courts.

Peter Arenella proposes a third approach.³²¹ Arenella offers, in essence, a reconstructed version of Herbert Packer's crime control and due process models³²² as a way to isolate the distinctive characteristics of the criminal law. Arenella suggests that ideologies of criminal procedure necessarily promote general functions, such as truth-discovery, efficiency, finality and the protection of individual rights. According to Arenella, however, these general functions do not provide helpful ways of defining or comparing the ideologies.³²³ Instead, a more focused conception of the functions served by the criminal

³²¹ Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 212 (1983).

³²² See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968) (hereinafter "LIMITS"); Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964); see also Ogletree, *supra* note 302, at 172 n.122. The two models can be summarized as follows. The crime control model places its emphasis on the swift resolution of criminal cases by administrative techniques (plea bargaining with police investigators that have cracked the case) in order to promote law and order. PACKER, *LIMITS*, *supra* at 160-65. The due process model relies on the adjudicatory process (trial in the adversarial paradigm) in order to best promote the respect and dignity of the individual and of the criminal process. PACKER, *LIMITS*, *supra* at 165-68. See also Arenella, *supra* note 321, at 210-11.

³²³ Arenella, *supra* note 321, at 186-88. According to Arenella, the "tired clichés like truth-discovery, crime control, and the protection of individual rights" create a "shallow" debate that "fails to illuminate fundamentally different approaches to the criminal process." Arenella, *supra* note 321, at 186, 187. From the perspective of these "tired clichés," the Burger and Warren Courts do not look that different. In part, this is because there is "no pure 'guilt or innocence' model of American criminal procedure. Constitutional criminal procedure serves other goals—efficient allocation of scarce resources, power allocation, and the protection of fair process norms—that may impair its function of reliably determining substantive guilt." Arenella, *supra* note 321, at 208. In the case of the Warren and Burger Courts, these "tired clichés" mask two very different ideologies of criminal procedure. "The academic consensus about the Burger Court ignores or minimizes the degree to which the Court's rhetoric and doctrine reflect a vision of criminal law's goals and procedural functions that differs significantly from that espoused by the Warren Court." Arenella, *supra* note 321, at 187.

process, and an analysis of how these functions are pursued, provide a better way to understand competing ideologies.

Arenella provides this concrete statement of the specific functions of American criminal procedure:

First, criminal procedure must provide a process that vindicates substantive criminal law goals. This procedural mechanism must determine substantive guilt³²⁴ reliably, authoritatively, and in a manner that promotes the criminal law's sentencing objectives. Second, criminal procedure must provide a dispute resolution mechanism that allocates scarce resources efficiently and that distributes power among state officials. Finally, criminal procedure can perform a legitimation function by resolving state-citizen disputes in a manner that commands the community's respect for the fairness of its processes as well as the reliability of its outcomes . . . by articulating fair process norms that attempt to validate the state's exercise of coercive power over its citizens.³²⁵

The opinions of the Warren Court pursue the first function through a commitment to trial adjudication—even though this “was tempered by its concern about an overburdened criminal justice system.”³²⁶ The decisions pursue the second function by constitutionalizing many aspects of criminal procedure and by judicially regulating law enforcement conduct.³²⁷ Finally, the Warren Court opinions promote the third function “by using, when possible, rules rather than standards to define the content of fair process norms and the circumstances under which they can be waived.”³²⁸ In addition, the Court took expansive views of its supervisory authority over the federal courts and of its jurisdiction under habeas corpus to resolve claims denied in state courts.³²⁹ Overall, the court's willingness to remedy violations of fair process norms by excluding evidence that would have been probative as to factual guilt, reflects the view that the criminal process was equally impor-

³²⁴ “Substantive guilt” is not merely factual guilt; it includes a moral component or “value judgments about the actor's moral culpability.” Arenella, *supra* note 321, at 198. Because of the moral component, “substantive guilt” cannot be equated with “truth-discovery.” This moral component is precisely what Gary Peller claims has not been deconstructed by a realist critique and results in the Warren Court's emphasis on process over substance. Peller, *supra* note 294, at 2239.

³²⁵ Arenella, *supra* note 321, at 188.

³²⁶ Arenella, *supra* note 321, at 229.

³²⁷ Arenella, *supra* note 321, at 231.

³²⁸ Arenella, *supra* note 321, at 240.

³²⁹ Arenella, *supra* note 321, at 240.

tant to the outcome of the criminal trial.³³⁰ "Perhaps the Warren Court's most significant message about criminal procedure's functions lay in its attempts to reinforce the notion that the criminal process should treat individuals with dignity and respect even if such treatment occasionally impairs the accuracy of the system's outcomes."³³¹

The Rehnquist Court has pursued the functions of criminal procedure differently. In particular, the Rehnquist Court "expresses a basic faith in the decentralized exercise of power by criminal justice officials."³³² The Rehnquist Court "trusts executive power and seeks to deregulate it."³³³ In addition, the Rehnquist Court has pursued fair process norms that relate to the legitimizing function of the criminal courts by "limiting opportunities for judicial implementation of norms that impair the state's capacity to detect and punish factually guilty offenders,"³³⁴ particularly by restricting the writ of habeas corpus in cases involving state criminal convictions.³³⁵ The Rehnquist Court, more so even than the Burger Court, reflects a number of themes from Arenella's reconstructed crime control model:

judicial deregulation of state and federal criminal justice officials, hostility to fair process norms that impair the state's capacity to detect and punish the factually guilty, and a pronounced tendency to view individual rights from a utilitarian perspective that defines their content in light of their functional impact on the system's capacity to promote social control.³³⁶

In contrast to the prior methods, this approach explains

³³⁰ Arenella, *supra* note 321, at 247. This reflects a clear articulation of the reconstructed due process model.

³³¹ Arenella, *supra* note 321, at 247.

³³² Arenella, *supra* note 321, at 223.

³³³ Arenella, *supra* note 321, at 233. Yale Kamisar, for instance, described then-Justice Rehnquist as "willing and eager to dismantle the work of the Warren Court in the search and seizure area." See Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *The Burger Court (Was It Really So Prosecution-Oriented)* and *Police Investigatory Practices*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 62, 81 (V. Blasi ed., 1983).

³³⁴ Arenella, *supra* note 321, at 241.

³³⁵ See, e.g., Smith, *supra* note 313, at 205-06 (discussing Scalia's efforts to curb filings by death row inmates by declaring that "he would not give extensions for the filing deadlines, even for prisoners who lacked professional assistance and thus were forced to represent themselves in seeking Supreme Court review").

³³⁶ Arenella, *supra* note 321, at 247.

the criminal law decisions that address police powers, as well as the allocation of power between state and federal courts. It has greater depth because it focuses not only on the criminal defendant, but on the allocation of discretion in the criminal justice system. Thus, the Warren Court's efforts to constitutionalize rules of criminal procedure reflect the court's inherent distrust of executive power (police and prosecutor),³³⁷ which is well illustrated by its imagery of police officers. Similarly, the Warren Court's overriding concerns for the integrity of the criminal process—which reinforces the notion that defendants should be treated with dignity and respect—reflect the court's inclusive image of the defendant as citizen. The Rehnquist Court's decentralization and trust of executive power mirrors its image of the police officer as trustworthy and its repeated theme that the courts should not impose additional duties on an already overly burdened police.³³⁸ In this way, Arenella's approach highlights the fundamental shift in the ideologies of the Warren and Rehnquist Courts by focusing on the allocation of discretion within the criminal justice system.

IV. THE IMPACT OF IMAGERY AND IDEOLOGY ON THE ADJUDICATIVE PROCESS IN THE CRIMINAL LAW

With these structures in place, it is possible to critically explore the relationship between imagery and ideology in the criminal law. The thesis of this Article is that images and ideologies relate in a dynamic way that produces centrifugal force in the adjudicative process: ideologies sharpen images, and images sharpen ideologies in a cyclical manner that creates distance in the resolution of criminal cases. This dynamic process includes several movements and this part of the Article will explore each of these movements separately.

³³⁷ Arenella, *supra* note 321, at 223, 231.

³³⁸ See also Smith, *supra* note 313, at 193 ("[t]he reduction of the scope of constitutional protections for criminal defendants and prisoners . . . is attributable to both the conservative philosophical orientations of recent Supreme Court appointees and increased skepticism among the justices about the continued risks of misbehavior by criminal justice officials"); see also Christopher E. Smith, *Police Professionalism and the Rights of Criminal Defendants*, 26 CRIM. L. BULL. 155 (1990).

A. *The Antebellum Period*

No one disputes that ideologies shape images. This is demonstrated well in the earlier discussion of the imagery in slave law.³³⁹ What is more intriguing is how images shape ideologies. The case of *Spence, a slave v. The State*³⁴⁰ provides a powerful illustration. Spence was charged with murder. At his trial, a jury was empaneled and included, as one of the eight slaveholder jurors, a fellow named Scurlock. During jury selection, Scurlock explained that he did not own any slaves at the time of trial, but that he was likely to inherit slaves in the very near future because his father had passed away and the estate, which included slaves, was under administration.³⁴¹ The trial court accepted Scurlock as a slaveholder juror, but certified the question for the appellate court. Spence was convicted of murder and sentenced to death.

The Alabama Supreme Court reversed Spence's conviction, holding that Scurlock was not a competent juror. He did not own slaves and there was a possibility he might not inherit any from his father's estate. He "expected upon . . . the distribution of his father's estate . . . to become a slaveholder. But before that time they might die; they might be sold for the purpose of a more equitable distribution; many circumstances might occur which would prevent either the legal title or the possession ever vesting."³⁴² According to the court, the law required more than a mere property qualification.

Why the fuss? Because of the lurking threat that an obedient and faithful slave might in fact reveal himself to be a traitor. This made it necessary to entrust the delicate task to *actual* slaveholders. Only they were familiar with the idiosyncracies of slaves. Only they were, in the words of the court, "*persons supposed to be familiar with this species of property, to have obtained a knowledge of their peculiarities and idiosyncracies from personal observation.*"³⁴³ Slaveholders were need-

³³⁹ See *supra* text accompanying notes 94-132 (discussing how fundamental tensions in the law of slavery affected the imagery of slave criminal defendants).

³⁴⁰ 17 Ala. 192 (1850).

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.* at 193 (emphasis added).

ed on the jury because they alone could discern the obedient, redeemable slave from the rebellious traitor.³⁴⁴

In this sense, the image of the chameleon slave became the available mental image from which the court formed an opinion about Scurlock's competence as a juror. This mental image became the basis of a facile heuristic device: slaves are peculiar and idiosyncratic and only slaveholders can really tell them apart. In the same way, the schizophrenic image of the slave as property empowered the slaveholder in the criminal justice system. Through that image, slaveholders gained control of the jury box, set fair market values and assigned the portion of the slave's value to be reimbursed to the owner.³⁴⁵

B. *The Warren Court*

The next step is to explore how this dynamic relationship between imagery and ideology creates centrifugal force in the judicial process. The opinions in *Haynes v. Washington*³⁴⁶ illustrate this well. Robert L. Haynes was accused of robbery and caught red-handed. When the police stopped to pick him up, he told them they had the right man. The police detained Haynes incommunicado for about sixteen hours, and repeatedly denied his requests to call his wife and an attorney—after which he signed a written confession.³⁴⁷ By the time the Warren Court decided *Haynes* in 1963, the court had developed a substantial body of law governing confessions. On the facts of

³⁴⁴ It is interesting to note that A.E. Keir Nash relies on the *Spence* case in support of the proposition that southern appellate judges ensured unbiased judges and juries. See Nash, *supra* note 22, at 81 and n.77. This underscores some of the flaws of Nash's statistical analysis, which fails to take into account that many reversals were entirely unrelated to the rights of the black defendant. Nash attributes to the appellate judges pro-slave leanings when in fact the decisions served only to perpetuate the system of chattel slavery.

³⁴⁵ This, in turn, legitimized punishment in the eyes of the slaveholding society. Newspaper accounts emphasized the participation of the slaveholder community in the trial process, as evidenced by the following newspaper report: "In November, 1843, Nancy, a slave of Parker Beasley was convicted of assault to kill Mary Beasley. Nancy, tried by a jury made up of 2/3's slaveholders, was sentenced to hang." The record of the trial also explicitly reflected that two-thirds of the jurors were slaveholders. See *Nancy, a slave v. The State*, 6 Ala. 483 (1844). On Jan. 27, 1845, the Alabama Legislature appropriated to Parker S. Beasley \$250 for a slave woman executed in Montgomery County in March 1844. Act of Ala. Vol 31, at 173.

³⁴⁶ 373 U.S. 503 (1963).

³⁴⁷ *Id.* at 504.

his case, Haynes had a strong claim of coercion. The lengthy incommunicado detention, coupled with unfulfilled promises that he could call his wife, were damning. A majority of the court ruled for Haynes in an opinion, written by Justice Goldberg, that focused on the police misconduct and its impact on the rule of law.

Justice Clark, in an impassioned dissent, focused the reader instead on the image of the defendant. Clark essentially argued that Haynes did not fit the image. Haynes was "a mature adult," "neither youthful in age . . . nor lacking in experience in law breaking," "of at least average intelligence," who was not "a stranger to police techniques," "nor unaware of his rights on arrest."³⁴⁸ Haynes did not look like the vulnerable defendant: he was neither young, nor mentally deficient and he did not appear impressionable. Clark's opinion seizes the visual terrain and sketches out caricatures of the criminal defendants from the Warren Court:

[The petitioner] cannot be placed in the category of those types of people with whom the Court's cases in this area have ordinarily dealt, such as the mentally subnormal accused, *Fikes v. Alabama*, 352 U.S. 191 (1957); *Payne v. Arkansas*, 356 U.S. 560 (1958), and *Reck v. Pate*, 367 U.S. 433 (1961); the youthful offender, such as *Haley v. Ohio*, 332 U.S. 596 (1948), and *Gallegos v. Colorado*, 370 U.S. 49 (1962); or the naive and impressionable defendant, such as *Lynumn v. Illinois*, 372 U.S. 528 (1963).³⁴⁹

The "mentally subnormal accused," the "youthful offender," and the "naive and impressionable defendant": these are the images of criminal defendants from the Warren Court. Clark turns cases into stereotyped mental images, and he then applies representativeness heuristics to solve the legal dispute: Haynes does not look like any of these images of coerced criminal defendants, so he was not coerced.³⁵⁰

³⁴⁸ *Id.* at 522 (Clark, J., dissenting) (opinion joined by Justices Harlan, Stewart and White).

³⁴⁹ *Id.* (Clark, J., dissenting).

³⁵⁰ What is interesting about Clark's catalogue and, in particular, about his description of Haynes, is the absence of the image of the savage and diabolical defendant. The foil to the impressionable and naive defendant is not the rebellious, but rather the mature adult who should be held accountable. Justice Clark takes great pains in *Haynes* to describe for the reader his image of the defendant:

The petitioner is neither youthful in age (though his exact age is not shown by the record) nor lacking in experience in law breaking. . . .

The use of this heuristic device, however, creates distance in the debate. Goldberg and Clark begin to talk about two very different individuals. Goldberg responds in two ways. First, he sharpens his ideological position: regardless of the defendant's mental state and physical ability, the police misconduct *alone* renders the confession involuntary. Second, he projects his own stereotyped mental image of the police officer. As the images become more defined, the ideologies become sharper:

Official overzealousness of the type which vitiates the petitioner's conviction below has only deleterious effects. . . . [I]t is the deprivation of the protected rights themselves which is fundamental and the most regrettable, not only because of the effect on the individual defendant, but because of the effect on our system of law and justice. Whether there is involved the brutal "third degree," or the more subtle, but no less offensive, methods here obtaining, official misconduct cannot but breed disrespect for law, as well as for those charged with its enforcement.³⁵¹

Gradually, the majority and dissent are no longer able to communicate, because Clark's stereotyped, available mental image of the criminal defendant does not relate to Goldberg's stereotyped, available mental image of the police.

The landmark decision of *Miranda v. Arizona*³⁵² also reflects the centrifugal effect of images on adjudication. Warren's

Some indication of his approximate age is given by the facts that his wife had been employed for some 14 years by the same employer, and that 11 years prior to the trial he had his first brush with the law, i.e., drunken driving, resisting arrest and being without a driver's licence. Further, in 1949 he was convicted of breaking and entering, and in 1950 of robbery. During the same year he pleaded guilty to breaking jail and to "taking a car." He had not only served time but had been on parole for two years, making regular visits to parole officers to whom he was assigned.

Id. at 522 (Clark, J., dissenting). See also *Massiah v. United States*, 377 U.S. 201, 207 (1964) (White, J., dissenting) ("The current incidence of serious violations of the law represents not only an appalling waste of the *potentially happy and useful lives of those who engage in such conduct* but also an overhanging, dangerous threat to those unidentified and innocent people who will be the victims of crime today and tomorrow") (emphasis added).

³⁵¹ *Haynes*, 373 U.S. at 519. This statement, which recalls Justice Brandeis's classic statement in *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), is then repeated in the decisions of lower courts. See, e.g., *United States ex rel. Smith v. New Jersey*, 323 F.2d 146, 157 (3d Cir. 1963) (en banc) (Biggs, C. J., dissenting); *State v. Hinkle*, 286 S.E.2d 699, 700 (W. Va. 1982); *State v. Hoyt*, 124 N.W.2d 47, 59 (Wis. 1963).

³⁵² 384 U.S. 436 (1966).

opinion in *Miranda* is premised on voluminous, negative police imagery. Ten full pages of his opinion document police abuse.³⁵³ The lengthy descriptions of police interrogation, psychological coercion, incommunicado detention and "Mutt and Jeff" tactics saturate the reader with graphic mental images of police misconduct and victimization. "Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party."³⁵⁴ A "police doctor told [the] accused, who was strapped to a chair completely nude, that he proposed to take hair and skin scrapings from anything that looked like blood or sperm from various parts of his body."³⁵⁵ Even though these images have nothing to do with the facts in *Miranda*, they compel the legal holding. Clark and White try to rehabilitate the police. "I am proud of their efforts, which in my view are not fairly characterized by the Court's opinion."³⁵⁶ "The obvious underpinning of the Court's decision is a deep-seated distrust of all confessions."³⁵⁷ Because they are images, however, these depictions of police officers are not subject to full rational debate. The images operate silently. They offer facile heuristic devices that sharpen the competing ideologies and, ultimately, lead both sides further apart.

C. *The Rehnquist Court*

This dynamic relationship between imagery and ideology is also expressed in the criminal law opinions of the Rehnquist Court. *Arizona v. Fulminante*³⁵⁸ is a good illustration. Oreste

³⁵³ *Id.* at 445-55.

³⁵⁴ *Id.* at 446.

³⁵⁵ *Id.* at 446-47 n.7.

³⁵⁶ *Id.* at 500 (Clark, J., dissenting in part).

³⁵⁷ *Miranda*, 384 U.S. at 537 (White, J., dissenting).

³⁵⁸ 499 U.S. 279 (1991). The questions presented in *Fulminante* were whether the confession was coerced, and, if so, whether harmless error applied to its introduction at trial. Justice White, writing for a majority of the Court, declared that the confession was coerced. Chief Justice Rehnquist, who disagreed, nevertheless ruled, in the portion of his opinion that represented the opinion of the Court, that harmless-error analysis applied to the introduction of a coerced confession. Justice White, who disagreed with that, concluded for a majority of the Court that the introduction of the coerced confession was not harmless and thereby affirmed the opinion of the Arizona Supreme Court.

Fulminante was convicted of the murder of his eleven-year-old daughter in part on the basis of a confession that he gave to a fellow inmate, Anthony Sarivola, who was a paid informant for the F.B.I. Rehnquist's opinion projects an image of Oreste Fulminante as a tough guy. He describes Fulminante as "an experienced habitue of prisons."³⁵⁹ "He had six prior felony convictions and had been imprisoned on three prior occasions."³⁶⁰ As Charles Ogletree suggests, "Chief Justice Rehnquist regarded Fulminante as a sophisticated criminal . . . who was able to handle the pressures to confess."³⁶¹

This stereotypical image of the tough guy leads Rehnquist to conclude that Fulminante *could* protect himself. The image is absorbed in the heuristic move. Rehnquist concludes that "Fulminante was an experienced habitue of prisons, and *presumably* able to fend for himself."³⁶² This question—whether Fulminante felt like he could fend for himself—was the pivotal issue, however. Rehnquist assumes the answer because he has an image of a tough guy. Yet, the facts of Fulminante's incarceration and of his physical and mental health support a competing image. Justice White points out that "Fulminante was slightly built and had spent time in the psychiatric unit of a prison during an earlier period of incarceration *due to his fear of other inmates*."³⁶³ This competing image of the fearful defendant, the defendant of slight build, carries with it a different presumption—certainly not the presumption that he was "able to fend for himself." Rehnquist does not see this other image. In fact, he makes no mention in his opinion of Fulminante's prior mental health problems or physical build. The stereotyped, available mental image of the tough guy effectively blinds Rehnquist.

Fulminante demonstrates how the mental image can replace reality, reinforce ideology, and, ultimately, break down communication. Rehnquist and White are talking about two different defendants. There is the tough guy Fulminante and the fearful Fulminante—and the two never meet. The compet-

³⁵⁹ *Id.* at 306.

³⁶⁰ *Id.* at 304.

³⁶¹ Ogletree, *supra* note 302, at 174.

³⁶² *Fulminante*, 499 U.S. at 306 (emphasis added).

³⁶³ Ogletree, *supra* note 302, at 174 (emphasis added) (citing *Fulminante*, 111 S. Ct. at 1252 n.2).

ing images sharpen their corresponding ideologies and create an unbridgeable gap in the adjudicative process. The judges do not discuss these images because images are not the locus of rational debate. Yet they create strong centrifugal force in adjudication.

*Thompson v. Oklahoma*³⁶⁴ provides another powerful illustration of this dynamic. The *Thompson* opinions, which address the propriety of executing a fifteen-year-old, project sharply different images of the criminal defendant. In what can only be described as a classic Warren Court maneuver, Justice Stevens portrays the young defendant as a child in need of protection. He repeatedly characterizes him as "a 'child' as a matter of Oklahoma law,"³⁶⁵ a "15-year-old child,"³⁶⁶ "such a young person."³⁶⁷ In sharp contrast, Justice Scalia draws the picture of a mature recidivist. Scalia sketches his image based entirely on the hideous facts of the crime: "I begin by restating the facts since I think that a fuller account of William Wayne Thompson's participation in the murder, and of his certification to stand trial as an adult, is helpful in understanding the case."³⁶⁸ Justice Scalia recites how "Thompson brutally and with premeditation murdered his former brother-in-law"³⁶⁹ by beating him in the head with his boots, cutting his throat and chest "so the fish could eat his body," shooting him twice in the head, and throwing him in the Washita River with a chain and blocks attached to his body.³⁷⁰ Justice Scalia then narrates, in detail, the evidence at the juvenile transfer hearing: Thompson had "an anti-social personality that could not be modified by the juvenile justice system," and had prior arrests for assault and battery, attempted burglary, and assault with a deadly weapon.³⁷¹ The image of the juvenile is that of a recidivist, psycho-murderer.³⁷²

³⁶⁴ 487 U.S. 815 (1988). Justice Stevens, writing for a plurality of the Court in *Thompson*, concludes that the execution of a 15-year-old youth violates the Eighth Amendment. Justice Scalia dissents, in an opinion joined by Chief Justice Rehnquist and Justice White.

³⁶⁵ *Id.* at 819.

³⁶⁶ *Id.* at 820.

³⁶⁷ *Id.* at 823.

³⁶⁸ *Id.* at 859-60 (Scalia, J., dissenting).

³⁶⁹ *Thompson*, 487 U.S. at 860.

³⁷⁰ *Id.* at 861.

³⁷¹ *Id.* at 862.

³⁷² It is worth noting that the motive of the crime was not the most despicable.

The contrasting images are not, by any means, accidental.³⁷³ Scalia *never* uses the word child or children to describe the defendant in his opinion—except when he quotes Stevens's plurality opinion.³⁷⁴ Throughout his opinion, Scalia refers to the defendant and the defendant's class as "15-year-old murderer[s],"³⁷⁵ "15-year-old criminals,"³⁷⁶ "15-year-old felons,"³⁷⁷ "15-year-olds,"³⁷⁸ "felons under 16,"³⁷⁹ "a person under 16,"³⁸⁰ "juveniles under 16,"³⁸¹ and "juveniles."³⁸² Scalia deliberately rejects Stevens's image of the child and instead portrays the class of fifteen-year-old defendants as street-wise recidivists, writing that³⁸³ "many juvenile delinquents [are] 'cynical, street-wise, repeat offenders, indistinguishable, except for their age, from their adult criminal counterparts'"³⁸⁴ "[I]n 1979 alone juveniles under the age of

It was not robbery, nor murder-for-hire, nor sexual gratification. Instead, the defendant apparently killed the victim because the victim was severely abusing the defendant's sister. Yet, even that does not get much play with Justice Scalia, who only writes that "the motive evidently being, at least in part, [the victim's] physical abuse of Thompson's sister." *Id.* at 860.

³⁷³ As Richard Posner reveals in his study of Benjamin Cardozo's famous opinion in *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), the omissions and misstatements producing mental images may, at times, be deliberate. See RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 42-45 (1990); see also L. H. LARUE, *CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY* 8 (1995) (arguing that "judicial opinions are filled with 'stories' that purport to be 'factual' but that instead are 'fictional,' and furthermore, that these 'fictions' could not be eliminated without crippling the legal enterprise").

³⁷⁴ *Thompson*, 487 U.S. at 872 (Scalia, J., dissenting) (referring to Stevens' comment about fiduciary obligations to children). Scalia also uses the term "child" once when explaining the Oklahoma law. *Id.* at 861.

³⁷⁵ *Id.* at 869.

³⁷⁶ *Id.* at 870, 873, 877.

³⁷⁷ *Id.* at 875.

³⁷⁸ *Id.* at 864, 866, 872, 874, 876, 877.

³⁷⁹ *Thompson*, 487 U.S. at 875.

³⁸⁰ *Id.* at 870.

³⁸¹ *Id.* at 868.

³⁸² *Id.* at 866, 868, 872.

³⁸³ Justice Scalia uses the same nomenclature—"16- and 17-year-old offenders"—in his majority decision in *Stanford v. Kentucky*, 492 U.S. 361, 375, 377 (1989) (holding that execution of 16 and 17-year-olds is constitutional).

³⁸⁴ *Thompson*, 487 U.S. at 865 (Scalia, J., dissenting) (quoting Hearings on S. 829 before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary, 98th Cong., 1st Sess., 551 (1983)); see also, *id.* at 874 ("[s]ome of the older minors become fully 'street-wise,' hardened criminals, deserving no greater consideration than that properly accorded all persons suspected of crime") (quoting *Fare v. Michael C.*, 442 U.S. 707, 734, n.4 (1979) (Powell, J., dissenting)).

15, *i.e.*, almost a year *younger* than Thompson, had committed a total of 206 homicides nationwide, more than 1,000 forcible rapes, 10,000 robberies, and 10,000 aggravated assaults."³⁸⁵ For Scalia, youth does not imply childishness, but rather the early onset of recidivism: Stevens's image is flat wrong.

These images feed back upon and sharpen ideology. "[S]ociety [has] fiduciary obligations to its children,"³⁸⁶ writes Stevens. "Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult."³⁸⁷ The notion of fiduciary obligation is empowered, reinforced, shaped by the stereotyped available mental image of the defendant as child. Stevens's argument crystallizes around the concept of protecting the vulnerable child. The image returns and reinforces the ideology.

This cycle of sharper images and crisper ideologies creates more and more distance between competing ideologies. There is no more common ground: Justice Stevens is dealing with a child and with society's fiduciary obligation to protect its children; Justice Scalia is dealing with street-wise repeat offenders from whom society is obliged to protect itself. These are the terms of the debate and they are irreconcilable. The parties are essentially talking about different people—one a child, the other an adult. Like the image of the fetus that drives pro-life and pro-choice activists further and further apart, the image of the child being executed creates distance in the adjudicative process.

V. REFLECTIONS

What this Article suggests is that imagery is far more determinative in the judicial process than is recognized in the text of criminal law opinions. Images of criminal defendants are powerful precisely because they are veiled—hidden not

³⁸⁵ *Id.* at 865-66 (Scalia, J., dissenting).

³⁸⁶ *Id.* at 837.

³⁸⁷ *Id.* at 835.

from the text or the reader, but from the decisionmaking process itself. Images shape the criminal law and create centrifugal force in adjudication.

A few other, equally intriguing generalizations can be gleaned from the analysis. The first is that the images used in judicial opinions have become more visual with time. The word descriptions in modern opinions are far more detailed, precise and visual than those from the antebellum South. Second, there seems to be greater predictability of outcome in the criminal law cases from the modern period than in those from the antebellum period. Third, images from the antebellum period recur in modern cases. The image of the obedient and faithful servant resurfaces in the Warren Court opinions. The image of the threatening and savage slave is mirrored in the decisions of the Rehnquist Court.

A. *The Visualness of Modern Images*

The images in the modern opinions are far more visual than those of the antebellum period. The modern opinions detail the defendant's age, height, clothes, IQ, race and criminal record. He is, for instance, a six-foot tall black male and wears a black jacket with yellow letters spelling "Big Ben."³³³ Or, he is a twenty-five-year old, born in Messina, Italy, who dropped out of school.³³⁹ These details are extremely visual and easily provoke stereotypical mental images of African-American gang members or Italian mobsters.

In contrast, the opinions of the antebellum period provide far less visual detail. In most cases, the slave is a stick figure, like Flora³⁹⁰ or Bob.³⁹¹ Lydia, the woman slave defendant in Chief Justice Ruffin's famous opinion, *State v. Mann*, is such a stick-figure that she loses her gender. Ruffin's entire discussion about slaves in *Mann* assumes a male pronoun.³⁹² In the

³³³ *New York v. Quarles*, 467 U.S. 649, 651 (1984).

³³⁹ *Spano v. New York*, 360 U.S. 315, 315, 316, 321-22 (1959).

³⁹⁰ *Flora, a slave v. The State*, 4 Port. 111 (Ala. 1836).

³⁹¹ *Bob, a slave v. The State*, 32 Ala. 560 (1858).

³⁹² Ruffin refers to the generic slave as "he." See *The State v. Mann*, 13 N.C.263, 266 (1829) ("he is thus to labour upon a principle of natural duty, or for the sake of his own personal happiness, such services can only be expected from one who has no will of his own").

antebellum opinions, the slave defendant is, as slave, a symbol of all slaves, a placeholder for general entreaties about the character of slaves. Slaves as a class are "ignorant,"³⁹³ "useful but degraded,"³⁹⁴ or at risk of becoming "the turbulent traitor."³⁹⁵ These are not individualized descriptions of the particular slave defendant, and are far less visual than the modern images.³⁹⁶

The ascendance of the visual reflects the fact that we live today in a "visually oriented culture."³⁹⁷ Images of felons, arrestees and criminal defendants—real and fictitious—bombard us every day on television, newspapers and magazine stands. The privileging of the visual is often described as a peculiarly contemporary—or postmodern—phenomenon.³⁹⁸ Our postmodern age is associated with "the takeover of images."³⁹⁹ It "borrows from popular culture, from the world of advertising, movies, and TV."⁴⁰⁰ It is associated with the music video, MTV, photo opportunities, CNN,

³⁹³ *Bob*, 32 Ala. at 567-68.

³⁹⁴ ALA. CONST. OF 1819, art. 6 in AIKIN'S DIGEST, *supra* note 102, *Slaves* § 16, at 394.

³⁹⁵ *The State v. Mann*, 13 N.C. 263, 267 (1829).

³⁹⁶ Orlando Patterson has suggested that the bland stereotype image of the slave is an ideological imperative of all systems of slavery and of the quintessential definition of the slave as a socially dead person. PATTERSON, *supra* note 111, at 207. This may contribute to the less visual nature of the word descriptions.

³⁹⁷ Petchesky, *supra* note 20, at 264. Petchesky observes how the use of the visual has accelerated in recent decades. "Beginning with the 1984 presidential campaign, the neoconservative Reagan administration and the Christian Right accelerated their use of television and video imagery to capture political discourse—and power." Petchesky, *supra* note 20, at 264. *See also* Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975, 1001 (1993) (discussing plight of "women in a consumer society dominated by visual images").

³⁹⁸ Postmodernism is, by its very nature, difficult to define. "Of all the terms bandied about in both current cultural theory and contemporary writing on the arts, postmodernism must be the most over- and under-defined." Linda Hutcheon, *Theorising the Postmodern Towards a Poetics*, in THE POST-MODERN READER 76 (Charles Jencks ed., 1992). In its simplest usage, postmodernism is "the cultural era in which we live" today. J. M. Balkin, *What Is A Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1967 (1992). In its more complex manifestations, it is often "identified with the rise of mass forms of communication and the commodification of intellectual products and symbolic forms." *Id.* at 1968.

³⁹⁹ Jennifer Wicke, *Postmodern Identity and the Legal Subject*, 62 U. COLO. L. REV. 455, 456 (1991).

⁴⁰⁰ Louise Harmon, *Law, Art, and the Killing Jar*, 79 IOWA L. REV. 367, 401 (1994).

telecommunications, and mass culture.⁴⁰¹ Most of these phenomena operate on the terrain of the visual: "With the television image—the television being the ultimate and perfect object for this new era—our own body and the whole surrounding universe become a control screen."⁴⁰² In this sense, our contemporary culture privileges the visual, which may account for the shift in the judicial opinions.⁴⁰³

B. *The Predictability of Modern Criminal Cases*

There is also a difference regarding the predictability of criminal law cases: remarkably, the outcome in modern cases seems more predictable than in the slave cases, at least in a state like Alabama. Voting patterns in criminal cases among the current members of the Rehnquist Court are strikingly consistent.⁴⁰⁴ In contrast, some southern appellate courts dis-

⁴⁰¹ Balkin, *supra* note 398, at 1969-76.

⁴⁰² Jean Baudrillard, *The Ecstasy of Communication*, in *THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE* 126-27 (Hal Foster ed., 1983).

⁴⁰³ The privileging of the visual, however, has also been described as a peculiarly masculine phenomenon. "[F]eminist cultural theorists in France, Britain, and the United States have argued that visualization and objectification as privileged ways of knowing are specifically masculine (man the viewer, woman the spectacle)." Petchesky, *supra* note 20, at 275. Luce Irigaray, for instance, has written in the context of sexuality, that

the predominance of the visual, and of the discrimination and individualization of form, is particularly foreign to female eroticism. Woman takes pleasure more from touching than from looking, and her entry into a dominant scopic economy signifies, again, her consignment to passivity: she is to be the beautiful object of contemplation.

Luce Irigaray, *This Sex Which Is Not One* in *THIS SEX WHICH IS NOT ONE* 25-26 (Catherine Porter trans., 1985). Studies of the psychology of sex differences conclude that it is "fairly well established" that boys have greater visual-spatial ability than girls, but that girls have greater verbal ability than boys. ELEANOR E. MACCOBY & CAROL N. JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* 351-52 (softbound ed. 1978), cited in Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 481 n.128 (1984). Feminist writers, such as Evelyn Fox Keller and Christine R. Grontkowski, have chronicled the privilege of the visual "as the primary means to knowledge in Western scientific and philosophical traditions." Petchesky, *supra* note 20, at 275 (citing Evelyn Fox Keller & Christine R. Grontkowski, *The Mind's Eye*, in *DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY, AND PHILOSOPHY OF SCIENCE* 207-24 (Sandra Harding & Merrill B. Hintikka eds., 1983). Thus, from the perspective of this critique, the supposed ascension of the visual in the late twentieth century may be an optical illusion—or worse, a vehicle of gender domination.

⁴⁰⁴ See Smith, *supra* note 313, at 193 (1992-93); see also Hurley, *supra* note 313, at 988 n.232 (citing Robert J. Giuffra, Jr., *Introduction—The Rehnquist Court*,

played less consistency toward the slave defendant.⁴⁰⁵ To be sure, a large number of reversals during the antebellum period bear little relationship to the criminal process, and are better explained by the market function that slave trials performed. Yet, even this explanation does not account fully for the cases reversing convictions on defective indictments or speedy trial violations—reversals that seem technical even by today's standards.⁴⁰⁶

Several hypotheses could explain the increased predictability. One is that slaveholders were more ambivalent about the criminal process because of their financial investment in slaves. Another is that the slavery debate unconsciously may have expressed itself through the criminal law. What this Article suggests, however, is that images play a role in the increased predictability of modern cases. In contrast to the vulnerable defendant in the Warren Court or the cold-blooded defendant in the Rehnquist Court, the slave defendant did not have one consistent, fixed image. At times he revealed himself obedient, at others he revealed himself a traitor. This multiplicity of imagery may well account for the lesser predictability in outcome. Moreover, the increased visual nature of modern opinions may invest courts with a greater need for consistency in the outcome of litigation.

It might be argued that the difference in the range of imagery is attributable to the way that this Article defines the historical periods. The Warren Court opinions include only those that Warren wrote or joined in; and the Rehnquist Court opinions include only those that Rehnquist wrote or joined in. Whereas these periods have narrow time frames and particularly influential judicial personalities, the analysis of antebel-

22 U. TOL. L. REV. 521, 550 (1991)); Chemerinsky, *supra* note 312, at 57.

⁴⁰⁵ See statistics of reversals in slave cases discussed *supra* at note 277.

⁴⁰⁶ See, e.g., *The State v. Phil*, a slave, 1 Stew. 31 (Ala. 1827) (discharging prisoner convicted of assault with intent to rape white woman because of a violation of speedy trial statute); *Nelson*, a slave v. *The State*, 6 Ala. 394 (Ala. 1844) (conviction for assault with intent to kill white person reversed for defective indictment); *The State v. Moses*, a slave, Minor 393 (Ala. 1825) (conviction for murder of master reversed because of defective indictment); *The State v. Clarissa*, a slave, 11 Ala. 57 (Ala. 1847) (conviction reversed for involuntary confession); *Ned*, a slave v. *The State*, 7 Port. 187 (Ala. 1838) (prisoner convicted of murder discharged because of improper discharge of jury); *Wyatt*, a slave v. *The State*, 25 Ala. 9 (Ala. 1854) (conviction reversed for involuntary confession).

lum slave cases spans a much longer historical period and a number of different courts and personalities. Does the wide-angle approach blur the distinctions of the southern judiciary and account for the more diverse imagery of slave defendants—and the lower predictability of outcome?

Not really. In the first place, both extremes of slave imagery can often be seen in one and the same judicial opinion. The images bleed into each other as the slave's character changes. A good illustration is Chief Justice Ruffin's dissenting opinion in *State v. Caesar*.⁴⁰⁷ There, the slave defendant killed a white man who had just battered the slave's friend. Ruffin dissented from the court's ruling that the slave was guilty of manslaughter rather than murder. Discussing the attributes of slaves, Ruffin deliberately commingles his images. He writes:

[I]t is an incontestable fact, that the great mass of slaves—nearly all of them—are the least turbulent of all men; that, when sober, they never attack a white man; and seldom, very seldom, exhibit any temper or sense of provocation at even gross and violent injuries from white men. . . . Such being the real state of things, it is a just conclusion of reason, when a slave kills a white man for a battery not likely to kill, maim, or do permanent injury . . . that the act did not flow from generous and uncontrollable resentment, *but from a bad heart—one, intent upon the assertion of equality, social and personal, with the white, and bent on moral mischief in support of the assertion.*⁴⁰⁸

As Fisher explains, the slave defendant "had by his violent reaction . . . lifted his mask, shown himself to be one of the few inherently 'bad' slaves—rebellious, cunning, and homicidal."⁴⁰⁹ Ruffin's use of both images in the same opinion reflects a very different relationship to imagery. Whereas the Warren and Rehnquist Courts each display their own unitary para-

⁴⁰⁷ 31 N.C. 391, 9 Ired. 49 (1849); see Fisher, *supra* note 22, at 1061-62.

⁴⁰⁸ *Caesar*, 31 N.C. at 424 (emphasis added), quoted in Fisher, *supra* note 22, at 1061-62. It is interesting to note that the same image of the malignant heart is projected in *State v. Hoover*, 4 Dev. & Bat. 365, 20 N.C. 413 (1839), a case involving a white master accused of killing his slave. There too, Ruffin attributes evil acts to a malignant heart. "[T]he acts imputed to this unhappy man do not belong to a state of civilization. They are barbarities which could only be prompted by a heart in which every humane feeling had long been stifled." *Id.* at 368; see also *id.* at 369 ("the acts of the prisoner were not perpetrated in sudden heat of blood, but must have flowed from a settled and malignant pleasure in inflicting pain, or a settled and malignant insensibility to human suffering").

⁴⁰⁹ Fisher, *supra* note 22, at 1062.

digm, the antebellum courts use both paradigms as alternative portraits.

In the second place, the same antebellum judge can be seen using different slave images in different decisions. Ruffin is, again, a good example. In his opinion in *State v. Mann*,⁴¹⁰ Ruffin projects an image of the slave as traitor;⁴¹¹ yet, in *State v. Hoover*,⁴¹² Ruffin portrays the slave as obedient servant.⁴¹³ What is most revealing is that, in both cases, Ruffin sets up the possibility that the image of the slave could have been different, that the slave's character could well have been its mirror opposite.

Ruffin's opinions are not eccentric deviations from otherwise more consistent imagery. The opinions of Justice R. W. Walker of the Alabama Supreme Court display the same variety of slave images. Walker described slaves as "ignorant"⁴¹⁴ in one opinion, yet acceded elsewhere to the image of the eleven-year-old slave as "heap[s] smarter than boys of twelve years generally are."⁴¹⁵ Similarly, Justice Ormond of the Alabama Supreme Court portrayed the slave defendant as property in one case,⁴¹⁶ recognized the moral obligations of slaves in another,⁴¹⁷ and acceded to an image of the slave as loyal and obedient servant in yet another case.⁴¹⁸

⁴¹⁰ 13 N.C. 263 (1829).

⁴¹¹ The image of the slave that resists the master is that of "the turbulent traitor." *Mann*, 13 N.C. at 267. Although we know nothing about Lydia, we know that she became a traitor. She revealed herself, in the eyes of her hirer, to be the rebellious slave.

⁴¹² 4 Dev. & Bat. 365 (N.C. 1839).

⁴¹³ The image of Mira, the slave in *Hoover v. State*, 4 Dev. & Bat. at 365, is that of a faithful servant struggling to obey her master and mistress even though she is "enfeebled" by brutal physical abuse. Ruffin primarily describes Mira—like the Rehnquist Court—by means of a graphic depiction of her victimization. The reporter of decisions supplements this with information that Mira was a faithful servant who only failed to obey her master "from absolute inability to comply with orders to which her condition and strength were unequal." *Id.* at 366 ("nor did it appear that she was disobedient or impertinent to her master or mistress; on the contrary, she seemed . . . to do her best to obey the commands of her master, and that when she failed to do so it was from absolute inability . . ."). The image that emerges from *Hoover* is that of a pregnant, enfeebled and obedient servant victimized by her master.

⁴¹⁴ *Bob, a slave v. The State*, 32 Ala. 560, 567 (1858).

⁴¹⁵ *Godfrey, a slave v. The State*, 31 Ala. 323, 325 (1858).

⁴¹⁶ *The State v. Marshall, a slave*, 8 Ala. 302, 307 (1846) (discussed *supra* at note 109).

⁴¹⁷ *Smith, a slave v. The State*, 9 Ala. 990, 996 (1846).

⁴¹⁸ *The State v. Abram, a slave*, 10 Ala. 928 (1847) (discussed at text accompa-

The difference between the unitary, consistent imagery of the Warren and Rehnquist Courts and the more varied, chameleon-like imagery of the antebellum period is not simply a distortion created by a one-court analysis versus a multiple-court analysis. It is, instead, inherent to the judicial attitude toward slavery. And it may account, in part, for the astonishingly lower predictability in the criminal law cases of the southern antebellum period.

C. *Recurring Images*

Another intriguing, and disturbing, point of comparison is the striking similarity between the image of the vulnerable defendant in the Warren Court and the obedient slave from the antebellum period, as well as the similarity between the image of the cold-blooded defendant in the Rehnquist Court and the rebellious slave in the antebellum period.⁴¹⁹ The shift in imagery from the Warren to the Rehnquist Court resembles the tale of the obedient and faithful servant that revealed himself to be a Nat.

Although the historical nexus between antebellum and modern imagery is veiled, the ideological continuity between the antebellum and modern period can easily be documented. The decision in *McQuirter v. State*⁴²⁰ is a case in point. Mr. McQuirter,⁴²¹ a black man, was accused of an attempt to commit assault with intent to rape a white woman in the small town of Atmore, Alabama.⁴²² The appellate court affirmed his conviction, ruling that the jury, in determining McQuirter's intent, could properly consider the "social customs" of the time: "In determining the question of intention the jury may consid-

nying note 119 *supra*).

⁴¹⁹ Sheri Lynn Johnson documents the modern "portrayals of persons of color as animal-like or subhuman" in many contemporary criminal cases. See Johnson, *supra* note 19, at 1753. Johnson references, for instance, the testimony of Officer Koon at the Rodney King trial, wherein he testified that "King showed 'Hulk-like strength,' 'gave out a bear-like yell,' and 'groaned like a wounded animal.'" Johnson, *supra* note 19, at 1753.

⁴²⁰ 63 So.2d 388, 390 (Ala. Ct. App. 1953).

⁴²¹ The defendant's first name does not appear from the appellate decision and he is simply described as "a Negro man." *Id.* at 388.

⁴²² The appellate court also failed to reveal the alleged victim's first name, referring to her as "Mrs. Ted Allen." *Id.* at 389.

er social conditions and customs founded upon racial differences, such as that the prosecutrix was a white woman and defendant was a Negro man."⁴²³ Not surprisingly, the evidence at trial corroborated the prevailing customs. Although McQuirter denied having made any statement, a policeman testified at trial that McQuirter told him, upon arrest, that "he came to Atmore with the intention of getting him a white woman that night."⁴²⁴

Two facts about the *McQuirter* case are striking. First, the decision in *McQuirter* dates from the second half of this century. The opinion was released on February 17, 1953. Second, the legal holding in *McQuirter* traces its genealogy directly to slave law. The opinion cites *Kelley v. State*,⁴²⁵ which in turn cites "*Lewis v. State*."⁴²⁶ The full caption of *Lewis v. State* is *Lewis, a slave v. The State* and the Alabama Supreme Court held there that, where a slave is charged with attempted rape of a white woman, "the jury should be instructed to give due consideration to the manner of the slave. . . ."⁴²⁷

The disturbing similarities between images of criminal defendants during the antebellum and modern periods, and cases like *McQuirter*, poignantly suggest that the opinions from the southern antebellum period are still relevant to a study of criminal law today. They shed some light on the direction that imagery has taken in the second half of the twentieth century.

CONCLUSION

The central implication of this Article is that self-criticism and self-consciousness of our mental images of criminal defendants and police officers may facilitate the adjudicative process in the criminal law. I am not suggesting that critical reflection

⁴²³ *Id.* at 390.

⁴²⁴ *Id.* at 389.

⁴²⁵ 56 So. 15, 15-16 (Ala. App. 1911) ("Taking into consideration the racial differences existing between the prosecutrix and the defendant, and the differences in their social life and customs . . . we cannot say, as a matter of law, that there was not some evidence in the case from which the jury might legally have drawn the conclusion that the defendant, when he assaulted the prosecutrix, did so with the purpose to ravish her.").

⁴²⁶ *Id.* at 16 (citing *Lewis v. State*, 35 Ala. 380 (1860)).

⁴²⁷ *Lewis*, 35 Ala. at 389.

about mental imagery will necessarily produce consensus. It will, however, encourage more genuine communication, a more honest appreciation of the disagreement, and the possibility of more informed decisions in the criminal law.

The alternative is to reify the competing images. This has been proposed in both the abortion and the death penalty contexts. In the abortion debate, Rosalind Petchesky suggests that pro-choice activists should recontextualize the image of the fetus to regain the visual terrain: "[W]e have to restore women to a central place in the pregnancy scene. To do this, we must create new images that recontextualize the fetus, that place it back into the uterus, and the uterus back into the woman's body, and her body back into its social space."⁴²³ Her proposal, then, is to correct the perceived distortion of the photograph, reframe the image, and recontextualize the visual—by means of competing images.

Robin West offers similar advice to the liberal members of the Rehnquist Court in the death penalty context.⁴²⁹ West demonstrates how the conservative members of the court have taken control of the narrative terrain. West notes that "in virtually every death case decided [in the 1989] Term, the conservative majority opinion begins in the narrative voice, recounting the story of the victim's death."⁴³⁰ In contrast, West observes "the complete absence of narrative and the narrative voice in the dissenting opinions of the Court's remaining liberals."⁴³¹ West concludes, on a pragmatic note, that "by eschewing both the narrative voice and themes of responsibility, the liberals neglect an opportunity to construct an alternative understanding of societal responsibility for criminality that might challenge the unbridled individualism of the narrative account provided by the conservative majority."⁴³² West's proposal, like Petchesky's, is to counter the narrative with a competing

⁴²³ Petchesky, *supra* note 20, at 287; see also Petchesky, *supra* note 20, at 286 ("[o]ne way out of this danger is to image the pregnant woman, not as an abstraction, but within her total framework of relationships, economic and health needs, and desires").

⁴²⁹ See West, *supra* note 201, at 175.

⁴³⁰ West, *supra* note 201, at 169.

⁴³¹ West, *supra* note 201, at 172. West notes an inverse relationship with regard to rights-talk: the liberal members use the voice of rights, whereas the conservatives eschew that discourse. See West, *supra* note 201, at 173-75.

⁴³² West, *supra* note 201, at 175.

narrative rich with responsibility, as well as ethical and social commitment.

To be sure, advocates may benefit by projecting compelling images and narratives into the adjudicative process. An appellate brief must, in order to persuade, trigger a vivid image. Yet the compelling image may not be enough. An attorney can present a forceful image, but it may do little to persuade a hostile reader. A capital defendant's attorney may offer a powerful image and a rich narrative, but the appellate court can easily ignore them and rely on the trial record or the trial court's findings to recast the defendant and the narrative in a less favorable light.

What I suggest, instead, is that the judge, the decisionmaker, and the citizen, unveil their mental images. We need to borrow insights from experimental sciences and critically examine how our mental images are triggered, how our mental images differ from the word descriptions in the trial record, how our mental images resemble a stereotype, how the available mental images interfere with our reasoning processes, and how our mental images break down communication in the adjudicative process. We need to discuss the role that the image plays in the decisionmaking process. In order to resume healthy communication, we need to expose the unbridgeable gap created by imagery. Only then will there be actual discourse and a possibility—if nothing more—of reaching a more informed decision.