

**THOMAS
FRAMPTON:**

Hello, and welcome to Criminal Law. Can folks hear me or see me? I am hoping that everybody can see the slides here and see me. It's a little bit jerky, but I hope we were able to figure this out with all the technical difficulties. And I appreciate your patience. I assume Ashley will hop on if there are technical difficulties.

But welcome to your first class of law school. I'm glad that you decided to make it Criminal Law. And if you are interested in criminal law, which I assume you are since you are here, I want to strongly encourage you to come to UVA. Our criminal law faculty is absolutely stacked. There are fantastic folks here who study criminal law, and it's an incredibly exciting environment.

Today's class, I'm going to introduce you to what criminal law that is taught as a 1L course actually consists of and what it does not consist of. I want to talk a little bit about the stakes of criminal law, what it is that we are talking about when we're talking about criminal punishment in the United States in 2021.

And then I typically teach my first class of 1L criminal law talking about two cases *Dudley and Stephens* and then *McCleskey v. Kemp*. I don't know if we're going to have enough time today to talk about *McCleskey v. Kemp*, but we are certainly going to talk about the rest.

So let's get into it. This is a class about substantive criminal law. So it is not a class that you are going to learn all of the criminal laws. The reason we're not going to learn all of the criminal laws is because there are simply too many.

In Virginia-- I spent a little bit of time recently just looking through-- it is a criminal offense to spit, expectorate, or deposit any sputum, saliva, mucus, or other form of saliva on a sidewalk abutting a public street, alley, or lane. That was my favorite criminal law until I found this one, which is the employment of lights under certain circumstances.

In Virginia, it is a crime to take your car between a half hour after sunset on any day and a half hour before sunrise the following day and use your headlights to focus on a poultry house or other building inhabited by such animals to panic them unless it's your own land. And if you do that, it's going to be a Class 4 misdemeanor.

So look, there's a lot of criminal laws. There are too many criminal laws, and that's not what we do in this class. In this class, you are going to be introduced to the basic principles of criminal law. You are going to learn about five or six serious crimes so you have an understanding of how statutes work. And then we're going to talk about principles of punishment, common defenses, and try to have an understanding of the ways in which race, class, and other forms of inequality are reproduced through our criminal legal system.

The other thing that this class is not is a class about learning, can the police do x? The investigation and adjudication of criminal wrongdoing is typically something that's taught in a separate upper level class on criminal procedure, which I encourage you all to take. But as we'll see in this class, the line between the two, between substance and procedure, can sometimes be a little bit blurry.

At the outset, though, I do want to emphasize, there's no such thing as, like, the criminal law or one body of criminal law. We're going to be talking about different bodies of criminal law from different jurisdictions throughout this class. So there is state law that's defined by criminal codes in Virginia or Louisiana and every other state. And within those states, there's criminal laws that are set out oftentimes in municipal statutes or codes as well.

Separately, there is federal law. At this point, we literally do not know how many federal criminal laws there are. There is also going to be a reference throughout this course to the common law and hearing about common law definitions of crimes. That's just a fancy way to say the ways in which courts traditionally understood the contours of certain offenses before legislators got around to drafting up criminal codes.

And then finally, if that weren't enough, on top of everything else we have the Model Penal Code, which was written by a bunch of law professors. It isn't adopted as the law of any jurisdiction, although the MPC-- for some reason on my slide is MPS-- apologies-- has become very influential. And many jurisdictions have adopted portions or large, large portions of the Model Penal Code as their substantive law.

So don't worry if this seems confusing at first. We will always learn about the dominant or majority rules. That is the rule that's followed in most jurisdictions. We might read cases from Oregon or Illinois or even Canada or the United Kingdom to demonstrate a typical approach or the genesis of a particular legal rule.

And we'll also deal with some federal cases dealing with the constitutional limits on criminal punishment. But at all times, we're going to be bouncing around so you understand how criminal law operates.

OK. So that's the most basic introduction to what this class is doing. Throughout the semester, whatever we're talking about, whether it's theories of punishment, whether it's defenses, whether it's talking about homicide or other offenses, there are going to be certain themes that come up again and again.

We're going to be asking which actors or institutions are best equipped to deal with criminal justice problems. We are going to learn that the criminal justice system is full and suffused with discretion on the part of different actors, whether that's cops, whether that's prosecutors, jurors, or even sovereigns who can grant pardons. Want you to be asking whether you think that that is a problem, if it's a bug or a feature of the system.

It is impossible to talk about criminal law without talking about inequality, without race, gender, class, and different axes of oppression. And I want to talk about the ways in which those affect the administration of criminal justice. And then writ large, we have some very big questions about who gets punished, who gets protected, and how we justify whether somebody gets punished or not.

OK. So now, we're getting to the intro to the stakes of what we're talking about here. Many of you will be familiar with these statistics already [INAUDIBLE] here, because I do think that it grounds everything else that we are talking about.

We have a lot of people in jail and in prison in this country. One out of five incarcerated people in the world is incarcerated in the United States. Our per capita incarceration rates are off the charts.

We not only have a lot of people in jail and prison compared to other countries. We have a lot of people in jail and in prison compared to our own country at any other point in our country's history. In recent years, there's been a slight decline, but we are talking about historically unprecedented incarceration levels, really at any point in any country in human history except maybe in the late '40s and early '50s during the height of the Gulag in the Soviet Union.

Most of those people who are imprisoned are imprisoned in state prisons and local jails. The federal legal system is only a tiny fraction. And you will notice as well that many of these individuals are pre-trial. They haven't been adjudicated guilty of any offense. We have about a half million people sitting in jail this morning who are awaiting trial and can't afford bail.

You'll also notice from this chart that a huge percentage of the people who are incarcerated are not just there because they are nonviolent drug offenders. The war on drugs has had a huge impact on driving mass incarceration. But the notion that if we just release nonviolent drug offenders from prison that we will solve our mass incarceration problem is simply a fallacy. If we are serious about ending mass incarceration, we're going to have to talk very seriously about people who have engaged in very serious forms of interpersonal harm or engaged in other criminal wrongdoing that's not just limited to drug offenses.

It's not just prison. So we have about two million people in jails and prisons, but that doesn't account for the millions of people who are under some other form of surveillance, whether that's probation or parole. It doesn't account for the millions and millions of people who still face collateral consequences as a result of felony convictions. There's probably about 20 million people in the United States who have been convicted of a felony, and many, many, many millions more who have criminal records.

And critically important, while our racial-- the scale of imprisonment today is unprecedented, the racial disparities are not. In fact, ever since the Civil War, we've had a massive overrepresentation of non-white people in our jails and prisons. Black, Latino, and indigenous populations are wildly overrepresented, and they are not equally represented in terms of economic class.

This slide here, the dark orange shows the average median incomes of non-incarcerated people, and the brighter yellow is for different sex and race, the average annual incomes pre-incarceration of those who get incarcerated. As the slide makes clear, most people in prison are poor.

So with that lengthy wind-up, let's just get straight into it. So the case that I hope many of you read for today's class is the case of *Dudley and Stephens*. It comes up in somewhat of a weird procedural history.

So as you all saw, a jury met in this case. And the jury did something a little unusual. It returned what's called a special verdict. So it found facts, as jurors do. They said what the facts were that they found. They spelled it all out. And then the jury effectively threw up its hands and said, judges, we don't know if this counts as murder or not. You have to tell us.

The case goes up, all the way up in the British legal system to the Lord Chief Justice. Lord Coleridge writes this famous opinion and ultimately gives his answer that we will talk about today.

But as you all heard, just to very briefly summarize the facts, Dudley and Stephens are on their way to Australia in a small yacht, a boat that you actually probably should not have been trying to take from England to Australia. They have with them a cabin boy by the name of Richard Parker. Sometime around the Cape of Good Hope, they hit a gale. The boat breaks up and they are all stuck on a life raft.

As you heard, things went from bad to worse. On day four, they ate a turtle. On day 11, the food is gone. On day 13, the water is gone. On day 18, Dudley and Stephens asked Brooks, one of the other adults, hey, don't you think somebody should be sacrificed? Cough, cough, clearly talking about the cabin boy. Brooks demurs.

On day 19, they suggest drawing lots. Again, Brooks says, count me out. And on day 19, they tell Brooks to take a nap. They kill the cabin boy, they eat him, and they are shortly thereafter rescued.

Why might this not be murder? Well, it might not be murder because as you will learn in our class, there are lots of different excuses or justifications for conduct that otherwise violates a criminal statute. For whatever reason, we decide that the person has actually not violated the criminal law.

So for example, self-defense. I hit him. Normally that would be a battery, but he hit me first. Duress. Yes, I smuggled drugs, but I was acting under duress. A drug dealer told me that they would hurt my family if I didn't do it. Insanity. She did it, but she did not the moral difference between right and wrong at the time of offense.

And then there's necessity. The necessity defense, which, in its current incarnation today tells us that generally speaking, a person can have a defense to a crime if they reasonably believed that there was an actual and specific danger, that there was no other alternative to completing the act, that the harm of the criminal act was less than the harm that was avoided, and the defendant did not himself contribute to or cause the danger. This is the approach to necessity that now dominates in most American jurisdictions, although whether or not the fourth prong is there varies quite a bit.

So this is my dog, Amos. You all are going to hear a lot about Amos this semester. I talked about him so much that the outfit on his right was bought by the students that I had this year as a gift to properly supplement my slides moving forward, because Amos is frequently getting into trouble.

But here's the question. Amos is having a dance party out at his summer cabin in the woods. It's just him. He's getting a little wild with the vodka bottle. Amos drops the vodka bottle, shatters on the floor, and cuts himself very badly. Like, a real gash. Like, he's in trouble. And he needs medical attention.

Amos hops in his car, drives to the nearest hospital, but is pulled over for drunk driving. Does Amos have a necessity defense to the criminal charge of driving under the influence? Can I get a volunteer here? Great. So Tyler, does Amos have a necessity defense here?

TYLER: My opinion is no, he does not.

THOMAS Why wouldn't he?

FRAMPTON:

TYLER: From the piece about, like, the greater harm, had he not done it versus had he proceeded to drive drunk, I would think-- I mean, I don't know his limited medical opinion on the danger of his cut on his hand. But I think it's reasonable to think [INAUDIBLE] harm driving intoxicated would be greater than the risk of finding a towel and wrapping your hand with it or something, because I feel like there's also [INAUDIBLE] super glue your cut shut. You know, there's plenty of ways to get away with it.

THOMAS FRAMPTON: Great. What if Amos is really bleeding out, though? Like, he managed to sever an artery?

TYLER: Is it reasonable for him to have a phone call 911? [LAUGHS]

THOMAS FRAMPTON: Ah, great. So there might be a realistic alternative. Let's go further with the hypo. He's really out in the country in this cabin and there's no phone.

TYLER: Uh, I don't know that one.

THOMAS FRAMPTON: Rachel, what do you think?

RACHEL: Can you hear me now?

THOMAS FRAMPTON: Perfect. Yeah, very clearly, actually.

RACHEL: OK, good. I was just going to say I think he does not have a necessity defense according to the definition because he himself contributed to the danger or caused the danger.

THOMAS FRAMPTON: Ah. So in a jurisdiction that applies that fourth prong-- and like I said, some do, some don't-- Amos could be in trouble because it was his own recklessness or his own negligence that put him in that spot. Great.

So look, this is going to be a close call. We'll have to look to the law of our jurisdiction and state to see how necessary something actually has to be, whether we have that prong on the fourth factor of the test. How realistic the alternative has to be, and whether it's purely Amos's subjective belief that it's necessary or, in fact, the jury has to find that on net, the harm's balanced in a particular way.

Point to remember, though. Necessity is a defense. It's long been recognized as a defense. So why is it-- well, let's first get to the holding of the case. Is necessity a defense to homicide, is the question in *Dudley and Stephens*. And what does the court end up telling us? Can I still pick on you a little bit further, Rachel?

RACHEL: I really appreciated the [INAUDIBLE] in the situation. And I think that in terms of necessity, like, it is so difficult because of the subjectivity of it, and I think that the court addressed how there's a real slippery slope in assuming that-- like, defining what necessity means in that situation. And especially when you don't know the future outcome. Yes, they were rescued in a few days. They could have been rescued 30 minutes later.

THOMAS FRAMPTON: Great. But let's hammer down first. What does the court end up saying? Does the defendants have a necessity defense here?

TYLER: No, they don't.

THOMAS FRAMPTON: OK, great. So the court ultimately says that on these facts, the verdict is that this is no legal justification for a homicide. They do not have a necessity defense. And incidentally, y'all should know that basically, necessity can be a defense for every crime, but *Dudley and Stephens* teaches us that it's never a defense for a homicide.

I'd like to get another volunteer if I could to start getting at the more interesting moral questions that are lurking in the background. We know the legal answer, but the court seems to be taking a somewhat more ambivalent approach to the question of whether what *Dudley and Stephens* did was actually immoral, right?

"The prisoners were subject to sufferings, which might break down the bodily power of the strongest man and try the conscience of the best. We are often compelled to set up standards we ourselves cannot reach, which we would not satisfy ourselves."

So here's my question. How is it that we are going to justify a murder conviction for *Dudley and Stephens* for doing something that even Lord Coleridge says, if I'm in the boat, I'm not sure that I don't go ahead and eat the cabin boy. So the question is-- and Mr.-- is it Peter [INAUDIBLE] Oh, Katherine Peters. I'll stick with you because you popped up first. So here's my question. Should we punish someone under our criminal law if reasonable people in the same situation would do the same thing?

KATHERINE: I think it depends on how you're approaching it. If you're approaching--

PETER: All right. Wait. I don't know if this is working.

THOMAS FRAMPTON: We can hear you, Peter. So let Katherine go, and I'm going to put the exact same question to you.

KATHERINE: If you're approaching it-- if you're approaching it from an incentives or precedent standpoint, I think it's really important to think about the incentive structure that you create if you start to allow exemptions. And I think that was on the minds of the judges here. And I think it also depends on whether you subscribe to something like a deontological or utilitarian moral philosophy.

THOMAS FRAMPTON: Whoa. OK. So you just used lots of big words here.

KATHERINE: Sorry.

THOMAS FRAMPTON: So let's break this down. So one possible justification here or one moral philosophy we could apply is that people have rights, right? Those rights do not yield. They do not yield even if by killing somebody, we could save the lives of three others.

From a different perspective, from a utilitarian perspective, well, if it's only one scrawny boy and he's about to die anyways that we can save the lives of three Englishmen, well, heck. Yeah, that's totally morally justifiable. And then it works here.

So let me really-- sorry. Did we lose the other volunteer? I'll stick with Katherine. Let's stick with sort of like this utilitarian view. If it's OK to have a necessity defense in other contexts, another context whether it's stealing bread or driving drunk, why shouldn't a straight up utilitarian justification for what *Dudley and Stephens* did get them off the hook here?

KATHERINE: So I should preface this by saying I'm a philosophy major, so if I use--

THOMAS [LAUGHS]

FRAMPTON:

KATHERINE: Jargony words, that's totally my fault. But there are two different types of utilitarianism that people like to talk about. One of them is act utilitarianism and the other is rule utilitarianism.

Act utilitarianism takes every case on a case-by-case basis and doesn't think about the larger extrapolation for society. And law seems to be more concerned with something like rule utilitarianism, which thinks about the precedence-- precedent that a given case sets and thinks, well, if we apply this rule as a general rule for people to follow in society, does it lead to more harm or more benefit?

And so I think, my suspicion is that here, rule utilitarianism was the dominant philosophy. And they were thinking about, well, for this case, I can see how it would make sense to think about it from an act utilitarian standpoint. But thinking in terms of the total society and the type of precedent that it sets, it makes more sense to adopt a rule utilitarian standpoint and say that this isn't defensible.

THOMAS Fantastic. OK, Madison. Oh, no. Where did Madison go? OK, great. Madison's moving up there. Hey, Madison.

FRAMPTON: Madison, is it-- would-- do you think it's appropriate to criminally punish someone? And notice that in Victorian England here, if they're guilty of murder, they get the death sentence for something that you or I or apparently even these very conscientious and moral judges, students of moral philosophy themselves would possibly be eating this poor cabin boy?

MADISON: I would have to agree that this seems justifiable, I think from more of a practical standpoint than a moral standpoint. It creates the need to make a standard for, at what point does the pressure or duress that a person's feeling, like, permit you to go over the line and harm someone else or infringe on someone else's right to self-preservation? And it creates kind of a benefit to those who might be more easily pushed over that line, while punishing those who can keep themselves under control under those type of situations.

THOMAS Great. OK. So one of the reasons that I like this case-- we could spend an entire class I think on *Dudley and*
FRAMPTON: *Stephens*. There's a lot to unpack here. There's a lot to talk about here.

One of the things which we haven't touched upon yet but I do want to flag, because it's going to come up again and again throughout the semester, is the way that ideas of gender are baked into this opinion, right? How is it that we could punish someone for doing something that we ourselves think we might do?

Well, a lot of it you'll notice is turning on conceptions of what masculinity are and what it is that a man, particularly a man in a Christian society, should do, right? A man's duty is not to live or to die, but to sacrifice himself for women, for children. These are duties that are part of Victorian manhood, that it is better to let yourself starve to death than to engage in acts that might even save more lives in particular instances.

We will see this again and again throughout the semester. We'll see it when we talk about self-defense. We'll see it when we talk about manslaughter. The common law, one traditional way that murder is downgraded to manslaughter was if one catches their spouse in bed with another person. That was deemed to downgrade murder, right? So we can understand the ways in which traditional conceptions of gender influenced the shape of substantive criminal law. And I think it's lurking in the background here.

Another issue that's lurking in the background here, which we will not be able to avoid at all, is that we have some pretty stark class issues, right? Notice that in the jury's opinion, they don't even mention the name of the cabin boy, right? Parker appears at the very, very top of Lord Coleridge's opinion. But the under-protection of vulnerable groups is a constant theme throughout particularly American criminal law.

And one of the main things that I love about this case-- and it's part of why we start the class here-- is that I think it really cleanly illustrates the frequent disjuncture, or maybe not, between law and morality. Oftentimes, these two things track one another. Sometimes they do not.

So I'd like to take a second. This is just an experiment. But if you have a web browser open, I want you to copy and paste that web address. And hopefully, it will take you to a screen that looks like a two-dimensional axis. Can you all say in the chat if you are not getting brought to that screen that is a two-dimensional axis?

And on these axes, on the x-axis that goes horizontally, I'd like you to plug in your view of whether or not this should be a crime, whether the defendants on these facts, taking these facts as true, should be criminally responsible for murder. And on the y-axis, the vertical axis-- so on the criminal issue if you go far to the left, they should have a very strong defense. If you go far to the right, I don't care how hungry you were, how necessary it was to save multiple people's lives. This is a crime.

And on the vertical axis, the y-axis, I'd like you to plug in whether you think what they did was immoral. That is to say, if you go very high up on the y-axis, you think that their conduct was morally justified. And if you go far down on the y-axis, it was not morally justified. So everyone, take, like, 15 seconds to go through this.

So as you guys will see, y'all are all over the place. And that's great. That's one of the things I love about criminal law is that it [INAUDIBLE] into very deep intuitions about fairness, about morality. And that oftentimes, those do not track cleanly our intuitions to what the criminal law does or does not proscribe.

And I also want to flag for you the extent to which your responses are actually in all four quadrants here. It's not that-- if law and morality tracked each other cleanly, we would expect to see your responses on a diagonal. Those of you who thought this was deeply criminal should also think that it should be deeply immoral. Likewise, those of you who think that it's completely moral should think that these persons have an excuse. But we don't see that sort of vertical tracking of everybody's results.

OK. Now we're going to come back to my slides. I see Adam's question. Sorry if this was answered, but are we referring to simply the murder or the way in which the murder was carried out? I.e., without warning or opportunity for consent.

That's a great question. My hypo there was taking the facts as true, so taking the facts that appear in your opinion as how it actually went down. But we could spend, like I said, far, far longer talking about all of the different pieces of this, the fact that some people didn't participate, the fact that some others did.

Incidentally, so Dudley and Stephens are sentenced. They are sentenced to death. And then they are promptly pardoned based on popular outcry. The country was gripped by the trial of Dudley and Stephens. And at the end of the day, the queen ended up letting them free, although the basic legal principle that's announced in that case stays with us today.

I don't have as much time to go through it, but I want to tell you all a little bit about the case of *McCleskey v. Kemp*, which is the case that I usually start my class with and I pair it with *Dudley and Stephens*. This is another murder case, but it's a murder case that takes place in a very different time in a very different location where McCleskey, a Black man, was convicted of two counts of armed robbery one count of murder in Georgia for a 1978 robbery of a furniture store that went wrong during which a white police officer was killed. He was sentenced to death by the jury.

And on appeal, he urged that his conviction violated the Eighth Amendment and the Fourteenth Amendment, the Eighth Amendment which prohibits cruel and unusual punishment, the 14th Amendment which guarantees equal protection of law. Based on his allegation, the death penalty as administered in the state of Georgia was arbitrary and racist.

At the heart of his legal defense was a study that's become known as the Baldus study that represents one of the most sophisticated analyses of race and the death penalty that has ever been conducted. According to the Baldus study, which the Supreme Court held-- accepted as true for purposes of the opinion, 22% of homicides involving Black defendants and white victims resulted in the death penalty, and only 1% of homicides involving white defendants and white victims resulted in homicide. The race of the defendant mattered quite a bit. The race of the victim really matters.

So when Black victims are killed, the death penalty is less rarely imposed. When white victims are killed, the death penalty is imposed with much greater frequency. McCleskey argued that this state of affairs was unconstitutional.

The court ultimately rejects his claims. Even accepting the Baldus study, which documents powerful racial disparities-- and I should mention as well, controlled for over 200 other variables that might explain why Black defendants or white victims typically correlated with certain results.

The court even accepting the study as true held that in order to prevail, McCleskey had to show discriminatory purpose on the part of some of the actors. So the prosecutor, the judge, or the jurors. What the Baldus study did not demonstrate was any evidence specific to his own case that would support an inference that racial considerations played a part in the sentence.

Accordingly, the court held that the Baldus study was clearly insufficient to support an inference that any decision makers in McCleskey's case had acted with discriminatory purpose. In other words, McCleskey had successfully shown that there was vast racial disparities in the application of death, but he didn't show that there was anything racist that had happened in his particular case. And when I say racist, I mean in the sense that there was subjective discriminatory purpose on the part of some of the decision makers.

Note how different that is from a definition of racism that's been advanced by Ruth Wilson Gilmore, a geographer and prison abolitionist who refers to racism as "the state-sanctioned or extra-legal production and exploitation of group-differentiated vulnerability to premature death," a definition that includes not only state-sanctioned violence in the form of the death penalty, but also different communities' disparate vulnerability to everything from interpersonal violence to, say, COVID.

That's not the way the Supreme Court has thought about race, and it's certainly not how the Supreme Court has thought about race in the context of criminal justice. We will return to this again and again about whether or not the Supreme Court standard is the right one. And maybe more beyond that, what the consequences of it are.

One fascinating part of the *McCleskey* opinion is that the court goes on to say that they rule against McCleskey for the following reasons. Taken to its logical conclusion, McCleskey's argument would throw into serious question the principles that underlie our entire criminal justice system. If we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar types of claims as to other types of penalties.

The court seems to be coming right up to the edge, right? It seems to be saying, well, heck. If we recognize that this was racist in some level that the Constitution prohibits, then we might not have a criminal justice system anymore.

And in fact, the dissent lampoons that approach. The dissent in very strong terms says, this is a cop-out. This is a fear of too much justice. We're going to allow a man to be sentenced to death because the prospect of his argument is that there are vast, impermissible racial discrepancies throughout our complete-- our judicial system, and we're just going to give up. It's a complete abdication of our judicial role. In any event, that view did not carry the day.

After the case was decided, it came out that most of the most damning evidence against McCleskey came from a jailhouse informant who had been planted by the Atlanta police. That won him a temporary reprieve.

But in 1991, the Supreme Court again, 6 to 3, upheld his conviction. On the eve of his death sentence, two of the jurors came forward and said they would have voted differently if they had known this was a police informant. To no effect, he was executed on September 29 in 1991. [COUGHS] Excuse me.

OK. So two things from *McCleskey v. Kemp* and *Dudley and Stephens*. Whenever you guys are reading a case, one thing that I want you to take away is, like, what's the basic holding? What's the basic legal rule? The principle that's applied to the facts that dictate that outcome.

McCleskey v. Kemp, pretty easy. You need to have discriminatory purpose in order to invalidate a conviction on equal protection grounds. In *Dudley and Stephens*, pretty simple. Necessity is a defense, but it's not going to be to homicide.

But the reason that I start my class this way is because I think they tee up broader ways that I want you all to be thinking about criminal law generally. I'm not going to be, like, hiding my biases. I think that *McCleskey* ranks as one of the cruelest, most misguided Supreme Court opinions in our country's history.

But it's far from indefensible. To the contrary, if you agree with the basic outcome in *McCleskey*, you are actually in the majority here. This is the dominant approach to equal protection law that we've had for decades.

But if you believe that, I want you to challenge yourself to think about sitting down with McCleskey as his attorney and informing him that the sad reality is he stands a much greater chance of being sentenced to death, if you're just being honest, because his victim was white and because of the race-- his own race.

Likewise, if you think that the dissent got it right in this case, I want you to take up that challenge. Think about, what does taking that argument to its logical conclusion mean? Does it mean that in a society like ours with serious racial disparities we can just not have a criminal justice system? What does a limiting principle of that look like?

And most importantly, I want you to sit with these moral questions throughout our semester. In both of these cases, there are important questions about which actors or institutions are best addressed, right? Should the legislature in Georgia fix the death penalty? Would we be better off with a system of clemency like ultimately benefited Dudley and Stephens? Is it a good thing that we have such discretion with judges and jurors? Or given our social divisions, is that deeply problematic?

How are these decisions based on questions of moral philosophy and legal reasoning? And how much are they just about race, class, power? And how do we think about questions, particularly when our moral intuitions differ so much from the criminal legal outcomes? Y'all, that's my first class. Come to UVA. I can't wait to talk to you about them more.