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BURYING THE LEDE: WHY TEACHING THE DUE PROCESS CASES IS CRITICAL TO INVESTIGATIONS IN CRIMINAL PROCEDURE

TRACEY L. MEARES*

When teaching the basic criminal procedure class on police practices—the course that covers the Fourth, Fifth, and small portions of the Sixth Amendments—the conventional wisdom is that one should address *Mapp v. Ohio* at or near the beginning of the course.[1] The reason is not particularly mysterious. *Mapp* held that the exclusionary rule is an essential part of the Fourth and Fourteenth Amendments.[2] By requiring states to exclude evidence obtained in violation of the Fourth Amendment at a criminal defendant's trial, *Mapp* insured both that the exclusionary rule would play a central role in regulating police and also that the rule would play a central role in our understanding of the *appropriate* way to regulate police. The goal of this Article is to trouble the ease to which students and professors come to the conclusions regarding the propriety of using the exclusionary rule as a best or even good way to regulate the police. By making an argument about the order in which topics in the criminal procedure course on investigations is typically taught, I intend to upend the conventional wisdom of *Mapp*'s place in the course in two parts. First, I will lay out an argument for starting the police practices course with confessions rather than searches. This approach emphasizes the importance of the Due Process Clause of the Fourteenth Amendment rather than incorporation of the exclusionary rule. Second, I will offer an argument about why it makes sense to highlight *Miranda*[3] as opposed to highlighting *Mapp*. In short, I'm suggesting that teachers bury *Mapp*.

Before readers become too alarmed, let me hasten to say that I do not mean that *Mapp* should be buried because it is incorrect and unimportant. Neither of these things is true. Rather, I simply mean to suggest that *Mapp* might be

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1. Mapp v. Ohio, 367 U.S. 643 (1961); *see, e.g.*, JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES, at xv–xvi, 75 (5th ed. 2013).

2. *Mapp*, 367 U.S. at 656.

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

buried in the sense that one might "bury the lede." *Mapp* is essential. We might even think of it as the engine of the Fourth Amendment jurisprudence. Still, in an age where some version of the television show *Law & Order* has been running since 1990,[4] the outcome in the case seems obvious and inevitable to many students.[5] I have, therefore, found it more effective to begin the course in another place, revealing *Mapp* at the midpoint of the course as opposed to the beginning. As I will explain below, I believe it is important to take what many might consider a detour to examine a set of early due process cases because excavating the origin of criminal procedure provides students with a better understanding of criminal procedure as constitutional law and, therefore, a grounded understanding of the limitations of constitutional law as a mechanism for regulating police conduct. I want students to understand that what we take for granted didn't need to end up that way. I also want students to understand that while the Constitution may have limitations in the context of regulating police, it is possible to think more broadly about the spectrum of methods to regulate the police within its confines. Specifically, I want students to take the Due Process Clause of the Fourteenth Amendment seriously. Finally, I want to suggest that by taking the Due Process Clause and the early jurisprudence seriously, students will actually gain a better appreciation of the value of *Mapp*.

I emphasize the early due process cases at the outset of my course for another reason. It is common wisdom that the Warren Court's criminal procedure revolution was very much grounded in concern for racially discriminatory criminal justice practices and with the struggle for civil rights more generally.[6] While many of us pay attention to the racial dynamics of modern policing and its regulation (*Terry*,[7] *Whren*,[8] *Wardlow*,[9] and other cases loom large here), the centrality of racial injustice to origins of criminal procedure in the interwar period tends to be emphasized less. I make these early cases the centerpiece of my students' introduction to criminal procedure.

4. *Law and Order*, IMDB.COM, http://www.imdb.com/title/tt0098844 [http://perma.cc/QF85-YGP4] (last visited Dec. 31, 2015).

5. The average age of a law student in the United States is about twenty-five, which means that the average law student has lived her entire life in a world with *Law & Order*! *E.g.*, *2018 Class Profile*, U. OF MICH. L. SCH., http://www.law.umich.edu/prospectivestudents/Pages/classstatistics.aspx [http://perma.cc/7FCM-RR27] (last visited Dec. 31, 2015) (reporting mean age of the 2018 class at Michigan Law as 24.5).

6. *See* A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1968) ("The Court's concern with criminal procedure can be understood only in the context for civil rights."); s*ee also* Dan M. Kahan & Tracey L. Meares, *Forward: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1156–58 (1998).

7. Terry v. Ohio, 392 U.S. 1 (1968).

8. Whren v. United States, 517 U.S. 806 (1996).

9. Illinois v. Wardlow, 528 U.S. 119 (2000).

Where the Warren Court chose to regulate state criminal justice through a "code" applicable to everyone regardless of the defendant's circumstances, essentially stripping race from the opinions,[10] as I discuss below, the criminal procedure cases of the interwar period, such as *Powell v. Alabama*,[11] *Brown v. Mississippi*,[12] and others, were consciously concerned with race. I believe and have written that it is impossible to understand the theory of "fundamental fairness" offered in those cases without attention to the fact that the Court in those cases explicitly invoked the racial context of the time.[13] The juxtaposition of the early criminal procedure cases to the cases decided in the '60s deeply affects how we interpret due process today.

I. ORIGINS

Almost every colleague I know who teaches the criminal procedure course focused upon investigations opens with the Fourth Amendment. I am sure that their decisions are heavily impacted by the organization of most casebooks, which tend to present the Fourth Amendment material before the material on the Fifth and Sixth Amendments.[14] Moreover, it does make some sense to address the Fourth Amendment before the Fifth Amendment because that approach follows the "natural" course of an investigation. Police often collect evidence by searching a person or place before they attempt to obtain a confession from a suspect, and a confession precedes a trial, and so on. Moreover, the fact that the Fourth Amendment applies even in the absence of a criminal investigation, as it applies to any search or seizure conducted by a state actor,[15] makes it more widely applicable than the Fifth and Sixth Amendments. Despite the truth of these observations, I teach the Fifth Amendment prior to the Fourth Amendment in my investigations course, which means that I teach confessions before searches and seizures. Here is why.

Federal courts did not engage in a robust review of state criminal court judgments until the exclusionary rule was incorporated to the states in *Mapp*.

10. Footnote 11 in *Terry* is striking because it does acknowledge these realities. *Terry*, 392 U.S. at 14 n.11.

11. Powell v. Alabama, 287 U.S. 45, 49–51 (1932).

12. Brown v. Mississippi, 297 U.S. 278, 281–84 (1936).

13. Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 105–06 (2005).

14. Full disclosure: the casebook on which I am a new co-author organizes the materials in precisely this way. RONALD J. ALLEN, JOSEPH L. HOFFMANN, DEBRA A. LIVINGSTON, WILLIAM J. STUNTZ, ANDREW D. LEIPOLD & TRACEY L. MEARES, COMPREHENSIVE CRIMINAL PROCEDURE (4th ed. 2016).

15. Camera v. Mun. Court of the City & Cty. of S.F., 387 U.S. 523, 535, 540 (1967); New Jersey v. T.L.O., 469 U.S. 325, 339 (1985); Ferguson v. City of Charleston, 532 U.S. 67, 84–86 (2001).

For many teachers, an examination of "early" criminal procedure means reading cases decided during the Warren Court's Criminal Procedure Revolution of the '60s and '70s. Importantly, constitutional criminal procedure began not with the Court's incorporation to the states of particular guarantees found in the Fourth Amendment or those found in the Fifth Amendment[16] but with a case called *Hurtado v. California*, decided in 1884 about twenty years after the end of the Civil War and a decade after the Slaughterhouse Cases.[17]

Hurtado is the Supreme Court's first extended discussion of the Fourteenth Amendment's Due Process Clause and the very first case in which the Supreme Court reviewed a state criminal decision. Hurtado was charged and convicted of capital murder. His complaint was that he was charged in an information instead of in a grand jury indictment. He claimed this procedure violated the guarantee of the Due Process Clause found in the Fourteenth Amendment. Hurtado urged the justices to cleave to a historical vision of due process of law and require states to charge a capital prosecution only by indictment,[18] but the Court rejected his approach. Relying on a definition of due process emphasizing legality and non-arbitrariness, the Court, per Justice Matthews, held that it was a legitimate exercise of legislative power for the State of California, through its duly elected representatives and in furtherance of the public good, to adopt a preliminary hearing procedure to initiate a capital prosecution rather than a grand jury indictment.[19]

What I find really interesting about *Hurtado*, though, is Justice Marshall Harlan's dissent. Harlan, known as "The Great Dissenter,"[20] argued in Hurtado's favor, although not in support of his cramped historical argument, by advancing the idea that the Fifth Amendment, which specifically provides for grand jury indictment, should apply to the states through the Fourteenth Amendment.[21] Justice Harlan thus became the first justice to argue for incorporation. By reading *Hurtado*, we can answer an important set of questions: Where did criminal procedure begin? Why? Even more important to my mind, by reading the due process cases that follow *Hurtado*, we can ask and try to answer a second set of questions: What did the Court do in order to nurture criminal procedure in its infancy? What was at stake? What were the pitfalls? What were the benefits of the early approach? Answers to these

16. Malloy v. Hogan, 378 U.S. 1, 1, 3 (1964) (incorporating to the states the privilege against compelled self-incrimination found in the Fifth Amendment).

17. Slaughter-House Cases, 83 U.S. 36 (1872).

18. Hurtado v. California, 110 U.S. 516, 521 (1884). For Hurtado, due process of law was equivalent to the "law of the land," which has a "fixed, definite meaning," and included "the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles [of public liberty and private right]." *Id.*

19. *Id.* at 519, 538.

20. Goodwin Liu, *The First Justice Harlan*, 96 CALIF. L. REV. 1383, 1384–85 (2008).

21. *Hurtado*, 110 U.S. at 541 (Harlan, J., dissenting).

questions, I think, help us to better evaluate the state of affairs we find ourselves in with respect to criminal procedure today. And because *Hurtado* has nothing to do with the exclusionary rule, students can assess the value of incorporation outside of a context in which the Court's search for an effective remedy seems to demand it.

After my students read *Hurtado*, the next step is to teach them what comes next in the Court's jurisprudence of criminal procedure. What comes next is not, of course, the Warren Court's development of constitutional criminal procedure through incorporation. What comes next is a set of cases in which the Court intermittently applied the Due Process Clause to regular state criminal justice. These cases rarely are excerpted in casebooks. At best, they are addressed in the notes; yet I find cases such as *Brown v. Mississippi*,[22] *Powell v. Alabama*,[23] *Rochin v. California*,[24] and *Breithaupt v. Abram*[25] to be central to understanding what criminal procedure is about.

II. EARLY DUE PROCESS CASES

As Michael Klarman has cogently argued, modern criminal procedure has racial origins.[26] Writing about *Moore v. Dempsey*,[27] *Powell v. Alabama*, *Norris v. Alabama*,[28] and *Brown v. Mississippi*, Klarman notes:

> These four cases arose out of three quite similar episodes. Southern black defendants were charged with serious crimes against whites—either rape or murder. All three sets of defendants nearly were lynched before their cases could be brought to trial. In all three episodes, mobs comprised of hundreds or even thousands of whites surrounded the courthouse during the trial, demanding that the defendants be turned over for a swift execution. No change of venue was granted in these cases (except in the retrial of the Scottsboro Boys). Lynchings were avoided only through the presence of state militiamen armed with machine guns surrounding the courthouse. There was a serious doubt—not just with the aid of historical hindsight, but at the time of the trial—as to whether any of the defendants was in fact guilty of the crime charged. The defendants in *Moore* and *Brown* were tortured into confessing. In all three cases, defense lawyers were appointed either the day of or the day preceding trial, with no adequate opportunity to consult with their clients, to interview witnesses, or to prepare a defense strategy. Trials took place quickly after the alleged crimes in order to avoid a lynching—less than a week

22. Brown v. Mississippi, 297 U.S. 278 (1936).
23. Powell v. Alabama, 287 U.S. 45 (1932).
24. Rochin v. California, 342 U.S. 165 (1952).
25. Breithaupt v. Abram, 352 U.S. 432 (1957).
26. Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48–97 (2000).
27. Moore v. Dempsey, 261 U.S. 86 (1923).
28. Norris v. Alabama, 294 U.S. 587 (1935).

> afterward in *Brown*, twelve days in *Powell*, and a month in *Moore*. The trials were completed within a matter of hours (forty-five minutes in *Moore*), and the juries, from which blacks were intentionally excluded in all three cases, deliberated for only a matter of minutes before imposing death sentences.[29]

In each of these cases, the Supreme Court invalidated a state criminal conviction on federal constitutional grounds that did not implicate the Bill of Rights. In other words, the Supreme Court developed a jurisprudence of the Due Process Clause that does not depend upon incorporation of the Fourth and Fifth Amendments. While the accuracy of the defendants' guilt clearly was at issue in these cases, making them "appealing on their facts,"[30] it is important to see that the Court did not base its understanding of the Due Process Clause solely upon the likelihood on the defendants' innocence. Instead, the Court emphasized fair process norms and the importance of public perceptions of the fairness of proceedings as serving a critical function in establishing the constitutional standards for due process in criminal trials. By emphasizing process norms, the Court acknowledged that the sorting function of trials—identifying who is guilty and who is not—is not the only or even primary goal of the procedures that make up a criminal trial.[31] Cases such as *Rochin* and *Breithaupt*, decided a few decades after the "race cases" of the 1920s, make clear that the accuracy of the judgment was not the determining factor of the Court's decisions in those cases. Rather, the Court was concerned with developing what I have called elsewhere a "public-regarding" conception of the Due Process Clause.[32] This is the idea that criminal procedure can insure that a suspect is treated with dignity and respect in way that captures "society's normative aspirations, embodied in its positive laws, customs, religions, and ideologies about the proper relationship between the individual and the state."[33] And in developing these ideas in later cases outside of the context of

29. Klarman, *supra* note 26, at 50, 52.

30. *Id.* at 53.

31. The seminal work in this tradition is HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 153, 163–65 (1968). Packer divides the criminal justice world into two simplified camps with different inherent values, which were given effect in two models of justice: the Due Process Model and the Crime Control Model. The Crime Control Model promotes the importance of making accurate determinations of guilt or innocence, while the Due Process Model promotes the importance of observing procedures, even at the expense of allowing guilty defendants to go free. *Id.*

32. Meares, *supra* note 13, at 105.

33. Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 200 (1983); *see also* Craig M. Bradley & Joseph L. Hoffmann, *Public Perception, Justice, and the "Search for Truth" in Criminal Cases*, 69 S. CAL. L. REV. 1267, 1272 (1996) ("[C]riminal trials are a form of civic theater that allows us to define who we are as a people . . . and provides us with an opportunity to foster our self-confidence in the fundamental morality of our society.").

southern mob justice, the Court continued to cite, and made integral to their reasoning, *Powell*, *Moore*, and *Dempsey*.

With these cases as a foundation, I am ready to turn to an examination of confessions in my criminal procedure course. The Supreme Court decided to review the judgments in *Brown*, *Rochin*, and *Breihaupt* because of police behavior that could be considered to violate an individual's constitutional rights. Each of these cases presents a set of facts that, were they decided in a later era, likely would have been addressed through the exclusionary rule. Specifically, the Court would have decided that there was a search or a confession that violated the Fourth or Fifth Amendments, and that police obtained evidence in violation of guarantees of individual rights, so the evidence must be excluded at trial. Interestingly, the litigants in these cases do not present arguments for incorporation to the Court. Instead, their briefs and the Court's opinions slowly develop a jurisprudence of a freestanding Due Process Clause. These cases thus help to frame once again the idea that the exclusionary rule is not the obvious or best remedy for a constitutional violation. Because so many of these early cases concern the voluntariness of confessions,[34] I find that turning to confessions at this point in the course prompts students to explore the path of federal review of state court judgments from one based on the Due Process Clause to one governed by the Fifth Amendment grounded in *Miranda*.

I use *Brown v. Mississippi* as the anchor for this section of the course. *Brown* is notorious, but it is worth excerpting the statement of facts as recounted by the dissent in the Mississippi Supreme Court:

> The crime with which these defendants, all ignorant negroes, are charged, was discovered about one o'clock p.m. on Friday, March 30, 1934. On that night one Dial, a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered, who began to accuse the defendant of the crime. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and still declining to accede to the demands that he confess, he was finally released and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial. A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the State of Alabama; and while on the way, in that State, the deputy stopped and

34. *See, e.g.*, Lisenba v. California, 314 U.S. 219, 238 (1941); Payne v. Arkansas, 356 U.S. 560, 568 (1958); Ashcraft v. Tennessee, 322 U.S. 143, 153 (1944).

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> again severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.[35]

At trial, the deputy who supervised Brown's beating admitted it; and when he was asked how severely he whipped the defendant, the deputy answered, "Not too much for a negro; not as much as I would have done if it were left to me."[36]

I consider *Brown*, like *Hurtado*, to be a landmark case. It is the very first case in which the Supreme Court invalidated a state court judgment based on the wrongful acts of the police who conducted the investigation rather than a trial error. Indeed, the errors at the trial were so minimal, given the state of constitutional law prior to the *Brown* decision, that there was an argument that federal review was inappropriate.[37]

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35. Brown v. Mississippi, 297 U.S. 278, 281–82 (1936).

36. *Id.* at 284.

37. The reasons for this are highly technical and fascinating and provide yet another reason why anchoring the criminal procedure court in the Due Process Clause rather than the Bill of Rights is critical. In *Brown* the torture-induced confessions were the basis of the prosecution's cases against Brown and his colleagues. *Id.* at 279. The defendants' lawyers objected to the introduction of the confessions, but the trial court submitted them to the jury with instructions, upon the request of defendants' counsel, that if the jury had reasonable doubt as to the confessions having resulted from coercion and that they were not true, they were not to be considered as evidence. *Id.* The defendants were convicted, and those convictions were affirmed on appeal. *Id.* at 279–80. At the Supreme Court, the defendants lost again on the basis of two reasons:

> (1) that immunity from self-incrimination is not essential to due process of law, and (2) that the failure of the trial court to exclude the confessions after the introduction of evidence showing their incompetency, in the absence of a request for such exclusion, did not deprive the defendants of life or liberty without due process of law; and that even if the trial court had erroneously overruled a motion to exclude the confessions, the ruling would have been mere error reversible on appeal, but not a violation of a constitutional right.

Id. at 280.

Thus, the Mississippi Supreme Court sought to preclude federal review on the basis of the defendants' procedural default. The United States Supreme Court would have none of this, forcefully stating:

> The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." The State may abolish trial by jury. It may dispense with indictment by a grand jury and substitute complaint or information. But the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law.

Id. at 285 (internal citations omitted). The Court supports this proposition by citing *Moore v. Dempsey*, 261 U.S. 86, 91 (1923), *Powell v. Alabama*, 287 U.S. 45 (1932), and *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). *Id.* at 286.

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Brown, then, anchors two streams of cases that follow it. The first stream concerns "bad confessions," and the second is about "bad police." In the "bad confessions" stream, the question is whether the defendant's will was overborne. We want to know whether the police placed too much pressure on this particular defendant. These cases make prominent the defendant's autonomy, but the approach is analytically difficult given that it is almost impossible to decide what is too much once you decide that some pressure is acceptable.[38] In the "bad police" cases, the Court did not focus so much on the effect of police action on the defendant, but rather tried to figure out whether the police conduct was acceptable or not—*Ashcraft* is an example.[39] In the best of these cases, the Court ties its analysis of the police practices to political and legitimacy considerations rather than voluntariness *per se*, making clear that voluntariness of confession is, for due process purposes, a legal term of art rather than an assessment of the defendant's free will. In all of these cases, the students must wrestle with the extent to which these streams can be separated from each other, as there is obvious overlap. Moreover, the reliability of the trial judgment also looms large. The bottom line is that by the time my students read *Miranda*, they have a strong grounding in a vision of criminal procedure governed by the Due Process Clause that is not tainted by incorporation with all of its weaknesses—and its strengths.[40]

Before my students read *Miranda v. Arizona*, I also ask them to listen to the oral arguments in the case.[41] We pay particular attention to John Flynn's argument on behalf of Ernesto Miranda because his colloquy with Justice Potter Stewart demonstrates both the way in which *Escobedo* was a problematic precedent for Flynn and the basis of the architecture for Fifth Amendment compulsion that Justice Warren lays out in this landmark case. Finally, reading the case together while listening to the oral arguments, I think, makes clear to the students the many ways in which requiring as a constitutional rule that the states provide a four-part warning to those being interrogated in custody on pain of having the confession excluded from trial

38. *See* Ronald J. Allen, *Miranda's Hollow Core*, 100 NW. U. L. REV. 71, 84–85 (2006).

39. *Ashcraft,* 322 U.S. at 148, 153–54.

40. I have argued that one strength of the fundamental fairness conception of due process in the early cases is its consonance with the social science of procedural justice. *See generally*, Meares, *supra* note 13. Another advantage of the early cases is that they do not shy away from discussing the potential of racial injustice as a central aspect of fundamental fairness in due process. *See* Tracey L. Meares, *What's Wrong With* Gideon, 70 U. CHI. L. REV. 215, 216, 230 (2003).

41. Oral Argument, Miranda v. Arizona, 384 U.S. 436 (No. 759), http://www.oyez.org/cases/1965/759 [http://perma.cc/SZ9U-3JXM].

was not inevitable.[42] It was also a really big deal in a way that is crystal clear to them. We finish the section on confessions with a tour through the basic doctrine of how the Fifth Amendment governs confessions but teaching the students doctrine is not my primary goal. My primary goal is to demonstrate the evolution of constitutional criminal procedure itself.

III. CONCLUSION

Policing has become a focal point of civil rights in the twenty-first century. It is impossible to teach the criminal procedure course on investigations without taking seriously the contemporary and historical significance of the nascent Black Lives Matter movement. Students are asking (and challenging) professors to incorporate discussions of race into courses, such as criminal law and criminal procedure. There are many ways to address their concerns.[43] Highlighting the demographic descriptions of the litigants is a start.[44] I have offered in this short Article one way to integrate contemporary issues of policing with political, social, and constitutional history in a deep and intellectually rigorous way. My hope is that what I have described here will encourage teachers to engage their students in a journey to better understand the very DNA of criminal procedure. My hope is that in the process they will gain an understanding of what it means, and has always meant, to do constitutional law.

42. *Id.* As an aside, John Flynn's oral argument is also an example of excellent lawyering craft, and most of us who teach in the classroom do not have many opportunities to provide our students with lessons of lawyering as we teach theory and doctrine.

43. *E.g.*, Cynthia Lee, *Making Black and Brown Lives Matter: Incorporating Race Into the Criminal Procedure Curriculum*, 60 ST. LOUIS U. L.J. 481 (2016).

44. *Id.* at 482–83.