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## Capital Defenders as Outsider Lawyers

Kathryn A. Sabbeth

*University of North Carolina School of Law*, [sabbeth@email.unc.edu](mailto:sabbeth@email.unc.edu)

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## CAPITAL DEFENDERS AS OUTSIDER LAWYERS

KATHRYN A. SABBETH\*

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### INTRODUCTION

Lawyers play a variety of roles in intragroup dissent. A lawyer may work to prevent or plan for disputes, facilitate communication or adjudication, or represent one side in its expression of dissent or effort to quash it. While lawyers sometimes identify as members of the groups whose disagreements they seek to resolve, they often stage interventions in communities from which they stand apart.<sup>1</sup>

\* Assistant Professor of Law, University of North Carolina at Chapel Hill. Many thanks to Anthony Amsterdam, John C. Boger, Frances C. Castillo, Jack Greenberg, Sarah Holladay, Rob J. Smith, and Bryan Stevenson for sharing their observations from capital defense practice. Thanks also to Al Brophy, Holning S. Lau, and the participants in the Intragroup Dissent symposium for helpful conversations, and to Nicholas Hill and Catherine McCormack for excellent research assistance.

1. On rare occasions, lawyers represent parties that oppose the groups to which the lawyers belong. See, e.g., David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030 (1995); ARYEH NEIER, *DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF Freedom* (1979).

Outsider lawyers offer special strengths. Lawyering for social change necessarily contests an existing social order, and dissent from within may be hindered by forces ranging from simple blindness to the injustice of the status quo to direct pressure to cooperate with dominant institutions. Outsider lawyers enjoy freedom from local pressures. When they contribute their perspectives and professional tools, their interventions can shift power towards particular subgroups and amplify voices that the local political process might otherwise drown out.

Yet the influence of outsider lawyering raises questions of authority and accountability. An important critique has been that outsider lawyers parachute into communities, equipped with their own agendas and little appreciation of local context. They impose their views on the individuals or subgroups they claim to represent and may in fact silence, rather than support, those community members. While claiming to usher in progress and universal rights, they instead replicate their own, culturally-specific specific social systems and historical dominance. These critiques of outsiders' legal work present challenges to the legitimacy of intervention projects and raise pragmatic questions about their effectiveness.

Of course, not all critiques of outsider lawyering are equally valid.<sup>2</sup> The charge of cultural imperialism can be falsified to undercut the legitimacy of advocacy that actually flows from grassroots; foes of activism may label it foreign by way of slur.<sup>3</sup> The origin of ideas does not necessarily indicate anything about their substantive merits, and some of the labels of origin are simply inaccurate.<sup>4</sup> Charges of cultural imperialism also gloss over or deny incidents of internal dissent.<sup>5</sup> To maintain the visibility and strength of voices of internal dissent, outsider lawyers offering support must strive to ensure that their own position of privilege does not result in overstepping their role of providing support to the principal agents of change.

2. See Kimberle Crenshaw, *Were the Rights Critics Right About Rights? Reassessing the American Debate About Rights in the Post-Reform Era*, in *BEYOND RIGHTS TALK AND CULTURE TALK* 61, 72-73 (Mahmood Mamdani ed., 2000) (comparing human rights interventions in Africa and civil rights interventions in the U.S. South, and arguing that "discourses of anti-imperialism reify and in some ways insulate conditions of disempowerment").

3. Myths of geographic identity and origin have been used to undercut lawyering for social change. See Martha C. Nussbaum, *In Defense of Universal Values*, 36 *IDAHO L. REV.* 379, 383 (2000) ("[C]harge of 'Westernizing' looks like a shady political stratagem, aimed at discrediting forces that are pressing for change."). On the descriptive and normative problems with labeling social change "Western," see generally Holning S. Lau, *The Language of Westernization in Legal Commentary*, 61 *AM. J. COMP. L.* 507 (2013).

4. See Lau, *supra* note 3, at 515-28 (describing inaccuracies of "Westernization" label).

5. See Madhavi Sunder, *Cultural Dissent*, 54 *STANFORD L. REV.* 495, 560-61, 563 (2001).

This Essay will examine the dynamics of outsider lawyers' interventions by exploring the case of capital defense in the Southern United States. Northerners have played an important role as capital defenders in the South.<sup>6</sup> The litigation involving Northern lawyers in Southern courts reflects particular contexts of intragroup conflicts. These include both the historical struggle between North and South for the definition of U.S. American identity, as well as dissent within Southern communities. From the Civil War through the Civil Rights Movement, Northerners have depicted intervention as necessitated by the South's moral and legal deficiencies, while many white Southerners have depicted white Northerners as invading the South for economic and political control. Capital defense in the U.S. South is imbued with this narrative of cultural conflict and that conflict has at times been used to undermine the legitimacy of the lawyers' work. This story offers broader lessons on the limits of outsider lawyering.<sup>7</sup>

6. The definitions of "the South" and "the North" are contested and political. See Larry J. Griffin, *Why Was the South a Problem to America?*, in *THE SOUTH AS AN AMERICAN PROBLEM* 10, 17 (Larry J. Griffin & Don H. Doyle eds., 1995) ("[I]n the contestation over the meaning of nation and region, the South became defined . . . by southerners and nonsoutherners alike 'in opposition' to America" and "opposite to broader culture"); SOUTHERN EDUCATION FOUNDATION, INC., *A NEW MAJORITY: LOW INCOME STUDENTS IN THE SOUTH'S PUBLIC SCHOOLS* 5 (2007), <http://www.southerneducation.org/getattachment/b1995557-faec-42a1-a951-5fad5491b9e4/Publications/A-New-Majority-Low-Income-Students-in-the-South-s.aspx> ("[I]n name and in fact there are many Souths. . . . [S]cholars use definitions of the South that generally include from 9 to 15 states."). The U.S. Census Bureau divides the United States into four regions, each with subregions: (1) West (Mountain and Pacific); (2) Midwest (West North Central and East North Central); (3) Northeast (Middle Atlantic and New England); and (4) South (West South Central, East South Central and South Atlantic); the South includes the District of Columbia and the following sixteen states: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Oklahoma, North Carolina, Southern Carolina, Tennessee, Texas, Virginia, and West Virginia. U.S. CENSUS BUREAU, *CENSUS REGIONS AND DIVISIONS OF THE UNITED STATES*, [http://www.census.gov/geo/maps-data/maps/pdfs/reference/us\\_regdiv.pdf](http://www.census.gov/geo/maps-data/maps/pdfs/reference/us_regdiv.pdf). See also MICHAEL BRADSHAW, *REGIONS AND REGIONALISM IN THE UNITED STATES* 3-5 (1988) (describing and adopting census definition). Some scholars limit the South to the eleven confederate states but distinguish between the Deep South—Alabama, Georgia, Louisiana, South Carolina and Mississippi—and the Outer South—Arkansas, Florida, Kentucky, North Carolina, Tennessee, Texas, and Virginia. See James M. Glaser, *Back to the Black Belt: Racial Environment and White Racial Attitudes in the South*, 56 J. POL. 21, 28 (1994). Critics of the death penalty in the South focus on the nine states that together account for the vast majority of executions carried out in the modern era—Texas, Florida, Louisiana, Georgia, Virginia, Alabama, Mississippi, North Carolina, and South Carolina. See *infra* note 9 and accompanying text (identifying these nine states as the "Death Belt"). This Essay uses the terms "the South" and "the North" primarily to refer to social constructs of the regions. To the extent that the terms do identify particular groups of states, "the South" will refer to the eleven confederate states, and "the North" will refer to the states identified by the U.S. Census as Northeast—Maine, Vermont, Rhode Island, Massachusetts, Connecticut, New York—or East North Central Midwest—Pennsylvania and Wisconsin, Illinois, Michigan, Indiana, and Ohio. See U.S. CENSUS BUREAU, *supra*.

7. On the comparison of international and domestic examples, Kimberle Crenshaw explains: [T]he spectre of the West imposing its values in the shadow of colonialism is of course a far more troubling concern than the complaint by white Southerners that the federal enforcement of civil rights constituted a reoccupation of the South by a 'foreign' presence. Yet what exactly is to be made of the difference? Is it a matter of degree or is there a fundamental distinction

This Essay begins by describing the phenomenon of capital punishment in the United States as a Southern problem with a Northern solution. It focuses on the death penalty as the descendant of lynching in the South, and describes the role of Northern lawyers in capital defense in the region. It then introduces two key rationales for intervention by outsider lawyers: they possess the will to confront local injustice and they contribute special expertise to aid the project. Such rationales, however, present inherent limits, particularly in a post-colonial context. When the outsider lawyers directly confront the local social order, they encounter accusations of cultural imperialism; when they launch indirect attacks with conventional legal tools, their expertise may contribute to the portrait of them as elitist, and the procedural approach may lack substantive moral force. The Essay concludes that for outsider lawyers to intervene effectively, they must rely on the language and strategy of local actors, and take their lead from the insiders engaged in intragroup dissent.

## I. SOUTHERN PROBLEM AND NORTHERN SOLUTION

This part describes the historical development of the Southern death penalty and Northern intervention in capital defense.

### *A. Death Penalty as Southern Phenomenon*

Critics of the death penalty have described Southern states as harboring a “unique fondness for capital punishment.”<sup>8</sup> The sheer number of executions in the South has earned the region the moniker “The Death Belt.”<sup>9</sup> According to Amnesty International, between 1977 and 2013, the regional distribution of executions was as follows: 4 executions in the Northeast, 82 in the West, 157 in the Midwest, 608 in just the states of Texas and Virginia, and 1090 in the South.<sup>10</sup> Attorneys and scholars have questioned the

between claims of empowered elites here and those elsewhere that reformist policies flying under the banner of rights constitute an affront to culture and sovereignty?

Crenshaw, *supra* note 2, at 72.

8. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But For the Worst Lawyer*, 103 YALE L.J. 1835, 1845 (1994).

9. The “Death Belt” refers specifically to the “[nine] Southern states that together account for over 90% of all executions carried out [in the U.S.] since 1976”—Texas, Florida, Louisiana, Georgia, Virginia, Alabama, Mississippi, North Carolina, and South Carolina. See, e.g., Charles J. Ogletree, Jr., *Black Man’s Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 19 (2002); Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 873 (1996).

10. See *Death Penalty and Arbitrariness*, AMNESTY INT’L, <http://www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/death-penalty-and-arbitrariness> (last visited Jan. 25, 2014).

ability of Southern courts to provide capital trials that meet constitutional requirements.<sup>11</sup> Southern judges have been accused of “‘ramrod[ing]’ death penalty convictions through trial and post-conviction review.”<sup>12</sup> The capital trial process in the Southern United States has been described as “more like a random flip of the coin than a delicate balancing of the scales of justice.”<sup>13</sup> Interpreting the administration of capital punishment in the South as little more than modern-day lynching, capital defense experts have advocated for intervention to protect capital defendants from the “uncivilized” system of Southern justice.

Capital punishment and lynching share a geographic history in the United States. Sociologists have observed a correlation between the number of lynchings in a state’s past and the number of death sentences in the state’s courts.<sup>14</sup> The prevalence of lynching decreased at the same time as courts’ use of capital punishment increased.<sup>15</sup> The two practices also express similar cultural struggles and similar tools of oppression, leading commenters to conclude that the death penalty has become a sort of legal replacement for the lynchings in the past.<sup>16</sup>

The practices of lynching and capital punishment have both relied on a myth of a black male rapist as justification for murdering African-Americans.<sup>17</sup> Before the Supreme Court held in *Coker v. Georgia*<sup>18</sup> that the rape of an adult woman did not qualify as a capital offense, juries were notorious for disproportionately choosing death sentences for African-American men accused of raping white women.<sup>19</sup> In the post-Reconstruction South, whites used the image of the black rapist as an excuse for lynching successful African-Americans who disrupted white supremacy.<sup>20</sup> The murders correlated with and served as a backlash against increases in blacks’ economic and political power.<sup>21</sup>

11. See, e.g., Bright, *supra* note 8, 1841-42.

12. Howard, *supra* note 9, at 874.

13. Bright, *supra* note 8, at 1842.

14. David Jacobs Carmichael et al., *Vigilantism, Current Racial Threat, and Death Sentences*, 70 AM. SOC. REV. 656, 656 (2005); see Ogletree, *supra* note 9, at 19 (explaining the states comprising the “Death Belt” of capital punishment “overlap . . . with the southern states that had the highest incidence of extra-legal violence and killings during the Jim Crow era”).

15. See *Carter Center Symposium on the Death Penalty*, 14 GA. ST. U. L. REV. 329, 350 (1997).

16. Jacobs et al., *supra* note 14, at 657-58.

17. MICHAEL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH* 6-7 (University of Georgia Press, 2d ed. 1995).

18. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

19. See generally John H. Blume, *Post-McCleskey Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771 (1998).

20. BELKNAP, *supra* note 17.

21. *Id.* at 2.

Although lynching initially targeted whites as well as African-Americans,<sup>22</sup> this changed during Reconstruction. By the 1890s, the overall number of lynchings began to drop off but the percentage of African-American victims increased dramatically. By the early 1900s, almost all lynching victims were African-American. The increase in African-American lynchings, like the creation of the Black Codes and the establishment of the Ku Klux Klan, correlated with an increase in African-Americans' political rights.

Social scientists also describe lynching as the expression of class and cultural warfare. For some whites, lynchings symbolized the chivalry of the Old South and the agrarian economy taking back the power they were losing to urban, industrial capitalism.<sup>23</sup> While increasing numbers of white women left the enclaves of family farms for factory work, lynchings were portrayed as a militant form of sexual conservatism, attempts to protect the honor of the men and women of the region. Whites who approved of lynching justified it as essential for preserving order and stability. They viewed lynching as creating a more democratic order than that of government policies promulgated by the urban elite, who did not reflect the will of the citizenry.<sup>24</sup>

In addition to racism and anxiety about changing gender roles, lynching may be interpreted as an expression of Southern whites' rebellion against Northern forces. The clashes concerning economic change stemmed partly from conflicts about whether to accept the industrialization of the South and model it after similar changes in the North.<sup>25</sup> Violence increased when national political parties attempted to defeat Southern conservatives by attracting black votes.<sup>26</sup> Conservative white Southerners warned Northerners that meddling in Southern affairs would only result in more violence against blacks.<sup>27</sup>

Northern legislators threatened to make lynching a federal crime, but a filibuster by Southern senators defeated an anti-lynching bill, claiming it

22. Robert A. Gibson, *The Negro Holocaust: Lynching and Race Riots in the United States, 1880-1950*, YALE-NEW HAVEN TEACHERS INST., <http://www.yale.edu/ynhti/curriculum/units/1979/2/79.02.04.x.html> (last visited Feb. 9, 2014) (stating that between 1830 and 1850 the majority of lynching victims were white).

23. Nancy McLean, *The Leo Frank Case Reconsidered: Gender and Sexual Politics in the Making of Reactionary Populism*, in JUMPIN' JIM CROW 183, 201-02 (Jane Daley et al. eds., Princeton University Press 2000).

24. *Id.*

25. *Id.* at 199-200.

26. BELKNAP, *supra* note 17, at 7.

27. *Id.* See also JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS MOVEMENT 95 (1994).

would have unconstitutionally infringed on states' rights.<sup>28</sup> Southern prosecutors, grand juries, and eyewitnesses failed to punish lynching as murder.<sup>29</sup> As late as 1933, less than one percent of all lynchings in the United States had resulted in successful prosecutions.<sup>30</sup>

In the early 1930s, however, Southern attitudes about lynching began to change.<sup>31</sup> Advocates of industrialism expressed concern about how lynching would affect opportunities for economic growth.<sup>32</sup> Some worried that, while the violence was intended to keep blacks from challenging their subordinate position in society, it actually convinced them to escape to the North, which could create labor problems for the Southern economy.<sup>33</sup> Southerners also began to view lynching as antithetical to law and order.<sup>34</sup> Some argue that lynching eventually became less common because Southern states wanted to show Washington that they could handle the problem on their own.<sup>35</sup>

The institution of the death penalty grew as that of lynching receded.<sup>36</sup> Stephen Bright has explained, "The death penalty is the first cousin of lynching. In the 1930s and 40s, when the South—particularly Alabama, Georgia and Mississippi—was getting such bad press for lynching people, the perfunctory death penalty trial replaced lynching as a way of accomplishing the same thing while pretending to provide some due process."<sup>37</sup> Community members had previously kidnapped criminal defendants and lynched them as a form of vigilante justice.<sup>38</sup> The capital trial allowed a judge to prevent an "extra-legal hanging" by assuring the local community that justice would be served with a reliably quick trial and an identical result.<sup>39</sup> Southerners concerned about their reputation for "backward-looking barbarianism"<sup>40</sup> shed the practice of lynching but adopted a formalized version of the same.

28. BELKNAP, *supra* note 17, at 17-21.

29. *Id.* at 9.

30. *Id.*

31. *Id.* at 22.

32. *Id.* at 23. Parallel arguments are common in the international human rights context, where commentators suggest acceptance of liberal values supports economic development and stability.

33. BELKNAP, *supra* note 17, at 23.

34. *Id.*

35. *Id.* at 21.

36. WILLIAM S. MCFEELY, *PROXIMITY TO DEATH* 32-33 (2000).

37. Stephen Bright, *The Politics of Crime and the Death Penalty: Not "Soft on Crime," But Hard on the Bill of Rights*, 39 ST. LOUIS U. L.J. 479, 481-82 (1995).

38. See BELKNAP, *supra* note 17, at 14-15; GREENBERG, *supra* note 27, at 217.

39. MCFEELY, *supra* note 36, at 33.

40. BELKNAP, *supra* note 17, at 23.

### B. History of Northern Intervention

As the practice of capital punishment spread in the South, attorneys from the North increasingly intervened. Organizations like the NAACP Legal Defense and Education Fund (LDF)<sup>41</sup> participated in capital trials as early as the 1930s “as part of a tradition of trying to assure fairness to blacks in the criminal process.”<sup>42</sup> In the 1970s, however, the role of Northern attorneys ballooned.<sup>43</sup> In *Furman v. Georgia*,<sup>44</sup> the United States Supreme Court struck down the death penalty as a form of cruel and unusual punishment whose arbitrary application violated the Eighth and Fourteenth Amendments.<sup>45</sup> *Furman* appeared to signal the end of capital punishment,<sup>46</sup> but, after the ruling, state legislative support for the practice only increased, especially in the South.<sup>47</sup> Within just a few years, over thirty states amended their statutes to narrow juror discretion,<sup>48</sup> and the Court gave the revised legislation its blessing.<sup>49</sup> The number of death penalty cases exploded, and Northern lawyers responded.<sup>50</sup>

After *Furman*, Northerners and Southerners with Northern educations formed new capital defense projects in the South.<sup>51</sup> The capital defense attorneys of the 1970s differed from those who had handled such cases on an ad hoc basis in the past.<sup>52</sup> Their projects were devoted exclusively to capital litigation.<sup>53</sup> These attorneys regularly filed habeas corpus petitions,

41. The National Association for the Advancement of Colored People (NAACP) had been founded in 1909 in response to a lynching in Illinois. *Id.* at 13. In 1940, the NAACP created the NAACP Legal Defense and Education Fund (LDF). GREENBERG, *supra* note 27, at 17-18.

42. GREENBERG, *supra* note 27, at 104. *See id.* at 108 (“We weren’t a general legal aid society. Merely defending the accused, who are entitled to counsel in all cases, wasn’t our aim, rather we had an agenda: to demolish Jim Crow.”)

43. Interview with Anthony Amsterdam, Professor of Law, New York University School of Law (Jan. 22, 2002).

44. 408 U.S. 238 (1972).

45. *Id.* at 249, 293-94, 365-96. *See id.* at 310 (Stewart, J., concurring) (“I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”).

<sup>46</sup> *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 362-63 (1995).

47. GREENBERG, *supra* note 27 at 486; David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings From Philadelphia*, 83 CORNELL L. REV. 1638, 1649 (1998).

48. *Id.*

49. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (“[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance”).

50. Interview with Anthony Amsterdam, *supra* note 43.

51. Interview with Bryan Stevenson, Executive Director of the Equal Justice Initiative and Professor of Law, New York University School of Law (Jan. 30, 2002).

52. Interview with Anthony Amsterdam, *supra* note 43.

53. *Id.*

arguing that local trial counsel had been ineffective and that defendants deserved new trials.<sup>54</sup> As the habeas petitions became the projects' core work, post-conviction litigation in federal court developed into a recognized sub-specialty.<sup>55</sup>

The post-conviction attorneys increased their anti-death-penalty successes by enlisting other attorneys in the abolition effort. Many of these attorneys were Northern elites from prestigious private firms that contributed pro bono labor.<sup>56</sup> Yet internal dissent from the South also became visible, as project attorneys enlisted local counsel with felony defense experience.<sup>57</sup> By portraying criminal defense as conventional lawyering, local attorneys could accept such cases without provoking as much controversy as if they had supported explicitly political work like litigation in support of racial integration.<sup>58</sup>

By 1988, habeas corpus petitions began overwhelming the federal courts, and Congress determined that capital defense required federal funding.<sup>59</sup> Congress reasoned that if attorneys could be trained to provide adequate representation at trials, the decrease in habeas petitions would save resources in the end. Through its Judicial Conference, Congress created twenty Death Penalty Resource Centers (DPRCs or Centers), later called Post Conviction Defender Organizations (PCDOs).<sup>60</sup> The primary function of the PCDOs was to recruit and train attorneys who would then represent capital defendants and provide expertise in capital litigation.<sup>61</sup> The PCDOs were set up in the jurisdictions deemed most lacking in adequate representation.<sup>62</sup> Not all of the PCDOs were in the South, but every state in the Deep South received one.<sup>63</sup>

As with earlier capital defense projects, transplants from other regions of the country staffed the federally funded Centers in the South. In many ways, these demographics grew out of the projects' design. The goal was to offer training and compensation to attract bright young lawyers to learn the practice of skilled capital defense and to continue it into the future; the

54. *Id.*

55. See Robert J. Smith, *The Geography of the Death Penalty*, 92 B.U. L. REV. 227, 267 (2012) (stating that ineffective assistance claims were the "bread and butter" of capital habeas petitions).

56. See GREENBERG, *supra* note 27.

57. *See id.*

58. *See id.*

59. Howard, *supra* note 9, at 906-07.

60. *Id.* at 865.

61. *Id.* at 904.

62. *Id.*

63. *Id.*

projects succeeded in pulling young lawyers out of their own communities and into the zones where they were needed.<sup>64</sup>

Since Northern attorneys first began litigating capital cases in the South, the setting of the litigation has changed. In the late 1980s and mid-1990s, several Northern states reintroduced the death penalty.<sup>65</sup> Many expatriot Southern attorneys headed North to contribute their expertise.<sup>66</sup> When setting up the New York Capital Defender Office, its organizers filled the staff with attorneys from the South.<sup>67</sup>

Meanwhile, in the South, local attorneys have begun to handle more capital cases.<sup>68</sup> More African-American attorneys practice in the South.<sup>69</sup> During the 1960s and 70s, it was difficult for an African-American to make a living as an attorney in the South. White lawyers were not always willing to bring black attorneys into their firms, and even black lawyers sometimes preferred to avoid hiring blacks, because they knew courts would treat their clients unfairly.<sup>70</sup> Now that overt discrimination has decreased and the availability of legal education has broadened, the black bar has grown, and some of its members handle capital defense.<sup>71</sup>

Despite these shifts in landscape, capital defense in the South is not divorced from its past, and outsider lawyers continue to maintain a disproportionate presence. The majority of post-conviction attorneys still hail from the North.<sup>72</sup> Lawyers based at large Northern firms continue to play a significant role, often relying on local counsel for admission to local courts but not collaborating further.<sup>73</sup> Non-profit organizations like the Southern Center for Human Rights (SCHR) in Atlanta, Georgia, and the Equal Jus-

64. See generally Ronald J. Tabak, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure*, 21 *FORDHAM URB. L.J.* 239 (1994).

65. For a current summary of states with the death penalty, see *States With and Without the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Jan. 22, 2014). Empirical studies have begun focusing on capital defense as the practice of outlier counties, rather than states or national regions. See Smith, *supra* note 55, at 233-246 (collecting studies and emphasizing the significance of counties).

66. Interview with Anthony Amsterdam, *supra* note 43.

67. *Id.*

68. *Id.*

69. See KENNETH W. MACK, *REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER* 9-10 (2012) (describing historical scarcity of black lawyers in South).

70. GREENBERG, *supra* note 27, at 38.

71. Even if African-American attorneys hail from the North, Bryan Stevenson has suggested that the majority of Southern audiences will view the attorneys as black rather than Northern. See Interview with Bryan Stevenson, *supra* note 51.

72. *Id.*

73. See, e.g., *Maples v. Thomas*, 132 S. Ct. 912, 915-16 (2012) (where local Alabama counsel facilitated the appearance of two New-York-based lawyers from Sullivan & Cromwell, and the pro bono lawyers subsequently left the firm without notifying the client or the Alabama court, the client “was left unrepresented”).

tice Initiative (EJI) in Montgomery, Alabama, formed in 1976 and 1989 respectively, continue to attract outsider attorneys to the region.<sup>74</sup> Bryan Stevenson, the Executive Director of EJI, teaches at New York University (NYU) and Steven Bright, the Executive Director of SCHR, teaches at Yale University. Professor Stevenson operates a clinic through which he takes a group of NYU law students to live and work in Montgomery each fall semester. Both SCHR and EJI also maintain fellowship programs, with EJI drawing on Yale's Liman Fellowship, and both drawing on other sources as well. The fellowship system, a valuable source of support for non-profits with limited budgets, regularly introduces new staff to temporary positions and tends to recreate the dynamic of lawyering by community outsiders. Although a handful of the attorneys are native Southerners, returning to their communities with outside education puts them in a position different from that they occupied during their Southern childhoods.<sup>75</sup> If they choose to remain in the South after the fellowships end, they will continue to navigate from their specific vantage points.

One might expect the presence of outsider attorneys to be less visible than forty years ago, because the practice of law in the United States has spread nationally. In particular, tort law has expanded so that parties regularly engage in litigation with out-of-state companies. This brings foreign lawyers across state and regional boundaries frequently enough that outsiders might not stick out so much as they once did.<sup>76</sup>

Yet the perceptions of capital defenders as outsiders remain remarkably unchanged. Even if the offices of capital defense projects are not filled entirely with Northerners, many locals, including clients, believe that they are.<sup>77</sup> Some capital defense attorneys argue that Southern judges and prosecutors intentionally perpetuate the myth of outsider lawyers to distract from the lack of adequate counsel in Southern states.<sup>78</sup> The myth is a powerful one. The history of Northern lawyers in Southern courts has created a dynamic such that even where capital defense attorneys are not Northern, their legitimacy may be undermined as if they were.

74. The organizations' missions include criminal justice beyond capital defense, but both carry impressive dockets of post-conviction work. See Interview with Anthony Amsterdam, *supra* note 52.

75. Interview with Bryan Stevenson, *supra* note 51.

76. *Id.*

77. Interview with Jacob H. Sussman, Attorney, Tin, Fulton, Walker & Owen (Nov. 17, 2001) (describing the observation of his first death row client in Georgia, who marveled aloud at how "all these northern Jews" flock to represent capital defendants).

78. Interview with Anthony Amsterdam, *supra* note 43.

## II. RATIONALES FOR INTERVENTION & COLONIAL CRITIQUE

Two key rationales support intervention by outsider lawyers: these agents of change possess the will to confront local injustice, and they contribute special expertise to the project. This part will apply these rationales to the case of Northern lawyers intervening in Southern capital defense. Such rationales, however, present inherent limits, particularly in a post-colonial context. As this part will show, the colonial relationship between the North and South of the United States makes the intervention subject to critique as cultural imperialism.

### *A. Rationales for Intervention*

Intervention by outsider lawyers relies on two rationales, which may be independent but mutually reinforcing. First, the outsiders bring expertise otherwise lacking in the community. The outsiders can contribute sophisticated education, training, experience, natural talent, financial resources, and technology. The second rationale for outside intervention is that, regardless of expertise or resources, the local community is simply unable or unwilling to take the positions that the outsiders do. The obstacle to their engagement might be emotional, intellectual, economic, or political. With this confluence of factors, the outsiders step in to fill a void.

Northern intervention in Southern capital defense reflects the rationales of expertise and the will to intercede. Arguments for intervention have historically highlighted the inadequacy of local counsel and the failure of Southern institutions to correct the problem on their own. Many Southern states lack public defender systems or provide so little funding that attorneys are overwhelmed or burn out well before learning the practice of capital defense. In jurisdictions that rely on appointments of local private counsel, the situation can be even worse. Historically, appointed attorneys have lacked experience with criminal law, let alone capital defense, and legislatures have set fees too low for the appointees to devote sufficient time to trial preparation.<sup>79</sup> Lawyers have demonstrated indifference and open hostility towards their clients, they have failed to read the governing statutes, slept or remained intoxicated during trials, and referred to their clients using racial slurs.<sup>80</sup> Southern states have historically failed to check this behavior: legislatures have failed to institute and enforce minimum

79. Bright, *supra* note 8, at 1845-46, 1849-50.

80. *Id.* at 1842-43.

qualifications for appointments,<sup>81</sup> and judges have pressed ahead with trials in the face of counsel's blatant inadequacies.

Beyond these basic failures, capital defense specialists maintain that the complex and unique procedures of capital trials demand particular expertise.<sup>82</sup> Death penalty trials are bifurcated into separate guilt and penalty phases. If the defendant is found guilty in the first phase, the jury will, in the second phase, determine whether the particular defendant deserves to be executed. To do so, the jury will consider aggravating and mitigating factors enumerated in statutory guidelines.<sup>83</sup> The defense attorney must possess familiarity with the statutory schemes and experience explaining them to juries. Zealous representation of a capital defendant might require the capacity for appellate work or filing post-conviction petitions in federal court.<sup>84</sup> Even more than other criminal trials, capital defense demands specialized knowledge and highly polished litigation skills.

The other argument for outside intervention stems from a concern about local community outrage.<sup>85</sup> The horrendous nature of capital crimes makes the hunger to punish almost predictable.<sup>86</sup> Donald Beschle has suggested that the need to identify an enemy as the source of any community's discord is instinctive,<sup>87</sup> and executions function primarily to provide a primitive ritual that unites the community based on hatred for a scape-

81. Howard, *supra* note 9, at 894-95. *See also* *Maples v. Thomas*, 132 S. Ct. 912, 916-18 (2012) (criticizing Alabama's inadequate standards and funding). In the past two decades, states that previously maintained no minimum qualifications, namely Texas, Mississippi, and Florida, have since adopted them, while others have made improvements. For a current summary of state standards, see the National Center for State Courts website. *Capital Case Representation*, NATIONAL CENTER FOR STATE COURTS, <http://www.ncsc.org/topics/access-and-fairness/indigent-defense/state-links.aspx?cat=Capital%20Case%20Representation> (last visited Feb. 19, 2014). The downside of increased credentials, however, is that many local attorneys cannot meet them; the requirement of minimum numbers of years of capital defense work necessarily excludes anyone new to the practice. Conversation with Robert J. Smith (Jan. 23, 2014).

82. *See, e.g.*, Smith, *supra* note 55, at 259-60.

83. In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court ruled that a statute's provision for consideration of aggravating and mitigating factors ensured that the administration of the death penalty would not be arbitrary or discriminatory. The statute at issue required the sentencing authority to find at least one aggravating factor listed in the statute in order to impose the death penalty, and it required that this same authority consider the defendant's background as well as circumstances of the crime in mitigation of the implementation of capital punishment. Typical statutory aggravating factors include the identity of the victim as a law enforcement official or that the murder was committed by torture. Typical mitigating factors include the age of the defendant or that the defendant was under extreme emotional disturbance. Statutes generally also include a "catch-all" factor that allows in any evidence pertaining to the character of the defendant or the circumstances of the offense.

84. Howard, *supra* note 9, at 877-88.

85. *See* Baldus et al., *supra* note 47, at 1723.

86. Howard, *supra* note 9, at 880.

87. Donald L. Beschle, *Why Do People Support Capital Punishment? The Death Penalty as Community Ritual*, 33 CONN. L. REV. 765, 775 (2001).

goat.<sup>88</sup> An outsider lawyer may be the only lawyer with the emotional and intellectual distance to feel comfortable representing the defendant.

Beyond any internal conflict, local lawyers must also contend with external, political influences. Community outrage pressures prosecutors, judges, and juries to find and punish perpetrators of highly visible crimes.<sup>89</sup> This has been true particularly in white-victim cases with black defendants, which attract disproportionate amounts of media attention. Prosecutors allocate disproportionate resources to pursuing such cases and may be more accommodating of victims' families' requests to seek the death penalty.<sup>90</sup> Local communities may be too insular for a lawyer from within to separate from the pack.

A local attorney might also encounter economic disincentives. Aside from personal ties or prejudices, private attorneys may feel beholden to current or potential paying clients who view the capital crime as indefensible. Similarly, the attorneys may depend for their appointments on local judges who are anxious to resolve capital cases without delay. Such judges may pressure appointed capital defense counsel not to file motions that would slow the process or not to request fees for experts who would complicate it. Therefore, even when lawyers do accept capital appointments, their zeal might be hampered by fear of alienating not only neighbors and friends, but also future sources of business.

In contrast, outsider lawyers may be free from the restrictions imposed by these influences.

### *B. Colonial Baggage of Outsider Intervention*

Outsider lawyers, however, risk replicating and reinforcing another set of problematic circumstances. Insights of postcolonial theorists can help to shed light on these dynamics. Critics have challenged international human rights organizations as replicating colonial relationships when they justify intervention measures by essentializing "Other" cultures as particularly oppressive of women or particularly homophobic. A number of feminist organizations use the status of women in a society as a marker of modernity, mimicking the rhetoric of imperialism.<sup>91</sup> They treat women in various Asian, African, and Latin American countries as victims of their cultures,

88. *Id.* at 774-75.

89. Howard, *supra* note 9, at 880.

90. *Id.*

91. See, e.g., Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 12 (2002); Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1196 (2001).

denying such women's agency within patriarchy and flattening the cultures of which they are a part.<sup>92</sup> Highlighting violence against women in the global South while neglecting its prevalence in the global North contributes to the construction of a dichotomy between liberated women of the global North and oppressed women of the global South.<sup>93</sup> This reconstructs the image of Northern behavior as a neutral norm, and reveals the desire to rely on imagined conceptions of the Other for definition of oneself.<sup>94</sup>

The analogy to North and South relations within the United States is not difficult to see.<sup>95</sup> Academic and popular literature that describes the South as a unique region of the country allows the North to occupy the position of the neutral norm, interchangeable with the nation as a whole. At the same time, the North has been defined largely in opposition to the South.<sup>96</sup> Admittedly, the implications of postcolonial theory must be interpreted differently within one nation dominated by whites,<sup>97</sup> where many of the interventions seek to protect African-American minorities whose ancestors were colonized by the ancestors of those whose practices the interveners now challenge.<sup>98</sup> Yet the phenomenon of outsider intervention, armed with the rationale of improving the locals' "backward" and "uncivilized" society, shares important similarities with international lawyering for social change.<sup>99</sup>

### 1. Colonial Relationship of North and South

The economic, military, and legal relationships between the North and the South suggest a pattern of colonialism. The North and the federal government, while distinct, have been collapsed in descriptions of their interventions in the South, as well as in narratives that depict the South as a

92. Volpp, *supra* note 91, at 1211.

93. *Id.* at 1211-12.

94. *Id.* at 1204.

95. See Crenshaw, *supra* note 7, at 72.

96. See Griffin, *supra* note 6, at 17 ("The South became defined . . . by southerners and non-southerners alike 'in opposition to' America and . . . 'opposite to' the broader culture."). See also R. Bruce Brasell, *The Degeneration of Nationalism: Colonialism, Perversion, and the American South*, 56 *Miss. Q.* 33 (2003).

97. *Id.*

98. See Griffin, *supra* note 6, at 20, 22 (arguing that "the relationship between America and the South was substantially more complex than that of opposition only" and the two were deeply interconnected, but that does not contradict the observation that the identity of the South was constructed in opposition to that of the nation as a whole).

99. See *id.* at 10 (citing references to South as "alien member of national family" and as "different from Massachusetts" as "the Congo"), 20 (describing myths of Southern culture), 25-26 (same). See also *id.* at 10-11 (highlighting "North's 'gullibility: a volitionless, almost helpless capacity and eagerness to believe anything about the South not even provided it be derogatory but merely bizarre enough and strange enough'") (quoting WILLIAM FAULKNER, *INTRUDER IN THE DUST* 152 (1946)).

unique region of the country with unique problems.<sup>100</sup> If the moral imperative of Northern lawyers' intervention into Southern legal systems rests on a belief that Southerners are educationally deficient or uniquely racist, that premise requires deeper analysis.<sup>101</sup>

Economic dynamics between the North and the South in the United States have inspired scholars to describe the relationship between the regions as colonial. Economist Joseph Persky has argued that the urban North has exploited the South's agrarian economy.<sup>102</sup> Like any dependent colony, the South functioned as the supplier of raw materials and the consumer of Northern factories' finished products.<sup>103</sup> When the North developed a diverse industrial system of divided labor, the South continued to maintain a specialized economy reliant on slavery.<sup>104</sup> Until the growth of the New South in recent years,<sup>105</sup> the North may have shouldered responsibility for the South's underdevelopment as an "artificially underurbanized" landscape.<sup>106</sup>

The pattern of Northern and federal intervention in the South—from the Civil War, to military occupation during Reconstruction, and again during the Civil Rights Movement—further supports the interpretation of the South as a colony. The Civil Rights Movement was marked by outsider lawyers from the North physically inserting themselves into the Southern landscape.<sup>107</sup> These interventions constituted part of a larger critique of Southern culture.<sup>108</sup> Jack Greenberg, former director and counsel of LDF viewed himself and his colleagues as "crusaders."<sup>109</sup> Federal intervention

100. See NATALIE J. RING, *THE PROBLEM SOUTH: REGION, EMPIRE, AND THE NEW LIBERAL STATE, 1880-1930* (2012); Griffin *supra* note 6, at 13-14 (describing social construction of problems as uniquely associated with Southern region).

101. See GREENBERG, *supra* note 27, at 15 (suggesting that, in the context of civil rights work, lawsuits simply provided a more effective attack on the South's overt racism than on the North's more hidden version).

102. See, e.g., JOSEPH J. PERSKY, *THE BURDEN OF DEPENDENCY* 3 (1992).

103. *Id.* at 9.

104. *Id.* at 4.

105. TRACY THOMPSON, *THE NEW MIND OF THE SOUTH 196-204* (2013) (describing "impressions of a returning native" in the City of Atlanta, a center of the New South).

106. *Id.*

107. See BELKNAP, *supra* note 17, at 128-58 (describing Freedom Summer of 1964, in which more than 150 Northern law students and attorneys accompanied hundreds of Northern college students to Mississippi to register black voters and teach in freedom schools); GREENBERG, *supra* note 27, at 13, 14, 17 (Both the NAACP and LDF were headquartered in New York City, but "[t]he fact [that most NAACP members and most African-Americans lived in the South,] along with the reality that lawsuits were more effective against virulent Southern racism and state-sanctioned segregation laws than against the often covert Northern variety of each, led lawyers to focus the legal attack in the South.")).

108. Gary Peller, *White Anxiety, Cultural Imperialism, and the Ideological Realignment of Brown*, in *RACE, LAW AND CULTURE* 199 (Austin Sarat ed., 1997).

109. See GREENBERG, *supra* note 27, at 133.

promoted a Northern approach to education as enlightened and legitimate, in contrast to the racism and religiosity of Southern traditions.<sup>110</sup> Gary Peller argues that the North forced the South to adopt a rationalist, technocratic, and standardized mode of education.<sup>111</sup> When the National Guard entered the South to enforce federal statutes and court decisions and to protect black and white activists, Southerners understood that force was being justified on the grounds that theirs was not a civilized society.<sup>112</sup>

Many local whites resisted these invasions. Aside from violent and extralegal activities, they also launched more “civilized” responses. Southern judges selectively enforced bar membership requirements to exclude, as one Mississippi judge described the outsider lawyers, “Jews and niggers from New York.”<sup>113</sup> Another form of white resistance included depicting the outsider intervenors as carpetbaggers, intruding for their own selfish purposes.<sup>114</sup>

The historical dynamic of military, legal, and cultural intervention, and local resistance to such intervention, forms the backdrop for capital defense in the South. Outsider lawyers engaged in this work must be mindful of utilizing colonial rhetoric, recreating colonial dynamics, or simply exposing the legitimacy of their work to that critique.

## 2. Colonial Rhetoric in Rationales for Intervention

The rationales for outsider intervention—expertise and will—carry inherent weaknesses due to the potential for charges of cultural imperialism. Capital defense experts argue that Northern or federal intervention in capital defense in the South is justified on the basis that Southern states have failed to provide the highly professionalized assistance that capital defense requires.<sup>115</sup> While capital procedures are indeed complex, the concept of Northern lawyers’ intervention as a needed professionalizing influence sounds remarkably similar to the portrait of an imperialist empire as a civilizing force bringing progress to undeveloped cultures.<sup>116</sup>

110. See Peller, *supra* note 108, at 199.

111. *Id.*

112. *Id.*

113. Interview with Jack Greenberg, Professor of Law at Columbia Law School and former director-counselor of the NAACP Legal Defense and Educational Fund in New York City, New York (Jan. 16, 2002); GREENBERG, *supra* note 27, at 348.

114. GREENBERG, *supra* note 27, at 99.

115. See *supra* Part II.A.

116. See EDWARD W. SAID, *ORIENTALISM* 3-4, 206-07 (1978). See also Uma Narayan, *Essence of a Culture and a Sense of History: A Feminist Critique of Cultural Essentialism*, 13:2 HAPATIA 86, 89-90 (1998).

Practitioners and policy makers should examine the practical implications of this rhetoric, as it can translate into resource allocation decisions with important consequences. Expertise and financial resources are difficult to reject, but their delivery may not be wholly satisfactory as a long-range strategy for social change. Intervention by outsiders can stymie grassroots growth, and to the extent that intervention involves an influx of resources, one might reasonably ask whether some of those resources could be redirected to develop and learn from local expertise.<sup>117</sup>

As for the argument that outsiders are uniquely positioned to provide assistance because of their distance from local pressures, this, too, can gloss over the complexity of local concerns and overlook the potential for strong internal dissent. Although racialized community outrage does put pressure on law enforcement and the judiciary, the depiction of Southern communities as “instinctive” simplifies individual and collective views and dismisses any pro-capital punishment position as pure irrationality.<sup>118</sup> While that depiction may resonate for attorneys and scholars who view the death penalty as a gruesome form of modern-day lynching, it does not grapple with the substance of the community’s discord. It implies that those of us against the death penalty have harnessed our baser instincts, or developed from a primitive state, in ways other communities have not. It relies on the same language used to justify imperialism: certain communities are not civilized enough to govern themselves.

This approach blinds outsider lawyers to the variety of interactions that occur in such communities, and in their own.<sup>119</sup> It does not account for the Southern activists who have participated in anti-death penalty efforts or the local jurors who have convicted white supremacists for violence.<sup>120</sup> It

117. Some of the most successful capital defender projects today provide training and support for local lawyers. See Smith, *supra* note 55, at 268-72 (describing trial consulting projects). This is a step in the right direction, though it still replicates the dynamic of the locals in the position of uneducated and in need of assistance. Another option would be to partner local and non-local lawyers on individual cases, so each could contribute his or her assets and learn from the other.

118. See Beschle, *supra* note 87, at 775.

119. See FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930*, at 3-4 (1992) (arguing that social scientists who seek to explain lynching by region-wide phenomena neglect significant differences in numbers between various Southern states). See also Christian Boulanger & Austin Sarat, *Putting Culture into the Picture: Toward a Comparative Analysis of State Killings*, in *THE CULTURAL LIVES OF CAPITAL PUNISHMENT* 1, 3-4 (Austin Sarat & Christian Boulanger, eds., 2005) (“Some believe that a ‘civilizing process’ leads inexorably to rejection of legalized state killing. . . . [T]his idea is inadequate to explain what has happened in abolitionist countries and might be misleading when thinking about the global process of abolition.”).

120. See David McCord, *Imagining A Retributivist Alternative to Capital Punishment*, 50 *FLA. L. REV.* 1, 38-39 (1998) (describing street protests organized by the Southern Coalition on Jails and Prisons); PHILIP ENGLISH MACKEY, *VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, 1787-1975*, xlv-xlvi (1976) (describing local Southern officials’ opposition to capital punishment); *id.* at xxxii (describing “hundreds of small campaigns and modest successes”).

omits the powerful role of communities of color in the South.<sup>121</sup> It fails to explain why Northern states have done a poor job of providing adequate capital defense. The contrast between rural and urban capital punishment rates has in fact become more visible than that between North and South.<sup>122</sup> In formulating arguments for federal funding of intervention in Southern courts, it has been helpful to paint a picture of Southern communities as uniquely troubled, but oversimplifying cultural and legal dynamics may ultimately make it more difficult for outsiders to locate a space to intervene.

### III. CHALLENGES FOR OUTSIDER LAWYERS

If lawyers abandoned all interventionist projects, important work might be neglected. To suggest that lawyers should serve only clients in their own communities would be to limit a significant source of power for social change. The question is how, as a community outsider, to intervene. The project of developing a legitimate and effective approach to intervention requires “negotiating [the] hazardous terrain somewhere between unself critical ethnocentrism and hyper-self critical cultural relativism.”<sup>123</sup>

This part addresses some of the possibilities for and challenges of that negotiation. First, it highlights the challenges for outsider lawyers launching direct critiques of local culture. Second, it turns to the possibility of indirect attacks through the use of lawyers’ professional tools, but acknowledges the challenges of this approach as well. Finally, it suggests that for outsider lawyers to intervene effectively, they must forgo some of the privilege of their outsider status, and rely on the language and strategy of local actors.

#### *A. Vulnerability of Cause Lawyers’ Cultural Critiques*

Outsider lawyers may be well positioned to identify systemic injustices deserving of fundamental critiques. Yet, in the case of capital defense,

121. See HERBERT H. HAINES, *AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972-1994*, 111-16 (1996) (describing African-American activism); Charles H. Martin, *The Civil Rights Congress and Southern Black Defendants*, 71 *GEO. HISTORICAL Q.* 25, 34-50 (1987) (describing death penalty work of the Civil Rights Congress); Eric L. Muller, *The Legal Defense Fund’s Capital Punishment Campaign: The Distorting Influence of Death*, 4 *Y. L. & POL’Y REV.* 158 (1985) (describing the capital defense work of the NAACP LDF).

122. For a discussion of the importance of focusing on counties, rather than states, as the geographic unit, see Smith, *supra* note 55, at 232-35.

123. Brenda Cossman, *Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project*, 1997 *UTAH L. REV.* 525, 527.

direct challenges to the racism of local systems have fared poorly.<sup>124</sup> Local actors resent the critiques of their communities.

Judges and juries perceive race-related critiques of the death penalty as condemnations of their courtrooms and communities. Refusal to recognize race discrimination claims reflects discomfort with labeling state officials and institutions as racist. The judiciary is reluctant to criticize prosecutors, whose discretion provides a key element of a functioning criminal justice system.<sup>125</sup> Prosecutors understand the judges' attachment to the existing system, and where defense attorneys produce discrimination statistics, prosecutors can directly counter-attack: "He is a racist. . . if he seeks the death penalty? So we're all racists."<sup>126</sup> This tactic may resonate strongly for judges who resent the implied condemnation of their own participation in capital adjudication.<sup>127</sup>

Arguments that have highlighted the local history of racism have faced stiff resistance. In one pre-trial hearing, an attorney argued that his African-American client's equal protection rights could not be upheld in a courtroom displaying the Georgia flag.<sup>128</sup> The attorney called expert witnesses to explain the history of the flag as an emblem of pride in slavery.<sup>129</sup> He called William S. McFeely, a professor at the University of Georgia and native of New York, to describe how the General Assembly of Georgia integrated the confederate battle flag into the Georgia flag to express resistance to desegregation.<sup>130</sup> In essence, the defense counsel's strategy asked the judge to recognize the Georgia flag as a symbol of oppression, with no place in civilized society.<sup>131</sup> As McFeely later explained, "[T]o no one's surprise, [the judge] was not impressed."<sup>132</sup>

It is difficult to imagine that a native Georgian would have made such an argument about the State flag. An outsider lawyer's perspective can be

124. The recent passage and repeal of the Racial Justice Act in North Carolina offers one illustration of the mixed reception from legislatures. N.C. GEN. STAT. § 15A-2012 (repealed June 19, 2013). See Lynn Bonner, *Legislators Close in on Racial Justice Act Repeal*, CHARLOTTE OBS. (Jun. 4, 2013), <http://www.charlotteobserver.com/2013/06/04/4085682/legislators-close-in-on-racial.html#UktZtWR4a4c>; Seth Kotch & Robert Mosteller, *The Racial Justice Act and the Long Struggle With Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2035 (2010) ("North Carolina has chosen for the first time to look squarely at the connection between race and the death penalty.").

125. See Blume, *supra* note 19, at 1808-09.

126. MCFEELY, *supra* note 36, at 35.

127. Ronald J. Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733, 745-46 (2001).

128. MCFEELY, *supra* note 36, at 25.

129. *Id.* at 30-32.

130. *Id.*

131. *Id.*

132. *Id.* at 184.

positive in its lack of attachment to the past and the high expectations it sets for social justice goals, but the flip side of this approach can be arrogance and carelessness. The outsider lawyer can lack an understanding of social meanings and can convey hostility to tradition. Too broad a critique of culture requires community members to reject their identities, in this case as Southerners or Georgians, as a prerequisite to embracing a norm of equality. Such a choice imposes a loss that the outsider lawyer may fail to recognize. Moreover, it prioritizes the dominant definition of culture and demands a choice that should not be necessary.<sup>133</sup>

At the other end of the spectrum from such insensitivity lies the paralysis of cultural relativism. In the infamous case of *McCleskey v. Kemp*, where the majority of the U.S. Supreme Court abdicated its responsibility for protecting African-American capital defendants from local race discrimination, the majority claimed an obligation to avoid undermining the “moral values of the people.”<sup>134</sup> Faced with a direct challenge to the racist administration of capital punishment in the State of Georgia, the majority looked the other way.<sup>135</sup> Warren McCleskey was an African-American man convicted of robbery and murder of a white police officer.<sup>136</sup> In support of a post-conviction petition for habeas corpus relief, NAACP LDF attorneys submitted an empirical study that demonstrated systemic race discrimination in Georgia’s application of the death penalty.<sup>137</sup> The study documented that black defendants who killed white victims were more likely than any other defendants to be sentenced to death.<sup>138</sup> The majority of the Court, however, held that the study was insufficient to show that any of the local actors in the particular case acted with discriminatory intent, and left the state’s judgment undisturbed.<sup>139</sup> The majority refused to issue a decision

133. See THOMPSON, *supra* note 105, at 3 (2013) (critiquing view of “black people whose families had roots in the South . . . as just ‘black,’ not ‘Southern’—as if skin color made them magically immune to feeling affection for the place they called home”); Sunder, *supra* note 5, at, 560-61, 566 (arguing against creation of a choice between culture and equality, and against forcing community members to exit culture to claim equality).

134. *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987) (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, J., dissenting)).

135. *McCleskey*, 481 U.S. at 308.

136. *Id.* at 283.

137. *Id.* at 286-87.

138. Statistics showed that defendants in Georgia charged with killing white victims received the death penalty more than those charged with killing black victims, and that blacks convicted of killing whites were far more likely to receive the death penalty than any other black-white combination of defendants and victims. *McCleskey*, 481 U.S. at 286. The study further illustrated that Georgia prosecutors had sought the death penalty in 70 percent of the cases involving black defendants and white victims, compared to 32 percent of the cases involving white defendants and white victims, 19 percent of the cases involving white defendants and black victims, and 15 percent of the cases involving black defendants and black victims. *Id.* at 287.

139. *Id.* at 297, 319.

that turned on the finding that Georgia's administration of capital punishment was a system of race discrimination.<sup>140</sup>

The choice in *McCleskey* to leave assessment of capital punishment to local legislatures neglected the presence and authenticity of local expressions of opposition to capital punishment.<sup>141</sup> This choice seems particularly disingenuous in a decision regarding the scope of the Court's obligation to protect minorities, whose influence on local political processes may be limited.<sup>142</sup> The decision is one example of how sensitivity to local culture may be used as an excuse for inaction even when members of the local community advocate change.

### *B. Vulnerability of Conventional Lawyers' Procedural Tools*<sup>143</sup>

Mindful of setting off culture clashes, most capital defense attorneys steer away from grand critiques of the death penalty and instead focus on zealous use of conventional lawyering tools.<sup>144</sup> Rather than present themselves explicitly as cause lawyers, these attorneys draw instead on profes-

140. *Id.* at 291-92. As the majority opinion infamously admitted, "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system." *Id.* at 314-15. This language suggests that, while the majority might have felt restricted by principles of federalism, the role of the judiciary, or the political influence of Southern neighbors, even more, it may have feared shaking the foundations of its own authority.

141. *Id.* at 319 (leaving assessment of capital punishment to local legislatures).

142. On the neglect of minority views by parties claiming to respect tradition, see Nussbaum, *supra* note 3, at 386 ("[T]he objector . . . oversimplifies tradition, ignoring countertraditions of female defiance and strength, ignoring women's protests against harmful traditions, and in general forgetting to ask women themselves what they think of these norms . . ."). See also Blume, *supra* note 19, at 1807-08 (noting that lower court judges have gladly used *McCleskey* to reject claims of countywide discrimination).

143. This Essay uses Sarat and Scheingold's definitions of "cause lawyering" and "conventional lawyering." See STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 1-22 (2004). Conventional lawyering "involves the deployment of a set of technical skills on behalf of ends determined by the client, not the lawyer." *Id.* at 2. In contrast to cause lawyering, conventional lawyering "is neither a domain for moral or political advocacy nor a place to express the lawyer's beliefs about the way society should be organized, disputes resolved, and values expressed." *Id.*

Capital defense may be interpreted as a hybrid. Capital defense lawyers represent individual clients, and the form of their work resembles that of conventional lawyers, yet many of the lawyers believe in an abolitionist cause and see the aim their work as saving lives. See Thomas M. Hilbink, *You Know the Type . . . : Categories of Cause Lawyering*, 29 L. & SOC. INQUIRY 657, 665, 673, 681 (2004) (defining and comparing three types of cause lawyering: "proceduralist," "elite/vanguard" and "grass-roots"). For arguments that all criminal defense is cause lawyering, see Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 934-36, 943, 957 n.158 (2000), and Monroe H. Freedman, *Why It's Essential to Represent "Those People"*, in HOW CAN YOU REPRESENT THOSE PEOPLE? 73, 78 (Abbe Smith & Monroe Freedman eds., 2013).

144. Interview with Bryan Stevenson, *supra* note 51.

sional expertise.<sup>145</sup> As Anthony Alfieri has highlighted, many capital defenders use “procedural devices” to serve individual clients, engaging in motion practice and filing petitions for additional levels of judicial review.<sup>146</sup> When they raise constitutional claims, they focus primarily on other lawyers’ failures to observe the standards of the profession.<sup>147</sup>

This approach has met significant success. Challenges on direct appeal, habeas corpus petitions, and motions for stays of executions have together prevented hundreds of potential executions.<sup>148</sup> Even reluctant state courts have recognized particularly egregious examples of substandard behavior by local counsel.<sup>149</sup> Successive habeas petitions, combined with motions for stays, have also created lengthy delays, during which time defense teams have uncovered evidence that justified retrials or lesser sentences.<sup>150</sup>

Procedural tactics, however, may have provided fodder for opponents to attack capital defenders’ legitimacy and support.<sup>151</sup> Opponents argued that the use of procedures resulting in delays was inherently manipulative: the lawyers knew the underlying substance of petitions was frivolous, and the filings suggested the absence of ethical scruples.<sup>152</sup> Legislators complained that, rather than promoting fair and balanced trials, the lawyers were attempting to outsmart the system and distorting the criminal process. In 1996, under mounting pressure, Congress ended federal funding for Post Conviction Defender Organizations and sharply restricted the power of federal courts to hear habeas petitions.<sup>153</sup>

Opponents portrayed the expertise of counsel as fundamentally devoid of moral content. While the attack sang an old song about lawyers as hired

145. See Hilbink, *supra* note 143, at 672 (“In describing its early involvement in the civil rights-era South, the [Lawyers’ Committee for Civil Rights Under Law] made clear that its representatives went to Mississippi not as ‘activists’ or ‘civil rights lawyers.’ Their goal was not to ‘target’ Southern white racism, but rather to simply serve as lawyers for a client . . . who approached them and requested assistance.”).

146. Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325, 334 (1996).

147. See Hilbink, *supra* note 143, at 668 (describing the work of the Lawyers’ Committee for Civil Rights Under Law as “proceduralist” because the organization “described its mission as getting the American legal profession to live up to its responsibilities”).

148. See, e.g., JAMES S. LIEBMAN, JEFFREY FAGAN & VALERIE WEST, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 pp. 30-32 (June 12, 2000), available at [http://www2.law.columbia.edu/instructionalservices/liebman/liebman\\_final.pdf](http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf) (4500 death sentences were reversed from 1973 to 1995); Alfieri, *supra* note 146, at 340-42.

149. Howard, *supra* note 9, at 921 n.197.

150. Alfieri, *supra* note 146, at 334.

151. *Id.* at 335-36.

152. See Margaret Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1709 n.223 (1997).

153. See 28 U.S.C. § 2254(d) (2014); Howard, *supra* note 9, at 865.

guns, it drew strength from the carpetbagger myth and a stylized image of meddling Northern attorneys. One editorial in a local Southern paper complained, "A few smart lawyers who are agents of different organizations, seek to hamper justice through the employment of legal technicalities. They may bring suffering to many innocent Negroes."<sup>154</sup> The message is that these overeducated individuals bring their bag of tricks from their schools in the North, interfere with the honest Southern system in place, and harm, rather than help, the locals that they claim to support. Prosecutors have drawn on this image to disparage expert witnesses offered by defense counsel.<sup>155</sup> The very domain of expertise has been tainted by Northerners' historical use of it as a rationale for intervention.

Technical, expertise-based arguments not only trigger ugly portraits highlighting the lawyers' outsider status, but also they can erase a client's voice.<sup>156</sup> Take the situation where a post-conviction attorney argues that a defendant received ineffective assistance of counsel because of a trial attorney's failure to present mitigation evidence at sentencing or failure to file a motion for appointment of an expert witness. This approach places fundamental choices within the trial lawyer's discretion and deemphasizes the client's participation in the case.<sup>157</sup> While strategic decisions generally fall to the lawyer under governing professional rules, the lawyer must consult with the client,<sup>158</sup> and a client might wish to override the lawyer's decision about, for example, the presentation of mitigation evidence concerning the client's difficult childhood.<sup>159</sup> Arguing in a post-conviction petition that presentation of such evidence is an ethical obligation, whose omission constitutes a Sixth Amendment violation, leaves little space for the client to raise preferences related to strategy or dignity.<sup>160</sup> One might make a similar argument with respect to attempts to negotiate a plea. In 2003, the American Bar Association revised its guidelines for the performance of capital defense counsel to emphasize the importance of pursuing pleas, and advocates have interpreted these guidelines to mean that encouraging a defendant to accept a life sentence is fundamental to competent representation.<sup>161</sup> While this view might be correct, it does squeeze the

154. GREENBERG, *supra* note 27, at 99 (quoting unidentified editorial in local Orlando newspaper).

155. *Id.* at 148.

156. Alfieri, *supra* note 146, at 344.

157. *Id.*

158. MODEL RULES OF PROF'L CONDUCT, R. 1.2, R. 1.4 (2013).

159. Alfieri, *supra* note 146, at 342.

160. *Id.*

161. See AM. BAR. ASS'N, ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 10.9.1 (rev. ed. 2003); Russell Stetler, *Com-*

space for deference to clients' stated wishes. Particularly where the lawyer is an outsider, she must be careful to listen for the client's expressed knowledge of social context and values.<sup>162</sup>

### *C. Discourse of Morality Grounded in Local Community*

Recognizing the limits of post-conviction appeals, and the potential for successful representation in initial proceedings, commentators have encouraged capital defense projects to front-load their resources, shifting attention from post-conviction to trial.<sup>163</sup> New trial projects offer training to meet the goal of improved trial representation.<sup>164</sup> To the extent that outsider lawyers defend clients at trial, however, they must give special consideration to overcoming barriers between themselves and local juries. As this subpart will discuss, successful trial strategies must be mindful to draw on, rather than reject, Southern culture.

The very fact that an attorney is comfortable representing a capital defendant may be the biggest barrier between her and any death-qualified jury.<sup>165</sup> Any additional factors that make the attorney unfamiliar only make her less trustworthy.<sup>166</sup> Convincing the jurors of one's own credibility and morality is almost as difficult an endeavor as convincing them of the defendant's. The image of Northern lawyers who manipulate the law for their own political ends only magnifies this task.

A potential pitfall of attorneys who view themselves as saving their clients is to slip into portraying the client as a victim of societal forces.<sup>167</sup> Victimization rhetoric in the presentation of mitigation factors can imply that the crime was outside the defendant's control. The attempt to shift blame away from the defendant may be met with cynicism.<sup>168</sup> "Dwelling" on a childhood of abuse or a life of structural oppression can appear to be an excuse for the defendant's behavior.<sup>169</sup> Worse still, it may convey that

*mentary on Counsel's Duty to Seek and Negotiate a Disposition in Capital Cases (ABA Guideline 10.9.1)*, 31 HOFSTRA L. REV. 1157, 1157 (2003).

162. Anthony Alfieri has argued that wresting control away from the client can erase the client's perspective from the defense presented. One result is that the jury then cannot hear him accepting responsibility. This may create a narrative lacking moral accountability. Alfieri, *supra* note 146, at 342-43.

163. See, e.g., Smith *supra* note 55, at 267.

164. *Id.* at 268-72 (describing trial consulting projects).

165. Interview with Bryan Stevenson, *supra* note 51.

166. *Id.*

167. Alfieri, *supra* note 146, at 342-43.

168. Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1558, 1590-91 (1998).

169. MCFEELY, *supra* note 36, at 174.

the attorney is blaming the local community for abuse or neglect experienced by the defendant. If the attorney is an outsider, mitigation arguments describing oppression may come across as pedantic. The outsider attorney's presence, in combination with the suggestion that the defendant suffered at the hands of society, may convey that the defendant needed an outsider to save him from the community.

Defense counsel's compromising position in the sentencing phase makes potent the image of the unscrupulous carpetbagger. If the penalty phase occurs, that means the jury did not trust defense counsel enough to honor her request at the conclusion of the trial's guilt phase. At sentencing, the jury's guilty verdict cannot be contradicted without inspiring resentment,<sup>170</sup> and yet the lawyer must appear consistent after arguing for a different result. Turning her back on the position she took in the guilt phase would implicate herself as previously trying to free a murderer.<sup>171</sup> Failing to acknowledge her awkward position or attempting to portray it as the mandate of the lawyer's job threatens the attorney's credibility and moral authority.<sup>172</sup> The defense attorney must therefore begin the penalty phase by verbally recognizing the legitimacy of the verdict without agreeing with it.

Once a juror has found a defendant guilty of murder, she will likely want to punish him, and scolding her for this retributive instinct can backfire and cause resentment. The problem can be exacerbated by Northern depictions of Southerners as primitive and instinct-driven, which can materialize in the description of the client and in any rebuke of the jury. Denying the defendant's responsibility can appear to challenge the jury's decision. A better approach to avoid a capital sentence is to convince the jury that life in prison is itself a severe punishment.<sup>173</sup> In this way, the attorney respects the jury's authority but requests that it consider alternative resolutions. Note that attorneys can also use the jury selection process to seek out jurors open to mercy as an alternative to the ultimate punishment.<sup>174</sup>

Successful capital defense attorneys have learned to adopt a moral discourse of "redemptive community."<sup>175</sup> Unlike some of their predeces-

170. Sundby, *supra* note 168, at 1578.

171. Mark Costanzo & Julie Peterson, *Attorney Persuasion in the Capital Penalty Phase: A Content Analysis of Closing Arguments*, 50 J. SOC. ISSUES 125, 131-32 (1994).

172. *Id.*

173. *Id.* at 140.

174. See McCord, *supra* note 120 (highlighting religious "themes . . . [of] rejection of retribution as a legitimate goal of punishment, and adherence to the principles of mercy, forgiveness, and reconciliation").

175. Alfieri, *supra* note 146, at 352.

sors, these attorneys adopt a tone of morality based in community.<sup>176</sup> Instead of treating either the client or the local community as ignorant, attorneys turn to those members of the community in the jury, and urge them to use their power to define the community as they see fit.<sup>177</sup>

Without flattening it into one oversimplified set of beliefs, attorneys must face the role of religion as a force shaping community views.<sup>178</sup> Instead of ceding the force of religious rhetoric to those who might use it to bolster claims for revenge,<sup>179</sup> successful defense attorneys draw from Judeo-Christian language about redemption.<sup>180</sup> Rather than reject it, the lawyers draw on and reinvent the language of the community. Where a prosecutor dismissed mitigating evidence by arguing that the defendant was “just plain mean” even as a child, Stephen Bright of the Southern Center for Human Rights, originally from Tennessee, responded by showing how this view denied “the redemptive power of God Almighty.”<sup>181</sup> While the narrative constructed by capital defense attorneys need not be explicitly religious, it cannot be hostile to religion. The most successful penalty phase summations emphasize “morality, justice, and human motivation.”<sup>182</sup>

#### CONCLUSION

Scholars and activists have long debated the legitimacy of outsider intervention in community disputes. When, if ever, is it appropriate to take sides in, or participate in the resolution of, conflicts within a community of which one is not a member? What is the role of outsider lawyers?

Lawyers could have a special role to play as professional interlopers. As crafters of laws or private agreements, they can work towards the prevention of strife, or, as mediators or judges, they can aid in its resolution.

176. *Id.* at 350.

177. See MCFEELY, *supra* note 36, at 166 (describing Stephen Bright’s use of the words “we” and “kill” to convey the jurors’ responsibility and choice in the matter of putting the defendant to death). See also Robin West, *Narrative, Responsibility and Death: A Comment on the Death Penalty Cases from the 1989 Term*, 1 MD. J. CONTEMP. LEGAL ISSUES 161, 162 (1990) (“When lawyers resolve conflicts by arguing about rights, they contribute to the creation of a community organized in one particular way. When lawyers respond to conflicts and resolve conflicts by telling stories, they contribute to the creation of a community organized in [a] very different fashion.”).

178. Boulanger & Sarat, *supra* note 119, at 5-6 (describing need for research on “how religious beliefs translate” into views on death penalty).

179. MCFEELY, *supra* note 36, at 53 (noting “concept of a wrathful God and death as a means of atonement”).

180. See GARDNER C. HANKS, *AGAINST THE DEATH PENALTY: CHRISTIAN AND SECULAR ARGUMENTS AGAINST CAPITAL PUNISHMENT* 25-51 (1997) (describing arguments from New and Old Testaments).

181. MCFEELY, *supra* note 36, at 168.

182. Costanzo & Peterson, *supra* note 171, at 126.

Attorneys also serve as professional partisans, supporting rather than quieting dissent. As lobbyists or litigators, they bring professional tools that generate power for particular parties. Often just their presence weighs in favor of their clients because of the lawyers' status as elites.

Cause lawyer outsiders can use their privileged outsider position for social good. As outsiders, they bring the advantage of perspective that allows them to see the injustice in the status quo and to challenge it head-on without fear of personal cost. As outsider *lawyers*, they legitimate the interests of those whose cause they advance, presenting their clients' demands as legal claims swathed in the legitimacy of the rule of law.

Yet the case of capital defense in the U.S. South shows the flip side of this: head-on challenges from outsider lawyers will be met with resistance and possibly special resentment because of the status of these challengers. Direct critiques of the racism in the administration of capital trials can be painted as attacks on the entire community. Even drawing on the rule of law may be fraught, given a history of federal military and Northern activist interventions in the name of law enforcement. Even to suggest that the law restricts the community's resolution methods may be viewed as provocative. The presence of the outsider lawyers in Southern courts may itself be portrayed as hostile and undemocratic.

To avoid challenging culture, many capital defense attorneys have drawn less on their perspective as outsiders and more on their position as lawyers. These attorneys have turned away from explicit narratives of racial discrimination and instead sought to utilize tools of conventional lawyers. These include appeals and post-conviction petitions that find flaws in the quality of the lawyering services provided at trial. This approach has proven more successful than the broader critiques of culture, but the use of these devices generates its own challenges. Particularly for outsider lawyers, reliance on their professional position can feed the construction of the lawyers as—even worse than pedantic missionaries—amoral tricksters. Emphasis on the special expertise of outsider lawyers can also highlight their outsider status and thereby undercut the legitimacy of their work.

Professional tools offer significant value, and outsider lawyers may be especially well equipped to utilize them. Yet direct attacks on systemic injustice may require internal expression to be perceived and sustained as legitimate. For outsider lawyers to intervene effectively, they may need to abandon to some degree their privileged position as outsider lawyers and to focus on learning from the communities in which they seek to work. This will require not shying away from moral discourse but embracing it, and doing so alongside local dissenters.