LESSON THREE - THE SUPREME COURT AND RACIAL INEQUALITY
LAW AND COMPLICITY

ESSENTIAL QUESTION

— What are the differences between law and justice?
— How has the U.S. Supreme Court created and sustained racial inequality?

OVERVIEW

The United States Supreme Court is the highest court of justice in the nation for all cases and controversies arising under the Constitution or the laws of the United States. It has also played a significant role in maintaining and legally codifying racial inequality.

In *True Justice* Bryan Stevenson states,"[Y]ou cannot understand slavery in America without understanding the role that the United States Supreme Court played in making slavery acceptable, making slavery moral, making slavery legal. . . I was persuaded, and still am, that the criminal justice system revealed the problems of our history of bias against the poor and people of color, unlike few systems did."

In this two-day lesson, students will explore their understanding of law and justice and begin to learn about the role of the Supreme Court in sustaining racial inequality since the nation's founding. Students will watch documentary film clips and interview threads from *True Justice*, and examine a variety of other resources to discover how our nation's highest court justified and legalized racial discrimination. Students will synthesize their learning of the lesson topic by creating a narrative map of their own design.

Teacher Note: This lesson is not a comprehensive look at the legal history of racial inequality in America. Because of the span of time and complexity of the topic, students may or may not choose to include additional legal cases and arguments in their narrative map.

LESSON OBJECTIVES

Students will:

— Discuss the distinctions between law and justice
— Explore the meaning of the phrase "equal justice under law"
— Examine how the Supreme Court legalized and maintained racial inequality
— View film clips from True Justice and excerpts from the Interview Archive that explain how decisions made by the Supreme Court systematically disadvantaged people of color
— Synthesize their learning by creating a narrative map that explains their understanding of how the Supreme Court has been complicit in perpetuating racial inequality

MATERIALS

Equipment for viewing film clips and interview threads, and copies of handouts

LENGTH

Two, 50-minute class periods plus optional extended learning opportunities

ACTIVITIES: DAY ONE

1 . OPENING DISCUSSION

Exploring Law, Justice and "Equal Justice Under the Law"

1. In *True Justice*, Stephen Bright says, "There's a huge difference between law and justice."

Have students create either a two column table and title one column law and the other justice, or draw a venn diagram of overlapping concentric circles with one circle law and the other justice. Ask students to individually list words and phrases that come to mind that describe and define each term. Discuss student's responses and, as a class, create a working definition of each word that can be enhanced and changed as the lesson unfolds.

*Note: If your students want more context for this activity, read aloud the full passage that contains Stephen Bright's quote (the text is also available in **Handout Three: The Promise of the Law Thread**).*

> Well, there's a huge difference between law and justice. Law says that, "If a person misses a deadline by a day, even though it's an innocent mistake, that person is going to be denied any relief in the court." That's not justice. Justice would say, "Let's look and see what happened and do the right thing." Law says, the Supreme Court says, "No, that person's out of luck. We will never look at what happened in that case." Law says that "We allow prosecutors to strike black people in picking juries and try cases to all white juries." Justice would say, "The jury would be representative of a community and would be a diverse jury." The law doesn't say that. You can look at time after time, the law says that, "We're going to have prosecutors who are absolutely immune from any misconduct while they're in office." Justice would say, "We'll look at those things and do whatever's appropriate to deal with some of the really egregious prosecutorial misconduct we've seen and particularly in death penalty cases.

2. Write the phrase "Equal Justice Under Law" and explain that the phrase is engraved on the entrance to the Supreme Court building in Washington D.C.

Read aloud the following statement from Bryan Stevenson in True Justice, regarding the meaning of that phrase to him, letting students know they will learn more about the *McCleskey v Kemp* case he refers to in the film clips that follow:

> For most of my career I've provided legal representation to people on death row. I've argued a bunch of cases before the United States Supreme Court and each time I go, I stand there in front of the court, I read what it says about equal justice under law. I have to believe that, to make sense out of what I do.
>
> Once I got involved in representing people on death row, it was McCleskey that began to illuminate the ways in which our history of racial inequality was limiting the commitment of the rule of law and disadvantaging people of color. What was surprising is that the United States Supreme Court didn't question the data. The court said even though we believe

you, we're not going to strike down the death penalty because a certain amount of bias in the administration of the death penalty is in our opinion "inevitable." And as a young lawyer working on that case, that was a real crisis. It felt like the court was abandoning the commitment to equal justice, it was abandoning the commitment to racial equality.

Have students discuss in small groups their understanding of "equal justice under law," and add any new insights to the class's working definitions of law and justice.

Teacher Note: Transition from this discussion to watching the three film clips from True Justice *on Day One of the lesson, and continue on Day Two with the primary source documents and the interview thread created for this lesson. Each offers insights and information on law and justice from multiple perspectives and experiences. Be sure to return to the class's working definition of law and justice several times during the lesson to capture reflections and new learning throughout the two days.*

2. ANALYZING FILM AS TEXT

Distribute **Handout One: The Supreme Court and Racial Inequality**

Ask students to review the Note Catcher before watching the clips so they are familiar with the questions. Invite students to write down their notes while watching, and offer a few minutes after each clip to complete their notes.

Film Clips

Clip One: The Doctrine of Inevitability (runtime: 11:00)

This clip introduces several seminal cases litigated by Bryan Stevenson and EJI before the Supreme Court. Bryan Stevenson argues that the death penalty is racially discriminatory, and in *McCleskey v Kemp*, the Supreme Court finds that some amount of racial bias is "inevitable."

Clip Two: Lynching and Its Legacy (runtime: 6 min)

Teacher Note: This segment uses a derogatory term for African Americans.

In this clip, Bryan Stevenson describes the case of Walter McMillian, and how unfair death penalty sentencing in the present is inextricably linked to the legacy of racial terror lynching.

**For more information on Walter McMillian see this short biography from Equal Justice Initiative.[26]

Clip Three: Being Willing to Say 'I'm Sorry' (runtime: 4:00)

Anthony Ray Hinton was wrongly convicted, sentenced to death row, and imprisoned for 30 years by the state of Alabama. To this day he has not received an apology. Bryan Stevenson talks about the need for and power of apology, despite our cultural norms against admissions of wrongdoing by powerful people and institutions.

Finish Day One of this lesson by offering students time to complete their Note Catchers.

26 https://eji.org/walter-mcmillian

ACTIVITIES: DAY TWO

1 . OPENING DISCUSSION

Begin Day Two by returning to the terms 'law' and 'justice.' Ask students to add new information or ideas to their working definition of the terms. Take a few minutes to discuss any new questions that have arisen before transitioning to the Day Two activities.

2. A HISTORICAL VIEW

The Supreme Court and the Justification for Slavery

Distribute **Handout Two: The Supreme Court and Enslaved People**
Handout Two contains excerpts from:

- Walter Johnson's *Soul by Soul*, featuring first-person accounts from enslaved people
- One of the Supreme Court decisions that played a major role in codifying slavery into law, *Dred Scott v. Sanford*

Briefly discuss the excerpts for clarity and understanding. Then have students write an essay reflecting on the following writing prompt:

> Juxtapose the personal accounts of enslaved people and the Supreme Court decision that made their enslavement legal.

2. A CLOSE VIEW - INTERVIEW THREADS

Teacher Note: The film-makers conducted numerous interviews to produce True Justice with nine of these interviews free and accessible in the Interview Archive on the Kunhardt Film Foundation website. A selection of these interviews, edited together here to create interview threads, are available for your students' learning.

For Lesson Three:

- One interview thread was created for this lesson that teachers and students can choose from, or use together, to deepen their understanding of the lesson topic.
- Print and distribute **Handout Three: The Promise of the Law** so students can follow along with the interview transcripts.
- As students watch the Interview Thread, have them follow along on the transcripts, and underline details that catch their attention, and jot down questions and insights that come to mind.

5. BUILDING A NARRATIVE MAP

Bryan Stevenson and the Equal Justice Initiative believe that throughout history, false narratives have helped to create and sustain injustice, and that it is necessary to confront and change these narratives in order to create a more just society.

To engage students in the process of building a new narrative, each lesson culminates by having students synthesize their learning and map out this information into a form of their choosing. In Lesson Six students will compile these new narrative maps to complete a final assessment.

Here are some suggested narrative maps:

- **Storyboard**

  A sequence of drawings, typically with some directions and dialogue - that conveys their understanding of the lesson topic

- **Graphic Organizer**

  A way to present related information in both a visual and text format

- **Sketchnotes**

  Often referred to as doodling, sketchnoting is defined as creative, individualized note taking that uses a mix of words and pictures together to create a personal story or narrative.

For Lesson Three: The Supreme Court and Racial Inequality

Using the narrative map of your choice from Handout Four, organize your learning to convey your understanding of distinctions between law and justice, and of the role of the United States Supreme Court in creating and sustaining racial inequality.

6. CLOSING DISCUSSION AND REFLECTION

- Begin by having students write down any questions that came up for them during this lesson that they would like to explore more deeply.
- If available, have students write these questions on large Post-It Notes or on an easel paper that can remain hanging in your class.
- Have each student share their question(s) aloud in a roundtable like convening, allowing students to respond - not answer the questions - only after the entire class has spoken.

This is the halfway mark of the lessons. At this juncture, it may be helpful at the conclusion of Lesson Three to take the emotional pulse of the class by asking each student to silently write down any thoughts or feelings that are surfacing. Invite students to share these reflections with if they are comfortable, or keep them as a personal journal entry.

7. EXTENDED LEARNING

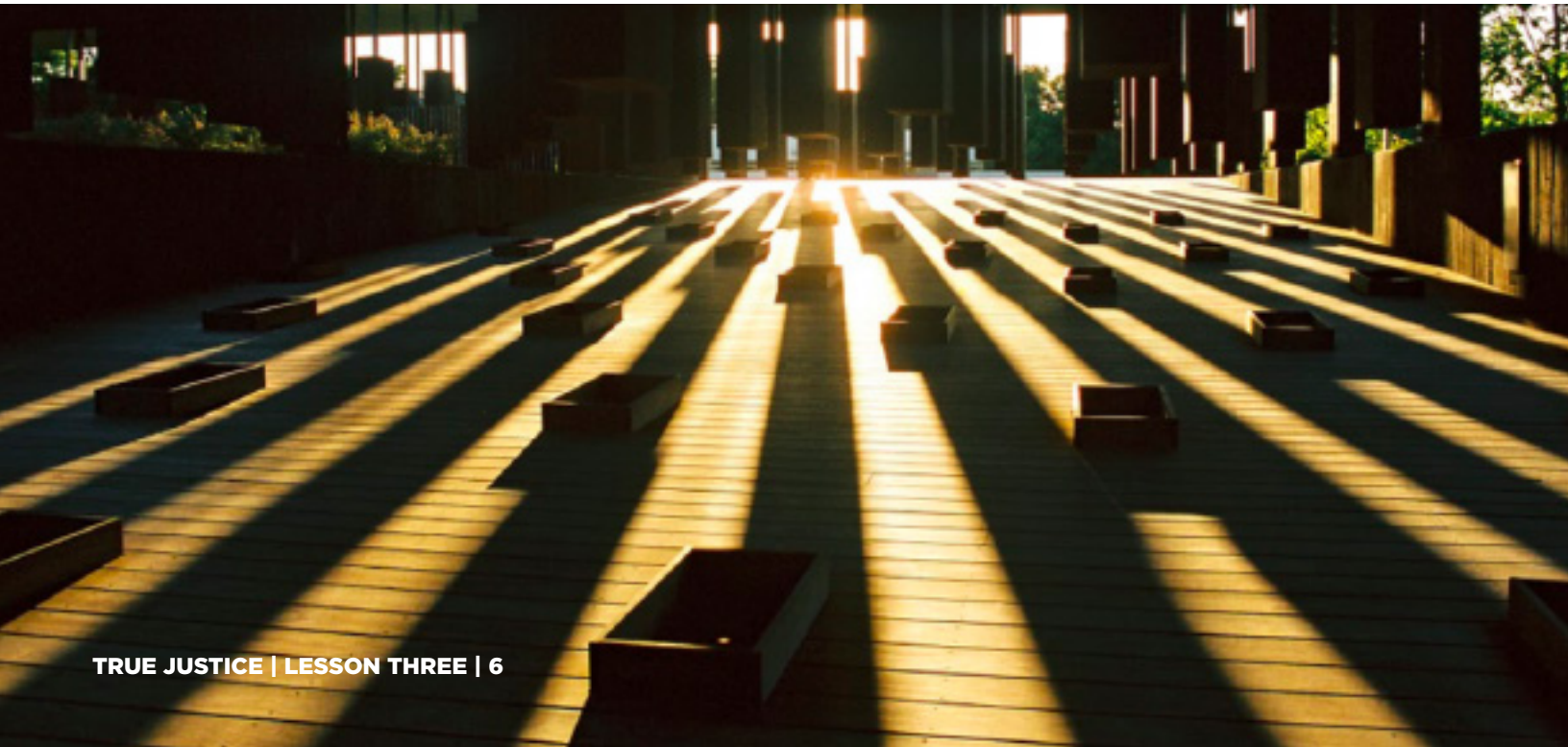
Option One: Close Examination: McCleskey v Kemp

Handout Five contains an outline of the case, the foundational Baldus study, excerpts from Justice Powell's majority decision and Justice Brennan's famous dissent. Using these materials, and the associated links to the primary sources of each document, create a case summary of *McCleskey v. Kemp* and its relevance to the essential question of this lesson: How has the U.S. Supreme Court been complicit in creating and sustaining racial inequality?

Option Two: Implicit Bias

The Equal Justice Initiative has extensive resources on their website, EJI.org, to learn more about the Supreme Court's role in sustaining racial violence, racial inequality, and racial bias. Invite students to survey these resources and engage with an independent research topic of their choosing on the Supreme Court.

- Step One: Type in "Supreme Court" in the EJI Search window
- Step Two: Select at least one article of interest
- Step Three: Complete a close reading of the article/site/video etc... and be prepared to share this summary the next day in class.



Common Core State Standards

Anchor Standards

Reading Literature and/or Information: Integration of Knowledge and Ideas.

RL/RI.X.7. Integrate and evaluate content presented in diverse media and formats, including visually and quantitatively, as well as in words.

RL/RI.X.8. Delineate and evaluate the argument and specific claims in a text, including the validity of the reasoning as well as the relevance and sufficiency of the evidence.

RL/RI.X.9. Analyze how two or more texts address similar themes or topics in order to build knowledge or to compare the approaches the authors take.

Speaking and Listening: Comprehension and Collaboration

SL.X.1 Prepare for and participate effectively in a range of conversations and collaborations with diverse partners, building on others' ideas and expressing their own clearly and persuasively.

SL.X.2. Integrate and evaluate information presented in diverse media and formats, including visually, quantitatively, and orally

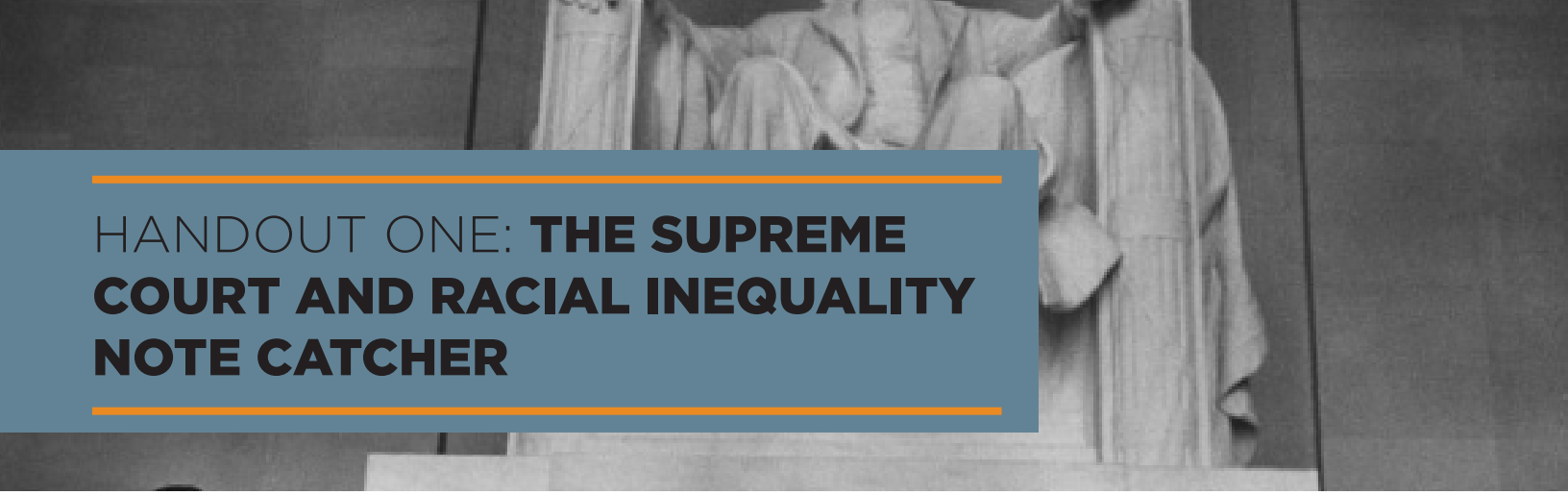
SL.X.3 Evaluate a speaker's point of view, reasoning, and use of evidence and rhetoric.

SL.X.5 Make strategic use of digital media and visual displays of data to express information and enhance understanding of presentations.

Writing: Research to Build and Present Knowledge.

W.X.7: Conduct short as well as more sustained research projects based on focused questions, demonstrating understanding of the subject under investigation.

W.X.8 Gather relevant information from multiple print and digital sources, assess the credibility and accuracy of each source, and integrate the information while avoiding plagiarism.



HANDOUT ONE: **THE SUPREME COURT AND RACIAL INEQUALITY NOTE CATCHER**

Directions: As you watch the film clips, consider the following questions and record your answers.

CLIP ONE: *THE DOCTRINE OF INEVITABILITY*

Write down key words and phrases that stand out to you as you listen to Bryan Stevenson explain the way the Supreme Court has sustained racial inequality:

General Notes:

CLIP TWO: *LYNCHING AND ITS LEGACY*

Write down key words and phrases that stand out to you as you listen to Bryan Stevenson explain the way the Supreme Court has sustained racial inequality:

General Notes:

CLIP THREE: *BEING WILLING TO SAY 'I'M SORRY'*

In what way did the clips influence how you think about "equal justice under law"?

General Notes:

HANDOUT TWO: **THE SUPREME COURT AND ENSLAVED PEOPLE**

Directions: Students will read excerpts from:

- **Walter Johnson's Soul by Soul: Life Inside the Antebellum Slave Market[27]**
- **The Supreme Court decision in Dred Scott v Sanford that legally declared enslaved people were not citizens in the United States, but rather had the same status as owned property.**

After reading these excerpts, discuss as a large group for clarity and understanding.

EXCERPT FROM CHAPTER ONE

The Chattel Principle, pp 19-22:

The character of the violence also changed as gruesome public spectacle lynchings became much more common. At these often festive community gatherings, large crowds of whites watched and participated in the black victims' prolonged torture, mutilation, dismemberment, and burning at the stake. Such brutally violent methods of execution had almost never been applied to whites in America. Indeed, public spectacle lynchings drew from and perpetuated the belief that Africans were subhuman—a myth that had been used to justify centuries of enslavement, and now fueled and purportedly justified terrorism aimed at newly emancipated African American communities. . . .

Living Property

From an early age slaves' bodies were shaped to their slavery. Their growth was tracked against their value; outside the market as well as inside it, they were taught to see themselves as commodities. When he was ten, Peter Bruner heard his master refuse an offer of eight hundred dollars (he remembered the amount years later), saying, "that I was just growing into money, that I would soon be worth a thousand dollars." Before he reached adulthood John Brown had learned that the size of his feet indicated to a slaveholder that he "would be strong and stout some day," but that his worn-down appearance - bones sticking "up almost through my skin" and hair "burnt to a brown red from exposure to the sun" - nevertheless made it unlikely that he would "fetch a price." Likewise, but the time she was fourteen, Elizabeth Keckley had repeatedly been told that even though she had grown "strong and healthy," and "notwithstanding that I knit socks and attended to various kinds of work ... that I would never by worth my salt." Years later the pungency of the memory of those words seemed to surprise Keckley herself. "It may seem strange that I should place such emphasis upon words thoughtlessly, idly spoken," she wrote in her autobiography. Condensed in the memory of a phrase turned about her adolescent body, Elizabeth Keckley re-encountered the commodification of her childhood.

...

The process by which a child was made into a slave was often quite brutal. As an adolescent, Henry [Clay Bruce] was adjudged "right awkward" and beaten by his mistress, who thought his arms too long and hands too aimless for work in her dining room. Ten-year-old Moses Grandy was flogged "naked with a severe whip" because he "could not learn his [master's] way of hilling corn." Thirteen-year-old Celestine was beaten until her back was marked and her clothes stained with blood because she could not find her way around the kitchen. Twelve-year-old Monday was whipped by his mistress because his lupus made his nose run on the dinner napkins. Just as the bodies of slaveholding children were bent to the carefully choreographed performances of the master class - in their table manners, posture and carriage, gender-appropriate deportment, and so on - motion by disciplined motion, the bodies of slave children were forcibly shaped to their slavery.

...

Just as the chattel principle was worked into the bodies of enslaved people, it was also present in their families and communities... The threat of sale, Thomas Johnson later remembered, infused his friendships with fear. Johnson remembered that the trade was present in his most intimate relations from the time he was very young: "my dear parents ... talked about our coming misery, and they lifted up their voices and wept aloud as they

27 Johnson, Walter, Soul By Soul: Life Inside the Antebellum Slave Market. Harvard University Press, Cambridge, MA. 1999.

spoke of us being torn from them and sold off to the dreaded slave trader." The account Jones made of his later attachments was similarly interpolated with the dread of sale: "I had a constant dread that Mrs. Moore would be in want of money and sell my dear wife. We constantly dreaded a final separation. Our affection for each other was very strong and this made us always apprehensive of a cruel parting. Likewise Lewis Hayden: "Intelligent colored people of my circle of acquaintance as a general thing felt no security whatever for their family ties." Some, it is true, who belonged to rich families felt some security; but those of us who looked deeper and knew how many were not rich that seemed so, and saw how fast the money slipped away, were always miserable. The trader was all around, the slave pens at hand, and we did not know what time any of us might be in it." Under the chattel principle, every advance into enslaved society - every reliance on one another, every child, friend, or lover, every social relation - held within it the threat of its own dissolution.

SUPREME COURT CASE: *DRED SCOTT v JOHN F.A. SANFORD*[28]

Facts of the case

Dred Scott was an enslaved man in Missouri. From 1833 to 1843, he resided in Illinois (a free state) and in the Louisiana Territory, where slavery was forbidden by the Missouri Compromise of 1820. After returning to Missouri, Scott filed suit in Missouri court for his freedom, claiming that his residence in free territory made him a free man. After losing, Scott brought a new suit in federal court. Scott's master maintained that no "negro" or descendant of enslaved people could be a citizen in the sense of Article III of the Constitution.

Question

Was Dred Scott free or an enslaved person?

Conclusion

- 7-2 Decision for Sanford
- Majority Opinion By Roger B. Taney
- Held portions of the Missouri Compromise unconstitutional in violation of the Fifth Amendment, treating Scott as property, not as a person.

Excerpt From Chief Justice Taney's Decision:

Original text available at the Library of Congress: https://www.loc.gov/resource/llst.020/?sp=1&st=text

"The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.
"It will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country, and sold as slaves.
...
"The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

28 Excerpted from: https://www.oyez.org/cases/1850-1900/60us3

HANDOUT THREE: **THE PROMISE OF THE LAW THREAD, INTERVIEW ARCHIVE**

Directions: Underline key phrases and new details as you watch and listen to the interviews

STEPHEN BRIGHT

Well, the great promise after the Civil War, of course, was the Fourteenth Amendment, and the Fourteenth Amendment provided that there was to be equal protection of the laws, and the purpose really was to protect the freed slaves and to protect the people during Reconstruction from being detained and imprisoned and otherwise dealt with by Southern communities. But almost immediately, the Supreme Court turned that around by saying it required state action, and therefore, the people who participated in the Colfax massacre were not entitled, in fact that the law protected the Ku Klux Klan from the government, not the people who were victimized from the Ku Klux Klan.

That's remarkable. Then later, the court said you had to prove motive that if you were denying people the vote or denying people their rights in some way, you had to prove the motive and the intent, which is almost impossible to prove. And so basically, you have, and this is something that I try to get across to my students, you have these laws and cases that sound very good on the face of it. When you look at what you actually have to prove, it's a very hollow promise. It doesn't live up to what we say we have in this country when we say equal justice under law.

STEPHEN BRIGHT

The criminal courts in the South have throughout our history played a role in racial oppression in the United States. There's no getting around it, enforcement of slavery, convict leasing where you brought people into court on some minor charge like loitering, and then leased them out to the plantations and the turpentine camps and the coal mines around Birmingham, whatever. Jim Crow, enforcing Jim Crow, that a black person could be shot dead by a white person and would probably never be tried for that. Mass incarceration, where we are today. Lynching and terrorism, in which the perpetrators of these murders were never tried or brought to justice at all.

And this was going on on a grand scale in the South. So the courts have really been used to perpetuate white supremacy and to disenfranchise black people. I've been to courts where you see black people pleading guilty, getting probation in felony cases, because they know this is disenfranchising all these people. Of course, you're taking a huge number of people out of the population, 2.2 million, and that's destroying people. It's destroying families, and it's destroying communities. Yet that's what the criminal courts in the Southern part of the United States, generally all over the country, but particularly in the Southern part of the states have been carrying on.

STEPHEN BRIGHT

Well, there's a huge difference between law and justice. Law says that "If a person misses a deadline by a day even though it's an innocent mistake, that person is going to be denied any relief in the happened in that case." Law says that "We allow prosecutors to strike black people in picking juries and try cases to all white juries." Justice would say, "The jury would be representative of a community and would be a diverse jury." The law doesn't say that. You can look at time after time, the law says that, "We're going to have prosecutors who are absolutely immune from any misconduct while they're in office." Justice would say, "We'll look at those things and do whatever's appropriate to deal with some of the really egregious prosecutorial misconduct we've seen and particularly in death penalty cases."

What evolved in the courts after very good success in challenging death sentences, and the courts were setting aside a number of death sentences. Both the United States Supreme Court and also the regional court that covers Georgia, Alabama, and Florida was setting aside a number of cases. Increasingly as that happened, the Supreme Court led by Justice Rehnquist, later with the help of Justice O'Connor started adopting, excuse me, all of these procedural ways of avoiding reaching the merits of issues in these cases. The court kept, as Justice Marshall pointed out, this became just an airtight way of avoiding looking at the issues. That increased the number of executions because increasingly, people were being denied a hearing in the courts because of some procedural rule that the Supreme Court had made up. This is not the work of Madison and Jefferson and those folks. This is the work of Rehnquist and O'Connor and other people on the Supreme Court and Scalia and so forth at that time. Increasingly, as Justice Stevens said at one point, "The court had lost its way in a procedural maze of its own making." That's exactly what happened. Unfortunately, Congress then got in on the act and passed a law to make it even harder for the courts to examine issues and decide them. The result now is that very much of the fighting in court is about whether you can even get to the issue and decide it on the merits.

BRYAN STEVENSON

I really do believe that hopelessness is the enemy of justice. Justice prevails where hopelessness persists. The Supreme Court was hopeless about what it could do to protect black people who were facing enslavement, so they created these rulings. The Congress and the Courts got hopeless after emancipation, but what they could do to create racial equality in this country. People in the North were hopeless about what they could say to stop these brutal lynching that were talking place across the region. We allowed states to segregate people, to codify racial segregation and hierarchy because we didn't think there was any chance that we could do anything better.

Then the United States Supreme Court in 1987, the upheld the death penalty despite overwhelming evidence of racial bias because they were hopeless about what our justice system could do to eliminate racial discrimination. It is that loss of hope that is motivating, at least me, to want to talk about slavery, and genocide, and lynching, and segregation. Even though it's brutal and difficult, there's something unbelievably hopeful about the stories of people who would endure this brutality, who would live with this threat and terror. Who would navigate the brutal, violent, humiliating segregation that many of my people have had to navigate, and still say, "I want to be an American. I want to succeed. I want to create justice in this country. I'm willing to create ways of living together with people who are different than me." The hope of that story is the strength of this nation, but we're not gonna understand that strength until we understand what has threatened it, what has shaped it. So yeah, I think it's important that we understand all the brutal, all the ugly details, 'cause those are things that actually give rise to what might allow us to one day claim something really beautiful.

STEPHEN BRIGHT

During the time that Bryan first came here, we were having pretty remarkable success in the courts challenging death sentences. About somewhere in there, the NAACP Legal Defense Fund started putting together the evidence showing just what we were seeing every day in our work, which was these grave racial disparities and the infliction of the death penalty in Georgia, that you were 4.3 times more likely to get the death penalty in a case where you had a white victim and a black defendant. All that was presented in the case of Warren McCleskey. That ultimately was appealed to the United States Supreme Court.

I would say the decision in McCleskey, sort of like the Dred Scott decision, was one of the most dismaying decisions in the history of the United States Supreme Court. The court said that racial disparities are inevitable, and that there was no need to deal in any depth. The court made several very disturbing findings. One, it was inevitable. Two, that if we got into the racial disparities for the death penalty, we would have to look at the racial disparities with all other kinds of sentencing, what Justice Brennan in his dissent called, "the fear of too much justice."

The other that there were procedures in place that were supposed to minimize the risk of race discrimination, but the court never examined the procedures to see if they actually worked or not. This is something only lawyers could come up with to say, "We'll have procedures to minimize the risk of race, but we won't ask whether those procedures first of all were even employed, and secondly, whether they worked or not." In McCleskey, one of the procedures they pointed to wasn't even adopted until long after Warren McCleskey's trial. It's a 5-4 opinion, very close and a very, very dismaying opinion for anybody who trusted the courts to come through in a situation like that.

HANDOUT FOUR: **NARRATIVE MAP**

FOR LESSON THREE: Using Create a narrative map that reflects your impressions, insights, opinions, and questions about the essential questions of this lesson:

- What are the differences between law and justice?
- How has the U.S. Supreme Court been complicit in sustaining racial inequality?

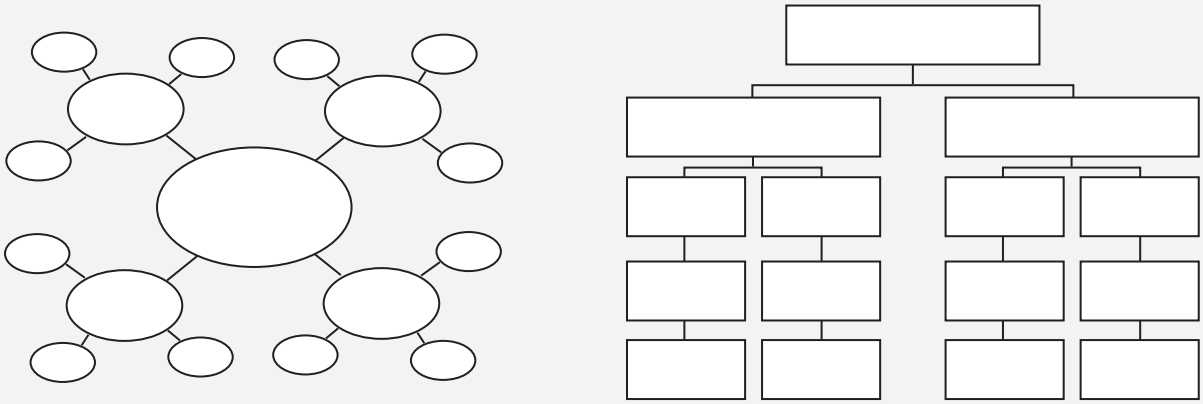
STORYBOARD

A sequence of drawings, typically with some directions and dialogue that conveys their understanding of the lesson topic, and which may be then made into a graphic novel or film. Each of the squares represents a 'scene' of the story you want to tell. Give each box a title, choose a representative image, and write a sentence or two about the ideas and concepts this section of your overall story will communicate.

Scene Title:	Scene Title:	Scene Title:
Description:	*Description:*	*Description:*

GRAPHIC ORGANIZER

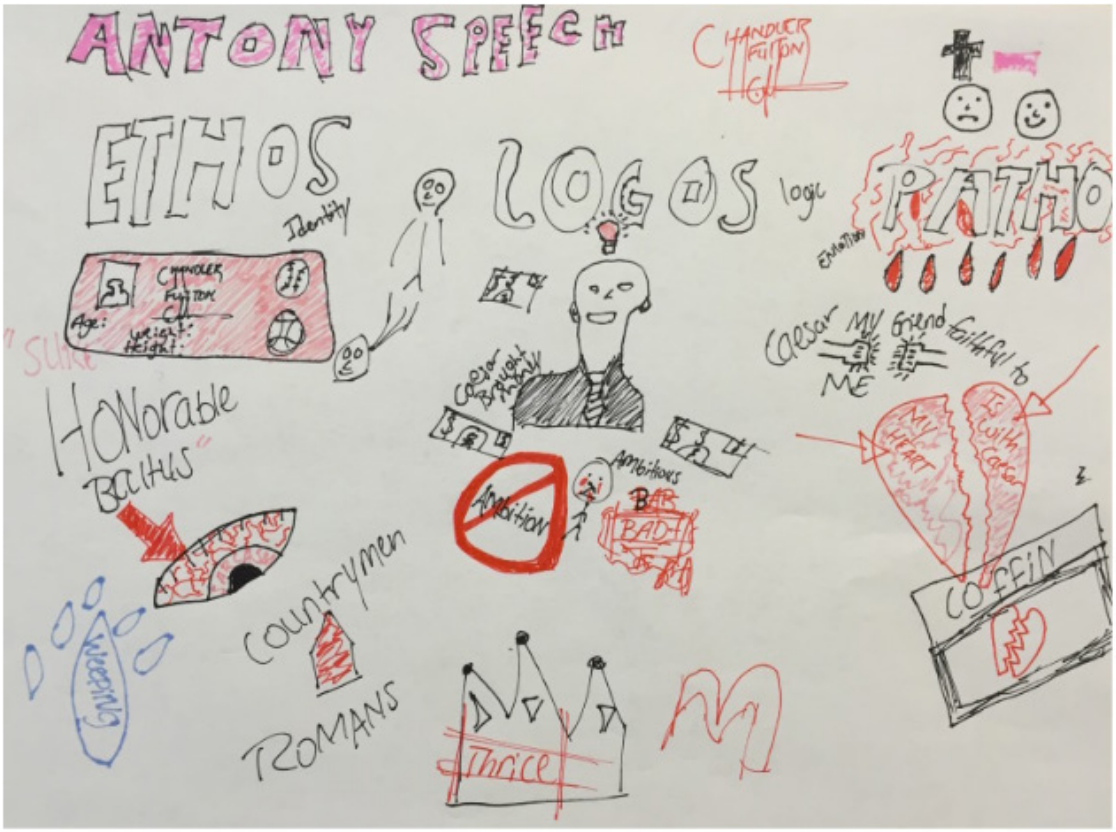
A visual method of organizing information that is sometimes called a mindmap, invites students to organize ideas and concepts in a non-linear, relational way using words and/or images.



Sample images from: https://www.cultofpedagogy.com/graphic-organizer/

SKETCHNOTE

Often referred to as doodling, sketchnoting is defined as creative, individualized note taking that uses a mix of words and pictures together to create a personal story or narrative.[7]



Sample Image from: https://www.kqed.org/mindshift/39941/making-learning-visible-doodling-helps-memories-stick

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HANDOUT FIVE: **DEEP DIVE, *MCCLESKEY v. KEMP***

Directions: Using the outline of the case and the Baldus study, together with excerpts from Justice Powell's majority decision and Justice Brennan's dissent, create a document that summarizes McCleskey v. Kemp and its relevance to the essential question of this lesson: How has the U.S. Supreme Court been complicit in sustaining racial inequality?

SUPREME COURT CASE MCCLESKEY v. KEMP

Facts of the case from https://www.oyez.org/cases/1850-1900/60us393:

McCleskey, a black man, was convicted of murdering a police officer in Georgia and sentenced to death. In a writ of habeas corpus,[30] McCleskey argued that a statistical study proved that the imposition of the death penalty in Georgia depended to some extent on the race of the victim and the accused. The study found that black defendants who kill white victims are the most likely to receive death sentences in the state.

Question

Did the statistical (Baldus) study prove that McCleskey's sentence violated the Eighth and Fourteenth Amendments?

Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Most commonly mentioned in relation to the death penalty.[31]

Fourteenth Amendment: Ratified on July 8, 1868, the Fourteenth Amendment is often referenced as granting citizenship to "all persons born or naturalized in the United States" with the most commonly used phrase for litigation is "equal protection under the law."[32]

Conclusion

- 5-4 Decision
- Majority Opinion by Lewis F. Powell, Jr.

The Court held that since McCleskey could not prove that purposeful discrimination which had a discriminatory effect on him existed in this particular trial, there was no constitutional violation. Justice Powell refused to apply the statistical study in this case given the unique circumstances and nature of decisions that face all juries in capital cases. He argued that the data McCleskey produced is best presented to legislative bodies and not to the courts.

Listen to the oral arguments of the case, and the announcement of the court decision at:
https://www.oyez.org/cases/1986/84-6811

Full text of the Baldus Study is available at: https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=6378&context=jclc

The full text of all of the Justice's opinions are available at:
https://www.law.cornell.edu/supremecourt/text/481/279#writing-USSC_CR_0481_0279_ZD

30 A writ, or order issued by a legal authority with administrative or juridicial powers, typically a court, of habeas corpus is used to bring a prisoner or other detainee (e.g. institutionalized mental patient) before the court to determine if the person's imprisonment or detention is lawful. https://www.law.cornell.edu/wex/habeas_corpus
31 https://www.law.cornell.edu/constitution/eighth_amendme
32 https://www.law.cornell.edu/constitution/amendment

Excerpt from Powell's Decision:

To evaluate McCleskey's challenge, we must examine exactly what the Baldus study may show. Even Professor Baldus does not contend that his statistics prove that race enters into any capital sentencing decisions or that race was a factor in McCleskey's particular case. Statistics at most may show only a likelihood that a particular factor entered into some decisions. There is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case. There are similar risks that other kinds of prejudice will influence other criminal trials. McCleskey asks us to accept the likelihood allegedly shown by the Baldus study as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions. This we decline to do.

Because of the risk that the factor of race may enter the criminal justice process, we have engaged in "unceasing efforts" to eradicate racial prejudice from our criminal justice system. Our efforts have been guided by our recognition that "the inestimable privilege of trial by jury . . . is a vital principle, underlying the whole administration of criminal justice." Specifically, a capital sentencing jury representative of a criminal defendant's community assures a "'diffused impartiality.'"

Individual jurors bring to their deliberations "qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. It is not surprising that such collective judgments often are difficult to explain. But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that "buil[d] discretion, equity, and flexibility into a legal system."

McCleskey's argument that the Constitution condemns the discretion allowed decisionmakers in the Georgia capital sentencing system is antithetical to the fundamental role of discretion in our criminal justice system. Discretion in the criminal justice system offers substantial benefits to the criminal defendant. Not only can a jury decline to impose the death sentence, it can decline to convict or choose to convict of a lesser offense. Whereas decisions against a defendant's interest may be reversed by the trial judge or on appeal, these discretionary exercises of leniency are final and unreviewable. Of course, "the power to be lenient [also] is the power to discriminate," but a capital punishment system that did not allow for discretionary acts of leniency "would be totally alien to our notions of criminal justice."

At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. The discrepancy indicated by the Baldus study is "a far cry from the major systemic defects identified in Furman." As this Court has recognized, any mode for determining guilt or punishment "has its weaknesses and the potential for misuse." Specifically, "there can be `no perfect procedure for deciding in which cases governmental authority should be used to impose death.'" Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.

Text from Brennan's dissent:

At the time our Constitution was framed 200 years ago this year, blacks had, for more than a century before, been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect.

Dred Scott v. Sandford, 19 How. 393, 407 (1857). Only 130 years ago, this Court relied on these observations to deny American citizenship to blacks. Ibid. A mere three generations ago, this Court sanctioned racial segregation, stating that "[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

In more recent times, we have sought to free ourselves from the burden of this history. Yet it has been scarcely a generation since this Court's first decision striking down racial segregation, and barely two decades since the legislative prohibition of racial discrimination in major domains of national life. These have been honorable steps, but we cannot pretend that, in three decades, we have completely escaped the grip of a historical legacy

spanning centuries. Warren McCleskey's evidence confronts us with the subtle and persistent influence of the past. His message is a disturbing one to a society that has formally repudiated racism, and a frustrating one to a Nation accustomed to regarding its destiny as the product of its own will. Nonetheless, we ignore him at our peril, for we remain imprisoned by the past as long as we deny its influence in the present.

It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. "The destinies of the two races in this country are indissolubly linked together," id. at 560 (Harlan, J., dissenting), and the way in which we choose those who will die reveals the depth of moral commitment among the living.

The Court's decision today will not change what attorneys in Georgia tell other Warren McCleskeys about their chances of execution. Nothing will soften the harsh message they must convey, nor alter the prospect that race undoubtedly will continue to be a topic of discussion. McCleskey's evidence will not have obtained judicial acceptance, but that will not affect what is said on death row. However many criticisms of today's decision may be rendered, these painful conversations will serve as the most eloquent dissents of all.