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About the Wiley A. Branton/ *Howard Law Journal* Symposium

Each year, Howard University School of Law and the *Howard Law Journal* pay tribute to the life and legacy of our former dean, Wiley A. Branton. What began as a scholarship award ceremony for the first-year student who completed the year with the highest grade point average has grown into a day-long program focusing on an area of legal significance inspired by Branton's career as a prominent civil rights activist and exceptional litigator. The Symposium is then memorialized in the *Journal*'s spring issue following the Symposium. The expansive nature of Branton's work has allowed the *Journal* to span a wide range of topics throughout the years, and the *Journal* is honored to present this issue, *Capital Punishment*, in recognition of the great Wiley A. Branton. Past Symposium issues include:

Unfinished Work of the Civil Rights Act of 1964: Shaping An Agenda for the Next 40 Years

The Value of the Vote: The 1965 Voting Rights Act and Beyond What Is Black?: Perspectives on Coalition Building in the Modern Civil Rights Movement

Katrina and the Rule of Law in the Time of Crisis

Thurgood Marshall: His Life, His Work, His Legacy

From Reconstruction to the White House: The Past and Future of Black Lawyers in America

Speaking Truth to Power: A New Age of First Amendment Rights?

Health Equity: Developments & Challenges of the COVID-19 Pandemic

Immigration Equality

Letter from the Editor-in-Chief

Since its inception, the *Howard Law Journal* has played a critical role as an incubator for legal scholarship and campaigns in the fight for civil rights and equal justice. Each year, for the past twenty years, we have dedicated the final Issue in each volume to honoring the life and legacy of our former dean and civil rights leader, Wiley A. Branton. This year, we also dedicate our Branton Issue to honoring the life and legacy of Judge Wiley A. Branton, Jr., who passed away in August 2023. "In the tapestry of justice and civil rights, he was a thread, woven with the legacy of his father."[1] Judge Branton's unwavering commitment to social justice shines as a beacon of hope and empowerment, and his legacy of compassion and action will be felt for years to come.

Consistent with the mission of our publication, the Branton Symposium has served as one of many tools the *Journal* uses to bring students, scholars, and advocates together to ensure that the voices of marginalized communities are heard far and wide. We used this year's Symposium to explore how *Capital Punishment* reinforces racialized hierarchies that abridge the civil rights of people of color. We began our week with two stimulating discussions: a "Pre-Symposium Lecture with Christina Swarns," Executive Director of the Innocence Project, and "Careers in Public Interest," a conversation with renowned attorneys engaged in public defense work. The Symposium, held on October 5, 2023, featured a keynote address and three thought-provoking panels on the effect of current capital punishment policies and the future of capital punishment reform in legislation and litigation.

Our Twentieth Anniversary Issue opens with inspiring remarks from our keynote speaker, Judge Carlton W. Reeves. In his address, *Townes, McDaniels, Till, Howard, and Flowers: Thoughts From Mississippi on the Death Penalty*, Judge Reeves provides a compelling journey through the evolution of lynchings and slavery into modern-day forms of systemic violence. He underscores the enduring realities of Black Americans, who have consistently borne the disproportionate brunt of state-sanctioned executions. Judge Reeves concludes by reflecting on the significance of Dean Charles Hamilton Houston's vision of training "social engineers." His motivating call to "do justice" is a sobering reminder that we already possess the tools—"our own experiences, histories, and memories"—to actively pursue and uphold justice in our society.

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[1] *Obituary Wiley Austin Branton Jr.*, Neptune Society, https://neptunesociety.com/obituaries/little-rock-ar/wiley-branton-11415726 (last visited Mar. 4, 2024).

The articles and essays in this Issue explore the complexities and injustices inherent in our legal system and offer valuable insights into ongoing efforts for reform. In *Long Overdue: Revisiting the Persistent Influence of Race in the Federal Death Penalty System*, John Nidiry and Ruth Friedman discuss the historical context of capital punishment and highlight how racial disparities in death sentences and executions were shaped by laws that categorized criminal behavior and punishment based on race and gender. They draw on empirical data to illustrate the ongoing biases in modern capital punishment. Viewing the death penalty as a pillar of the country's racial caste system, Nidiry and Friedman argue that efforts to abolish capital punishment must address the underlying systems that restrict access to wealth and political power.

Next, in *Capital Punishment Unmasked: Shades of Justice in America's Grim Theater*, Akin Adepoju describes the entrenchment of white supremacy within America's legal institutions. He highlights connections between slavery, constitutional compromises, and the death penalty as tools that devalue Black lives. Professor Adepoju discusses the importance of racial diversity in legal institutions and concludes with insights advocates can use to foster inclusive and equitable communities.

In *Dismantling Structural Racism to End Capital Punishment*, Diann Rust-Tierney exposes the legal framework that upheld slavery as an immoral business model that promoted racial discrimination in the imposition of the death penalty. She contends that capital punishment does not serve the public interest by punishing the most serious crimes, but rather reinforces a legal hierarchy that prioritizes white lives above all others. Professor Rust-Tierney concludes with a reminder that to abolish capital punishment, we must systematically eradicate the laws that deny humanity to all people.

Howard University School of Law graduate Darryl E. Williams, Jr. tackles the practice of death qualification in jury selection in his essay, *Disqualifying Death: Why Capital Abolitionists Should Look Back to Move Forward*. Williams explains how death qualification empowers prosecutors to dismiss jurors with moral objections to capital punishment, resulting in juries that are more prosecution-friendly and more likely to deliver death sentences. He posits that an originalist approach grounded in the historical tradition of the Sixth Amendment right to a jury trial can assist abolitionists in dismantling the American capital punishment system.

Michael Meltsner concludes our discussion of capital punishment with his essay *The American Death Penalty: Tracking the Absurdities*. He discusses the challenges to reform given the current composition and position of the Supreme Court and underscores the need for a shift in public opinion to abolish the death penalty. Recognizing the increasing opposition to capital

punishment, Professor Meltsner calls for a targeted cultural shift that engages the general public in challenging and reshaping the prevailing norms surrounding the death penalty.

The fair administration of justice is the cornerstone of our legal system. It entrusts in us a collective responsibility to ensure that justice is an ideal and tangible reality for all human beings. As you read the submissions in this Issue, I urge you to think critically about our criminal legal system—who it helps, who it hinders—and to ask yourself what it truly means to have equal justice for all.

As the last footnote is penned, I embrace the gentle yet bitter-sweet conclusion to my chapter as Editor-in-Chief. I extend my deepest appreciation to the Volume 67 Executive Board. Lexi, Morigan, Fedel, and Joi, it was an honor to witness your fortitude and leadership in action each and every day. Thank you for your motivation, support, and partnership. I would also like to thank the entire Editorial Board, our advisors, Interim-Dean Crooms-Robinson, and law school administrative staff for their hard work and dedication. Without your efforts, this publication would not be possible. Last but not least, I extend a special thank you to the speakers and authors who contributed their scholarship and unique perspectives to the Twentieth Wiley A. Branton Symposium and Symposium Issue. It has been an honor to serve as Editor-in-Chief of the *Howard Law Journal* and help uphold our storied institution's longstanding legacy. I am confident that the *Journal* will continue to serve as a vehicle for social change, engaging in difficult yet necessary discourse to champion critical conversations that help dismantle the barriers to justice woven into our society.

Hafzat K. Akanni
Editor-in-Chief
Volume 67

Townes, McDaniels, Till, Howard, and Flowers: Thoughts From Mississippi on the Death Penalty

Carlton W. Reeves*

I want to thank the editors of the *Howard Law Journal* for inviting me to speak about the death penalty. It is a privilege and honor to do so today at this distinguished Symposium on these hallowed grounds. There is no better place to speak about this subject than Howard Law, given its position in training what Dean Charles Hamilton Houston called "social engineers."[1]

I think of Pauli Murray, who was driven to attend Howard by the capital case against Odell Waller in Virginia.[2] I think of Fred Banks, Class of 1968, my mentor and friend, a lawyer from my Mississippi who went from defending people on death row to shaping death penalty jurisprudence on our state's Supreme Court.[3] And, of course, I think of

* The Honorable Carlton W. Reeves is a United States District Judge of the United States District Court for the Southern District of Mississippi and Chair of the United States Sentencing Commission. This Article represents a lightly edited and footnoted version of the Keynote Address the Honorable Carlton W. Reeves delivered on October 5, 2023, at the 2023 Wiley A. Branton Symposium.

1. Okianer Christian Dark, *The Role of Howard University School of Law in Brown v. Board of Education*, 16 Wash. Hist. 83, 84 (2004) (describing Houston's vision of a school that would produce "social engineers" who would engage in solving the "problems of local communities" and in "bettering conditions of the underprivileged citizens").

2. *See* Braham Dabscheck, *Pauli Murray: The US Firebrand's Unique Opportunity To Influence A Continent*, 30 Econ. and Lab. Relations Rev. 566, 573 (2019) (noting Murray's belief that, "given her brushes with the law" in the Waller case, "she might as well become a lawyer" and attend Howard Law).

3. *See* Rob McDuff, *Notes of A Fan*, 40 Miss. C. L. Rev. 455, 456–57 (2022) (noting that Banks, "after graduating from Howard" University School of Law in 1968, worked as an attorney "defend[ing] Black people in death penalty prosecutions"); James W. Craig, *Happy Warrior: Lessons Learned from Watching Fred L. Banks, Jr.*, 40 Miss. C. L. Rev. 461, 467 (2022) (noting that Banks "could apply an exacting, one might even say unforgiving, view of the Eighth Amendment and Mississippi law to vacate the death penalty" which enabled him "to carry other members of the Court to the conclusion that a capital case had to be re-tried").

Thurgood Marshall, "the Founding Father of the New America."[4] The Thurgood who "fought countless battles for human rights in stifling antebellum courthouses where white supremacy ruled."[5] The Thurgood who took the fight against the death penalty all the way to the Supreme Court bench.[6] The Thurgood who was likely the only Justice to have ever stood beside a client while a judge pronounced that death was the *just* sentence to be imposed.

Of course, it should be of little surprise that graduates of our oldest historically Black law school have played an outsized role in challenging the death penalty.[7] State-sanctioned executions are an inextricable part of the Black experience in this country—in *my* country—in *our* country.[8] Our ancestors lived beneath a government that approved our legal death through Constitutionalized slavery and facilitated our bodily death by protecting killers of enslaved people.[9] Our parents and grandparents lived under the thumb of governments that legally sanctioned our lynchings.[10] And what everyone in this room has lived through—even today, a mere decade after many proclaimed a "post-racial America"[11]—is a country whose officials continue to execute Black Americans. Sometimes in a prison, after a legal process that ends with an injection of potassium chloride. And other times in front of the local convenience store, after nine minutes of a knee on a neck.

The death penalty is often held up as a necessary deterrent for the most heinous wrongs, and humane justice for those who commit such wrongs.[12] But this vision is not what is indelibly impressed on

4. Gilbert King, Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America, 2 (2012).

5. *Id.*

6. *See generally* Jordan Steiker, *Long Road Up from Barbarism: Thurgood Marshall and the Death Penalty*, 71 Tex. L. Rev. 1131 (1993).

7. Gwendolyn Glenn, *Reinventing Howard's Law School*, 18 Black Issues in Higher Educ. 24 (2001) (calling Howard home to "the nation's oldest historically Black law school").

8. *See generally* From Lynch Mobs to the Killing State: Race and the Death Penalty in America (Charles J. Ogletree Jr. & Austin Sarat eds., 2006).

9. *See generally* Andrew T. Fede, Homicide Justified: The Legality of Killing Slaves in the United States and the Atlantic World (Paul Finkelman & Timothy S. Huebner eds., 2017).

10. *See generally* Michael J. Pfeiffer, Rough Justice: Lynching and American Society, 1874–1947 (2004).

11. Talk of the Nation, *The "Post-Racial" Conversation*, Nat'l Pub. Radio, (Jan. 18, 2010), https://www.npr.org/templates/story/story.php?storyId=122701272 ("After Barack Obama was elected president, in the days leading up to his inauguration, many people heard, for the first time, the term post-racial. It signified a new era brought about by the election of the first African-American president. Many people believed or hoped or wanted or expected that the new presidency would change how we talk about and how we experience race in this country.").

12. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 175, 183 (1976) (Stewart, J.) (holding that the "death penalty is said to serve two principal social purposes: retribution and deterrence of capital

the minds of so many Black Americans. To be Black in America—*my* America—*our* America—is to have a terrifying familiarity with the realities of state-sanctioned executions.

We know it has often been hate, not justice, behind government-sanctioned killings. We know it has often been the innocent, not the guilty, who have been subject to the ultimate penalty.[13] We know how often these killings have functioned not to deter crime,[14] but to stifle resistance.[15] And we know that no matter how humane a method purports to be, the death it delivers is often excruciating[16]—and comes at immense cost.[17]

We know these things because Black people, in this country, have always disproportionately been the targets of government-sanctioned killings.[18] We know that those killings more often come as retribution for crimes against victims who are white, not Black.[19] And we know those killings have long been underwritten by a system of social control and racial hierarchy that survives and continues to mutate to this day.[20]

With these realities so deeply etched in our minds, it is no surprise that Black people in this country are more skeptical of the death penalty

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crimes by prospective offenders," and that the death penalty is permissible so long as it is not "cruelly inhumane or disproportionate to the crime involved").

13. *See, e.g.,* Mary Church Terrell, *Lynching from a Negro's Point of View*, 178 North Am. Rev. 853, 858 (1904) ("So great is the thirst for the negro's blood in the South, that but a single breath of suspicion is sufficient to kindle into an all-consuming flame the embers of hatred ever smoldering in the breasts of the fiends who compose a typical mob. When once such a bloodthirsty company starts on a negro's trail, and the right one cannot be found, the first available specimen is sacrificed to their rage, no matter whether he is guilty or not.").

14. Indeed, as the Committee on Deterrence and the Death Penalty of the National Academies' National Research Council concluded, "research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates." Nat. Rsch. Council, Deterrence and the Death Penalty 2 (Daniel S. Nagin & John V. Peppers eds., 2012).

15. Harry Haywood & Milton Howard, Lynching: A Weapon of National Oppression 5 (1932) ("Brutality and savagery. mark all lynchings. … This ruling class savagery has a purpose: to strike terror into the hearts of the oppressed Negro people so that they dare not strike out for liberation.").

16. *See, e.g.*, Arthur S. Miller & Jeffrey H. Bowman, *Slow Dance on the Killing Ground: The Willie Francis Case Revisited*, 32 DePaul L. Rev. 1, (1982) (describing the botched execution of a Black Alabama teenager by electric chair in 1946); *accord Glossip v. Gross*, 576 U.S. 863, 977 (2015) (Sotomayor, J., dissenting) (describing a form of lethal injection as "an excruciatingly painful death hidden behind a veneer of medication").

17. *See State Studies on Monetary Costs,* Death Penalty Info. Ctr., https://deathpenaltyinfo.org/policy-issues/costs/summary-of-states-death-penalty (last visited Oct. 1, 2023) (listing studies detailing the financial cost of capital punishment).

18. Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 Colum. Hum. Rts. L. Rev. 983, 987 (2020) ("Since its inception, the disproportionate imposition of the death penalty has denied murdered Black victims the equal protection of the laws.").

19. Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513, 529 n.68 (2014) (describing "a host of empirical studies measuring race-of-defendant effects, race-of-victim effects, or both").

20. *See generally id.*

than other Americans.[21] It is no surprise that the *Howard Law Journal* has traditionally been home to scholarship challenging the death penalty.[22] And it is no surprise that one of this institution's most esteemed graduates, Justice Marshall, "the Founding Father of the New America," grounded this part of his jurisprudence in the following hypothesis: that "the American people, fully informed as to the purposes of the death penalty and its liabilities, would . . . reject it as morally unacceptable."[23]

Generations of Black skepticism grounded in generations of Black experience is not the only evidence supporting Justice Marshall's hypothesis. For those posed to dismiss this lived experience out of hand, there is ample social science research to buttress these beliefs. Study after study has suggested that, when people are forced to reckon with the realities of state-sanctioned executions, their skepticism of the system increases.[24]

For further proof, look no further than my Mississippi.

In 1937, moments after they were accused of a murder there is little reason to believe they committed, Roosevelt Townes and Robert McDaniels were dragged by a lynch mob out of a courthouse and into woods of Montgomery County, Mississippi.[25] They were chained to trees.

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21. *See* Pew Rsch. Center, Most Americans Favor the Death Penalty Despite Concerns About Its Administration (2021) ("As in the past, support for the death penalty differs across racial and ethnic groups. Majorities of White (63%), Asian (63%) and Hispanic adults (56%) favor the death penalty for persons convicted of murder. Black adults are evenly divided: 49% favor the death penalty, while an identical share oppose it."); *see also* Aaron Griffith, *Black Americans' Skepticism Toward the Death Penalty*, PRRI (Aug. 12, 2022), https://www.prri.org/spotlight/black-americans-skepticism-toward-the-death-penalty/ ("Recent PRRI polling shows that Black Americans are significantly more skeptical of the death penalty's fairness with regards to race than other racial groups.").

22. *See, e.g.*, Barry Scheck, *Innocence, Race, and the Death Penalty*, 50 How. L.J. 445 (2007); Debra D. Burke & Mary Anne Nixon, *Post-Traumatic Stress Disorder and the Death Penalty*, 38 How. L.J. 183 (1994); Melanie Shaw, *Race, Statistics and the Death Penalty*, 34 How. L.J. 503 (1991).

23. *Gregg v. Georgia*, 428 U.S. 227, 232, 96 S.Ct. 2971, 2973 (1976) (Marshall, J., dissenting).

24. *See, e.g.,* Eric G. Lambert, Scott D. Camp, Alan Clarke & Shanhe Jiang, *The Impact of Information on Death Penalty Support, Revisited*, 57 Crime & Delinquency 572 (2011) (finding that "information on both deterrence and innocence leads to a reduction in death penalty support and views on the death penalty"); Sishi Wu, *The Effect of Wrongful Conviction Rate on Death Penalty Support and How it Closes the Racial Gap,* 47 Am. J. of Crim. Just. 1006 (2022) (finding that "people's perceived wrongful conviction rates were negatively associated with support for the death penalty," to the point that "perceived wrongful conviction rate fully mediated the effect of being Black on death penalty support"); Talia Roitberg Harmon, Diana L. Falco & David Taylor, *The Impact of Specific Knowledge on Death Penalty Opposition: An Empirical Test of the Marshall Hypothesis*, 68 Crime & Delinquency 1516 (2022) (finding "qualified support" for hypothesis that "knowledge is significantly related to an increase in death penalty opposition," with "the following factors were significant predictors of overall change in participants' opinion: cost, deterrence, race of victim, and evolving societies").

25. The facts about Townes and McDaniels' execution can be found in Amy Louise Wood, *"Somebody Do Something!": Lynching Photographs, Historical Memory, and the Possibility of Sympathetic Spectatorship*, 14 Euro. J. of Am. Stud. 1 (2019).

Their bodies were burned with blowtorches. They were shot, over and over. They were covered with gasoline and set on fire. Amidst this carnage and desecration, the lynch mob photographed Townes and McDaniels, memorializing the so-called "justice" the *government* allowed them to exact.

It was common to create such memorabilia of lynching. What was rare in this case is that *Life* and *Time* magazines managed to obtain and publish one of the photos. It was the first time an image of a lynching had been published in the mainstream national media.[26] The effect was immediate, with the pictures spurring the approval of an anti-lynching law by the U.S. House of Representatives and sparking a broader movement to end the practice of lynching across the South.[27]

It was also a precursor to another movement-sparking moment out of *my* Mississippi: Mamie Till's "want[ing] the world to see" the mangled body of her son, Emmett.[28] Emmett Till, *that boy*, was, as you know, murdered for allegedly propositioning a white woman in a Mississippi convenience store—an incident that, years later, the woman admitted never occurred.[29] Well, the world *did* see Mamie Till's child. And again, reality shocked our collective conscience into action.[30]

It is easy to imagine that things have fundamentally changed since then that these lynchings are written in a chapter of our history far different from our current one. We can test that assumption by returning to the place Townes and McDaniels were tortured and executed: Montgomery County, Mississippi.[31]

It was there, in 1996, that a Black man named Curtis Flowers worked at the local furniture store.[32] Many of you have heard of

26. Amy Louise Wood, Lynching and Spectacle: Witnessing Racial Violence in America, 1890-1940, 212–13 (2011).

27. *See generally* Sherrilyn A. Ifill, On the Courthouse Lawn: Confronting the Legacy of Lynching in the Twenty-First Century (Beacon Press, 1st ed. 2007) (discussing broadly the legacy of lynching in America).

28. Wood, *supra* note 26, at 267–68.

29. Dianne Gallagher et al., *Woman Whose Accusation Led to the Lynching of Emmett Till has Died at 88*, CNN (Apr. 28, 2023, 5:30 AM), https://www.cnn.com/2023/04/27/us/carolyn-bryantdonham-emmett-till/index.html#:~:text=Video-,Woman%20whose%20accusation%20led%20to%20the%20lynching%20of%20Emmett,died%20at%2088%2C%20coroner%20says&text=Carolyn%20Bryant%2C%20pictured%20at%20age%2021 (emphasizing Carolyn Donham's 2008 admission that Emmett Till did not grab her hand and waist or proposition her, contrary to her 1955 grand jury testimony).

30. *See* Devery S. Anderson, Emmett Till: The Murder That Shocked the World and Propelled the Civil Rights Movement (2015) for a full exploration of Mamie Till's remarkable sacrifice.

31. Jennifer Ritterhouse, Discovering the South: One Man's Travels through a Changing America in the 1930s 90–91 (2017).

32. *See generally* Darby Gibbins, *Six Trials & Twenty-Three Years Later: Curtis Flowers and the Need for a More Expansive Batson Remedy*, 59 Hous. L. Rev. 713 (2022) (describing a detailed account of Flowers' story).

Flowers. He spent the next twenty-plus years on death row for the killing of the white woman who owned the furniture store and three of her employees.[33] During that time, Flowers was tried by Doug Evans, the white district attorney.[34] Evans sought Flowers' death in a nearby county named for Robert E. Lee, in a courthouse flying a state flag that long featured the Confederate emblem, across the street from a monument to the Confederacy.[35]

Flowers' initial conviction was overturned by the Mississippi Supreme Court.[36] But Flowers was tried by Evans again, *and again*, *and again*, *and again*, *and again*—six times in total.[37] The retrials were necessary because of rampant prosecutorial misconduct, including the exclusion of potential jurors *because they were Black*.[38] It was so bad that the U.S. Supreme Court stepped in and vacated the last conviction in 2019.[39] Summoning all the arrogance he could muster, Evans declared that this was a "ridiculous ruling."[40] It took an independent review by the State Attorney General to put an end to the criminal proceedings once and for all.[41]

Now, despite its outcome, the *Flowers* case is hardly one where the legal system covers itself in glory. It relegated an innocent man to state prison, robbing him of twenty years of his life. And Black men

33. Dorothy E. Roberts, *Abolition Constitutionalism*, 133 Harv. L. Rev. 1, 3 (2019).

34. *Id.* at 4.

35. Flowers v. State, 773 So. 2d 309, 313 (Miss. 2000) ("After a change of venue was granted, the trial commenced on October 13, 1997, in Lee County."); Susie J., *After Verdict, Legal Fight Goes On*, Greenwood Commonwealth (Oct. 19, 1997), https://gwcommonwealth.newspapers.com/image/237826789 (noting that Flowers' first trial was conducted at the Lee County Justice Center); *In Lee County, Mississippi: No Vote on Moving Rebel Statue*, Associated Press (Aug. 4, 2020), https://apnews.com/general-news-498738aca13b79eff7c57d75fbec30d1 (noting that a monument to Confederate soldiers stood on the grounds of the Lee County Courthouse and describing the history of Lee County's name); *Courthouse Locations*, Miss. First Cir. Ct., https://www.firstcircuitcourt.ms.gov/courthouse-locations (last visited Mar. 3, 2024) (showing that, until recently, the Mississippi state flag flew over the Lee County Justice Center); 201 W Jefferson St., Google Maps, https://www.google.com/maps/place/Lee+County+Justice+Center/@34.2592175,-88.7050752,3a,75y,7.51h,89.68t/data=!3m6!1e1!3m4!1s1P14NBVl3BMOApNAS3eZIQ!2e0!7i16384!8i8192!4m6!3m5!1s0x88874e98ec14db47:0xed886d3f5b9b4a31!8m2!3d34.2594365!4d-88.7050292!16s%2Fg%2F1vg_81jq?entry=ttu (follow hyperlink; then view "photos") (showing the Lee County Justice Center across the street from the Lee County Courthouse's Confederate monument as of September 2022).

36. *Flowers*, 773 So. 2d at 334 (Banks, P.J., concurring in part).

37. Roberts, *supra* note 35, at 4.

38. Gibbins, *supra* note 34, at 715.

39. *Id.* at 729–32.

40. Alissa Zhu, *Curtis Flowers: NAACP Sues Mississippi Prosecutor Who Tried Man 6 Times for the Same Crime*, Miss. Clarion Ledger (Nov. 18, 2019, 4:33 PM), https://www.clarionledger.com/story/news/2019/11/18/curtis-flowers-naacp-sues-mississippi-prosecutor-who-tried-man-6-times-same-crime/4230895002/.

41. Gibbins, *supra* note 34, at 732.

like Flowers have made up a massively disproportionate number of the more than 1,500 people who have been executed since the Supreme Court reinstated the death penalty in 1976.[42]

Nevertheless, the Flowers saga is a modern illustration of a lesson from the killings of Townes, McDaniels, and Till. If you have heard Curtis Flowers' story, you have likely done so literally—because someone made a courageous decision to unearth it. A podcast called *In the Dark*[43] brought to our ears not only Mississippi's attempts to execute Curtis Flowers, but the junk science, prosecutorial malpractice, vindictiveness, and racial bias behind that callous crusade. It was the exposure of these things, which appear all too frequently in death penalty cases, that spared a man's life—forcing the world to again take notice.

Yet Curtis Flowers' story reveals an even more fundamental difference between the past and the present. In his tale, there was something that had been absent from the Mississippi of Townes, McDaniels, and Till: lawyers who looked like them. For all the immense good that the podcast did, Black lawyers played a crucial role in saving Curtis Flowers' life.[44] As did white lawyers like my friend and colleague Magistrate Judge Keith Ball and others.[45]

But there were the Black attorneys who defended Flowers.[46] There were the Black jurists who scrutinized the case against him. Indeed, it was Justice Banks—that esteemed Howard Law graduate—who led the Mississippi Supreme Court that overturned Flowers' first conviction.[47] And it was the Founding Father of the New America who helped craft the legal framework around jury selection that was later used to reverse Flowers' convictions.[48]

In other capital cases, it has been Black prosecutors playing a crucial role in ensuring the law reflects reality. I think of the case of Eddie Lee

42. *See generally* Franklin E. Zimring & Gordon Hawkins, *Capital Punishment and the Eighth Amendment: Furman and Gregg in Retrospect*, 18 U.C. Davis L. Rev. 927 (1985); Death Penalty Info. Ctr., The Death Penalty in 2022: Year End Report (2022) (providing data on death sentences in the United States).

43. Gibbins, *supra* note 34 at 741.

44. *See* Browning, *infra* note 96.

45. *See, e.g.,* Flowers v. State, 842 So.2d 531 (Miss. 2003) (noting representation of Curtis Flowers by F. Keith Ball); Flowers v. State, 773 So. 2d 309, 309 (Miss. 2000) (noting representation of Curtis Flowers by F. Keith Ball and James Craig).

46. William Browning, *Sextuple Jeopardy*, Reason Mag. (Apr. 2012), https://reason.com/2012/03/19/sextuple-jeopardy/ (noting that Flowers' attorneys included Ray Charles Carter and Chokwe Lumumba).

47. *Flowers*, 773 So.2d at 334 (Banks, P.J., concurring in part).

48. K. Winchester Gaines, *Race, Venue, and the Rodney King Case: Can Batson Save the Vicinage Community*, 73 U. Det. Mercy L. Rev. 271, 294 (1996) (describing "the mantle left by Justice Marshall, who had the willingness to extend *Batson* principles to a jury pool case").

Howard, another Black man who the State of Mississippi wrongly put on death row for decades—this time, solely because of the quote-unquote "science" of bite mark analysis.[49] Attorneys at the University of Mississippi and the Innocence Project spent years building the case for Howard's freedom and vacating his convictions.[50] Yet Howard ultimately walked free because of Scott Colom, the first Black district attorney elected to a majority-white voting district in our state's history.[51] Colom chose to accept the reality that, because bite mark analysis is junk science, there was effectively *no evidence* on which to base a prosecution. This Scott Colom is the one who has been tapped by President Biden to bring this same sense of justice to my sister court in the Northern District of Mississippi.[52]

As we think about what the tales of Curtis Flowers and Eddie Lee Howard tell us, consider how their stories echo the research showing that capital cases prosecuted by Black attorneys are less likely to end in the death penalty.[53] Consider, too, the studies showing the influence of Black jurors on criminal convictions and penalties in all cases, not just capital ones.[54] And consider the studies demonstrating that relief

49. *See generally* John McGee, *Eddie Lee Howard: Free After 26 Years on Death Row Due to Faulty Bite-Mark "Evidence,"* Miss. Free Press (Feb. 21, 2021), https://www.mississippifreepress.org/9488/eddie-lee-howard-free-after-26-years-on-death-row-due-to-faulty-bite-mark-evidence.

50. *Id.*

51. *District Attorney*, Dist. Att'y's Off. for the Sixteenth Cir. Ct. of Miss., https://www.msda16.org/scott-colom (last visited Oct. 1, 2023).

52. *President Biden Makes Twenty-Seventh Judicial Nominations Announcement and Announces New Nominees to Serve as U.S. Attorneys and U.S. Marshals,* The White House (Oct. 14, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/14/president-biden-makes-twenty-seventh-judicial-nominations-announcement-and-announces-new-nominees-to-serve-as-u-s-attorneys-and-u-s-marshals/; *but see* Carl Hulse, *New Pressure to End Old Senate Practice After Mississippi Judicial Pick is Blocked*, N.Y. Times (Apr. 11, 2023), https://www.nytimes.com/2023/04/11/us/politics/senate-biden-judicial-picks.html ("Senator Cindy Hyde-Smith, Republican of Mississippi, served notice to the Judiciary Committee that she would not allow the nomination of Scott Colom, a candidate for a court vacancy in the state, to move forward, citing his past political support from the left, among other reasons. Her stance endangered the confirmation of Mr. Colom, a popular Black Democratic state prosecutor who had the backing of Roger Wicker, the other Republican senator from the state, as well as leading Mississippi Republicans including two former governors, Haley Barbour and Phil Bryant.").

53. *See, e.g.,* Jami-Reese Darling Robertson & Lauren C. Bell, *Equal Justice Under Law? Prosecutor Demographics and the Death Penalty*, 103 Soc. Sci. Q. 1295 (2022) (finding that "the race of the prosecutor is both statistically and substantively important" in determining "whether the death penalty is imposed").

54. *See* Gilad Edelman, *Why is it So Easy for Prosecutors to Strike Black Jurors*, The New Yorker (June 5, 2015), https://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors (describing studies showing that "striking potential black jurors raises the odds of a black defendant being convicted and increases the penalty he is likely to receive").

for capital defendants is more likely to be granted by courts with Black judges.[55]

Perhaps most importantly, consider a story from a state a little closer to Howard Law than my Mississippi, a state that in 2021 became the first in the South to abolish the death penalty.[56] The nonprofit that orchestrated the push for abolition in Virginia was led by a Black woman.[57] Black legislators served as lead sponsors for the abolition legislation,[58] legislation that was supported by a large majority of Black Virginians.[59] Given all this, it is no surprise that it was Black folk who surrounded the state's governor when, citing the fight against "racism and discrimination" as reasons to do so, he officially signed death penalty abolition into law.[60]

With all this in mind, we can reconsider Justice Marshall's hypothesis about the death penalty. There is little doubt that exposure to the facts reduces support for capital punishment. But producing such effective exposure is an immensely difficult challenge, given the present character of state-sanctioned execution.

As that keen perceiver of reality Justice Sonia Sotomayor recently put it, the "excruciatingly painful" truth of state-sanctioned death is now, thanks to lethal injection, "hidden behind a veneer of medication."[61] That fact works to give those in power, and indeed millions of ordinary Americans, what Justice Sotomayor calls a "collective comfort" that

55. *See, e.g.,* Jonathan P. Kastellec, *Race, Context, and Judging on the Courts of Appeals: Race-Based Panel Effects in Death Penalty Cases*, 42 Just. Sys. J. 394 (2021) (finding that "the assignment of a black judge to an otherwise all-nonblack panel substantially increases the probability that the panel will grant relief to a defendant on death row" when a defendant is Black).

56. *Closing the Slaughterhouse: The Inside Story of Death Penalty Abolition in Virginia*, Death Penalty Info. Ctr. (Nov. 7. 2022), https://deathpenaltyinfo.org/news/closing-the-slaughterhouse-the-inside-story-of-death-penalty-abolition-in-virginia (providing the story of abolition in Virginia, along with the role that Virginians for Alternatives to the Death Penalty ("VADP") played, can be found at Death Penalty Information Center).

57. *Virginia Abolishes the Death Penalty After 413 Years of Executions*, VADP, https://www.vadp.org/virginia-abolishes-the-death-penalty-after-413-years-and-1390-executions/ (last accessed Oct. 1, 2023) (stating that Kristina Leslie was President of the board of VADP at the time Virginia abolished the death penalty).

58. *2021 Special Session I*, Virginia's Legis. Info. Sys., https://lis.virginia.gov/cgi-bin/legp604.exe?212+sum+HB2263 (last accessed Oct. 1, 2023) (providing that the Lead sponsors (or "patrons") of the abolition legislation included Delegate Jerrauld Jones and Senator Jennifer McClellan.); *see* also Virginia Capitol Connections, Virginia Legislative Black Caucus 2019 12, 23 (2019) (both Jones and McCellan were members of the Virginia Legislative Black Caucus).

59. *2021 State of the Commonwealth Survey*, The Watson Center (Feb. 2, 2021), https://cnu.edu/wasoncenter/surveys/archive/2021-02-02.html.

60. Madeleine Carlisle, *Why it's So Significant Virginia Just Abolished the Death Penalty,* Time (Feb. 9, 2021), https://time.com/5937804/virginia-death-penalty-abolished/.

61. Glossip v. Gross, 576 U.S. 863, 977 (2015) (Sotomayor, J., dissenting).

stymies further reform[62]—a comfort working to cut off more and more avenues for people looking to challenge wrongful convictions.[63]

It is a striking contrast to public shock and outrage about police killings of George Floyd, Eric Garner, and others. When people see with their own eyes cell phone videos of reality, they are moved to action. There are no such videos in a death chamber.

Yet the stories of death and life in *my* Mississippi, along with the broader struggle for justice in places like Virginia, can give us hope. Advocacy to expose the truth, both inside and outside the courtroom, is crucial in the quest to imbue the realities of the Black experience into the law. At the same time, few things work better than ensuring that—in every jury room, in every prosecutor's office, on every court bench, and every legislative body—"We the People" includes *all* the people.[64]

And so I conclude by returning to this place, Howard Law, these hallowed grounds, and Dean Houston's vision of training "social engineers" to build a more just society. The story of the death penalty in America—*my* America—*our* America—emphasizes how important this kind of training is. For it shows us that an understanding of civil procedure means little without an education regarding political power and social change. It shows us that attorneys work best when we learn to see newspapers, community meetings, and city streets as equal to courtrooms. And it shows us the power of recognizing that we already have the key—our own experience, our own past, our own memories—to go, do justice.

62. *Id.*

63. *See, e.g.,* Michael A. Cohen, *The Supreme Court Just Said that Evidence of Innocence is Not Enough*, The Daily Beast (May 24, 2022), https://www.thedailybeast.com/the-supreme-court-just-said-in-in-shinn-v-ramirez-that-evidence-of-innocence-is-not-enough (describing the effects of Justice Thomas's opinion in Shinn v. Ramirez, 596 U.S. 366 (2022)).

64. U.S. Const. pmbl.

Long Overdue: The Need for an Examination of the Specter of Racial Bias in the Federal Death Penalty System

John Nidiry and Ruth Friedman†

The specter of racial bias in the federal government's administration of the death penalty over the past thirty-five years has been long apparent yet insufficiently scrutinized. Scholars have studied the racially disparate application of capital punishment at the state level and linked those disparities to a history of racialized violence. The federal death penalty, especially with regard to the impact of race, however, remains largely unexamined.

It is time to bridge this gap in the research on racial bias in the criminal justice system and in the implementation of the federal death penalty specifically. There are, as this Article sets forth, troubling indicia of the continuing influence of race in the federal death penalty system that require further investigation. These include entrenched racial disparities in its current application, policies and practices adopted by federal officials that reinforce the disparities, and emerging evidence of racial bias in the historical development of the federal death penalty in the wake of the Civil War. This Article calls for an in-depth—and long overdue—examination of the issue.

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I. Introduction

Persistent criticism of and commentary on the racially disparate application of the death penalty in this country have focused almost exclusively on state capital punishment systems, leaving the indicia of racial bias and the evident racial disparities in the federal government's administration of the death penalty largely unexamined. This Article contends that such an examination is long overdue.

While the population of the federal death row is not as large as that of states like California and Texas,[1] the federal government is a highly visible actor, whatever the issue; its role on the capital punishment stage recently became more prominent when it briefly led the nation in the pace of executions.[2] Yet many aspects of the federal death penalty remain largely unexplored. In particular, although racial disparities are among the system's most salient features, the role of race in the implementation of the federal death penalty has yet to be scrutinized.

The primary focus on state capital punishment systems is not surprising. Most death sentences and executions have taken place in the states, historically and throughout the "modern era" of the death penalty. In 1972, when the U.S. Supreme Court held in *Furman v. Georgia* that capital punishment statutes across the country were unconstitutional because they were arbitrarily and capriciously administered in violation of the Eighth and Fourteenth Amendments,[3] many states—in contrast to the federal government—pressed forward immediately and aggressively with revamped death penalty schemes. These new statutes led the Court to reverse course just four years later in *Gregg v. Georgia*.[4] Within months of the Court's decision in *Gregg*, states once again began pursuing death sentences and conducting executions, ushering in the "modern era" of the death penalty.[5]

1. *Death Row Prisoners by State,* Death Penalty Info. Ctr., https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf (last visited Jan. 12, 2024).

2. *Executions Under the Federal Death Penalty,* Death Penalty Info. Ctr. [hereinafter *Executions Under FDP*], https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/executions-under-the-federal-death-penalty (last visited Jan. 12, 2024).

3. *See* Furman v. Georgia, 408 U.S. 238, 245 (1972) (Douglas, J., concurring) (citing race discrimination as among the rationales for finding capital punishment unconstitutional).

4. *See* Gregg v. Georgia, 428 U.S. 153 (1976) (holding that the state's amended death penalty statute sufficiently guided jurors' discretion and narrowed the class of eligible offenders to withstand constitutional challenge).

5. *See* Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Beck v. Alabama, 477 U.S. 625 (1980); *see also Gary Gilmore*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/database/person/1/gary-gilmore (last visited Jan. 11, 2024).

By comparison, it was not until 1988 that the United States Congress reinstated the federal death penalty, initially only for certain drug-related offenses under the Anti-Drug Abuse Act.[6] Congress then significantly expanded the use of capital punishment for numerous federal offenses in 1994 when it passed the Federal Death Penalty Act.[7] The first federal death sentence of the modern era was imposed in 1991,[8] and the first federal execution was carried out in 2001,[9] over two decades after *Gregg*.

Since Congress reinstated the federal death penalty more than thirty-five years ago, the specter of racial bias in its implementation has proven both chronic and pervasive. The enduring racial disparities of the modern era, the emerging evidence of similar disparities in the administration of the federal death penalty pre-*Furman*, and federal practices leading to less diverse jury pools and sitting juries all suggest a need for careful examination of the impact of race in our federal capital system.

Scholars have studied the disproportionate impact of state capital punishment systems on Black Americans and linked those disparities to racialized violence at both the state and county level, tracing their roots to the institution of slavery, Black Codes, convict leasing, and racial terror lynchings.[10] The body of academic work about the federal death penalty, on the other hand, especially that which concerns the appearance of bias in its administration, is "surprisingly thin."[11] The unprecedented string of thirteen executions carried out by the federal government in a six-month period in 2020 and 2021—the most under one presidential administration in a century—brought renewed public,

6. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

7. Federal Death Penalty Act of 1994, Pub. L. No. 103-322, 108 Stat. 1959 (providing for over forty federal offenses punishable as capital crimes); *The Federal Death Penalty System: A Statistical Survey (1988-2000)*, U.S. Dep't Just. 1 (Sept. 12, 2000), https://www.justice.gov/archive/dag/pubdoc/_dp_survey_final.pdf.

8. United States v. Chandler, 996 F.2d 1073, 1082 (11th Cir. 1993) ("On May 14, 1991, the district court sentenced Chandler . . . to death on Count Three.").

9. *Executions Under FDP*, *supra* note 2; Christopher Wren, *McVeigh Is Executed for Oklahoma City Bombing*, N.Y. Times (June 11, 2001), https://www.nytimes.com/2001/06/11/national/mcveigh-is-executed-for-oklahoma-city-bombing.html.

10. *See, e.g.,* Alex Lesman, *State Responses to the Specter of Racial Discrimination in Capital Proceedings: The Kentucky Racial Justice Act and the New Jersey Supreme Court's Proportionality Review Project*, 13 J.L. & Pol'y 359 (2005); Margaret Vandiver & Michel Coconis, *"Sentenced to the Punishment of Death": Pre-*Furman *Capital Crimes and Executions in Shelby County, Tennessee,* 31 U. Mem. L. Rev. 861 (2001); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 Santa Clara L. Rev. 433 (1995).

11. Lee Kovarsky, *The Trump Executions*, 100 Tex. L. Rev. 621, 622 (2022).

and scholarly, attention to the federal death penalty.[12] But, with rare exceptions,[13] little of it has focused on race.

Scholarship related to federal capital punishment in the modern era has tended to focus on its purported uniqueness—that is, the special features built into the federal capital case review process[14] or issues peculiar to the federal system.[15] In addition, scant attention has been paid to the federal administration of capital punishment prior to *Furman*. In the rare instances where scholars have examined it, they have for the most part done so with a narrow focus on its legislative history.[16]

This emphasis on the federal system's uniqueness has obscured the extent to which it mirrors the state systems, particularly when it comes to its disproportionate impact on people of color. This Article urges scholars of race and criminal justice as well as the federal government

12. Michael Tarm & Michael Kunzelman, *Trump Administration Carries Out 13th and Final Execution*, Associated Press (Jan. 15, 2021, 4:20 AM), https://apnews.com/article/donald-trump-wildlife-coronavirus-pandemic-crime-terre-haute-28e44cc5c026dc16472751bbde0ead50.

13. *See, e.g.,* Hannah Freedman, *Furman at 50: The Modern Federal Death Penalty: A Cruel and Unusual Punishment*, 107 Cornell L. Rev. 1689 (2022). Freedman's piece, discussed in detail below, uses the recent spate of executions as a jumping-off point to delve into the history of the federal death penalty; in doing so, Freedman touches upon historical trends related to race and racial disparities in its application. As of this date, no other scholar or commentator has undertaken a similar analysis.

14. *See, e.g.,* Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 Fordham Urb. L.J. 347, 353, 410, 501 (1999) (describing the Justice Department's creation of high-level Capital Case Review Committee (CCRC) as federal death penalty system's "central innovation" and its role as unique in the realm of capital punishment systems).

15. A topic that has garnered much interest, for example, relates to issues that arise when the federal government pursues the death penalty in states (or U.S. territories) that have abandoned it. *See, e.g.,* Michele Martinez Campbell, *Federalism and Capital Punishment: New England Stories*, 36 Vt. L. Rev. 81, 81 (2011) ("Application of the federal death penalty to crimes committed in states that have abolished capital punishment is a tiny problem with a disproportionately powerful scholarly impact."); Jonathan Ross, *The Marriage of State Law and Individual Rights and a New Limit on the Federal Death Penalty*, 63 Clev. St. L. Rev. 101, 105 (2014); *see also* Michael Mannheimer, *The Coming Federalism Battle in the War Over the Death Penalty*, 70 Ark. L. Rev. 309, 327 (2017) (predicting uptick in federal capital prosecutions in states that have abolished the death penalty); Michael Mannheimer, *When the Federal Death Penalty Is "Cruel and Unusual,"* 74 U. Cin. L. Rev. 819, 821 (2006) (arguing Eighth Amendment bars federal government from imposing death sentences in states that do not have the death penalty); Eric A. Tirschwell & Theodore Hertzberg, *Politics and Prosecution: A Historical Perspective on Shifting Federal Standards for Pursuing the Death Penalty in Non-Death Penalty States*, 12 U. Pa. J. Const. L. 57, 98 (2009) (describing opposition to federal capital prosecutions in states that have abolished the death penalty); Cristina M. Quiñones-Betancourt, *When Standards Collide: How the Federal Death Penalty Fails the Supreme Court's Eighth Amendment "Evolving Standards of Decency" Test When Applied to Puerto Rican Federal Capital Defendants*, 23 Cornell J.L. & Pub. Pol'y 157, 161–62 (2013) (arguing Eighth Amendment prohibits federal government from imposing death sentences in territory of Puerto Rico in light of political, cultural, and historical differences from American states).

16. *See, e.g.,* Little, *supra* note 14, at 360–72; *see also* Kovarsky, *supra* note 11, at 624–28.

itself to address these apparent inequities. Although the federal system has been described as a "'bit player' in the larger drama of capital punishment" playing out in the states,[17] the federal death penalty carries outsized importance, implicating executive presidential powers, the nation's highest level law enforcement agency (the Department of Justice) and Congress. It also has, as a result of the spate of executions in 2020 and 2021, been thrust more recently into the national spotlight.[18] For those studying the disproportionate impact of our nation's penal system on Black Americans and people of color generally, and especially for policymakers, an examination of the role race has historically played, and plays today, in the federal government's use of the ultimate punishment is imperative.

This Article proceeds in four parts. Following this Introduction, Part II describes the racially disparate patterns that have become entrenched

17. *See* Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh*, 53 DePaul L. Rev. 1591, 1593 (2004).

18. Kovarsky, *supra* note 11; John D. Bessler, *The Rule of Law: A Necessary Pillar of Free and Democratic Societies for Protecting Human Rights*, 61 Santa Clara L. Rev. 467, 566–70 (2021); Mary Margaret L. Kirchner, *The Execution of Lezmond Mitchell: An Analysis of Federal Indian Law, Criminal Jurisdiction, and the Death Penalty as Applied to Native Americans*, 25 Lewis & Clark L. Rev. 649 (2021); Isaac Green, *Also Featuring: A Cruel and Unusual Docket: The Supreme Court's Harsh New Standard for Last Minute Stays of Execution*, 16 Harv. L. & Pol'y Rev. 623 (2022); Dan Noble, *Thirteen Federal Executions Under the Trump Administration: What Was the Constitutional Price?*, 37 W. Mich. U.T.M. Cooley L. Rev. 15 (2022); David Cole, *A Rush to Execute*, N.Y. Rev. of Books (Feb. 25, 2021), https://www.nybooks.com/articles/2021/02/25/trump-supreme-court-execution-spree/#:~:text=In%20six%20months%2C%20the%20Trump,in%20the%20previous%20six%20decades.&text=Dustin%20J.,Terre%20Haute%2C%20Indiana%2C%202014.; Sadie Gurman, *Last-Minute Litigation Seeks to Block First Federal Execution Since 2003*, Wall St. J. (July 13, 2020, 12:22 PM), https://www.wsj.com/articles/last-minute-litigation-seeks-to-block-first-federal-execution-since-2003-11594657358; Khaleda Rahman, *Death Row Inmate Felt 'Excruciating Pain' and Sensation of Drowning During Execution*, Newsweek (Aug. 24, 2020, 11:23 AM), https://www.newsweek.com/death-row-inmate-felt-excruciating-pain-during-execution-1527208; Marcy Widder, *My Client Atoned for His Sin. The Trump Administration Had Him Killed Anyway.*, Wash. Post (Dec. 14, 2020, 1:58 PM), https://www.washingtonpost.com/outlook/2020/12/14/trump-death-penalty-cruelty/; Kristine Phillips, *Trump's Execution Spree Reflects Death Penalty 'Shaped by Racial Bias,' Critics Say*, USA Today (Dec. 23, 2020), https://www.usatoday.com/story/news/politics/2020/12/23/execution-black-men-like-brandon-bernard-reflects-bias-critics-say/3903395001/#:~:text=The%20Trump%20administration's%20execution%20spree,penalty%20experts%20and%20advocates%20say; Adam Liptak, *'Expedited Spree of Executions' Faced Little Supreme Court Scrutiny*, N.Y. Times (Jan. 18, 2021), https://www.nytimes.com/2021/01/18/us/executions-death-penalty-supreme-court.html; Aris Folley, *Over 40 Lawmakers Sign Letter Urging Merrick Garland to Prioritize Abolishing Death Penalty*, The Hill (Jan. 27, 2021, 2:02 PM), https://thehill.com/homenews/house/536135-over-40-lawmakers-sign-letter-urging-merrick-garland-to-prioritize-abolishing/; Christina Carrega, *More than 80 Civil Rights Organizations Call on Biden to Abolish the Federal Death Penalty*, CNN Pol. (Feb. 9, 2021, 1:48 PM), https://www.cnn.com/2021/02/09/politics/80-organizations-anti-federal-death-penalty/index.html; Michael Tarm, *Biden's Silence on Executions Adds to Death Penalty Disarray*, Associated Press (June 18, 2021, 6:05 AM), https://apnews.com/article/donald-trump-joe-biden-executions-health-coronavirus-pandemic-67ed5dd28d92f11629310ddb7590357a.

in the administration of the federal death penalty in the modern era as well as some of the federal policies and practices that contribute to the persistence of those patterns. Part III discusses recent findings that suggest the roots of present-day disparities run deeper than previously acknowledged. Part IV describes the lackluster efforts undertaken to date by the federal government and others in examining how the federal death penalty has come to be imposed so disproportionately on people of color and in cases involving white victims. The Article concludes with a call for a serious inquiry on the part of both scholars and policymakers into issues that have long garnered attention at the state level.

II. Race and the Federal Death Penalty in the Modern Era

The racial disparities that pervade the federal death penalty system today have been present throughout the modern era. They are intertwined with the geographic concentration of federal death penalty cases in a handful of jurisdictions, mainly in the South, and they have crystallized in part due to ways in which federal prosecutors have wielded their broad discretion, unchecked by the courts.

A. Racial Disparities in the Federal Death Penalty System

People of color have been sentenced to death and executed by the federal government at rates disproportionate to their share of the general population throughout the modern era of the federal death penalty.[19] Of the forty individuals who are currently[20] under a federal death sentence, 55% (or twenty-two) are people of color.[21] Black men alone represent 38% of the federal death row population, although Black adults comprise only about 10% of the country's population,[22]

19. Capital punishment is known to fall on the disadvantaged generally: those sentenced to death are almost uniformly poor, and are disproportionately suffering from mental illness, trauma, brain damage, or other infirmities. *See, e.g.,* Kathy Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 Hofstra L. Rev. 923, 923–24 n.1 (noting "[p]overty and exposure to trauma are almost universal facts among the life histories of people on death row").

20. These data are as of January 1, 2024. As these numbers will fluctuate whenever someone is sentenced to death, obtains relief, or dies, the authors have used that date for all the federal death row statistics in this Article, unless otherwise noted.

21. *See Federal Death Row Population by Race*, Fed. Cap. Habeas Project, https://2255.capdefnet.org/General-Statistics/Federal-Death-Row-Population-By-Race (last visited Jan. 11, 2024).

22. *See Race for the Population 18 Years and Over, 2020*, U.S. Census Bureau, https://data.census.gov/table/DECENNIALPL2020.P3?q=voting%20age%20race%20united%20states (last visited Jan. 11, 2024); *Race, 2020,* U.S. Census Bureau, https://data.census.gov/table/DECENNIALPL2020.P1?q=united states population 2020 (last visited Jan. 11, 2024). Only those

and six of the last seven federal executions were of Black men.[23] The federal death penalty system also ensnares young people of color inordinately. Of the nearly one in four individuals on federal death row who were twenty-one-years-old or younger when capitally charged, 67% are people of color.[24]

The race, and gender, of victims has, moreover, served as an alarming predictor of who is sentenced to death and who is executed in the federal system. These disturbing trends have persisted throughout the modern era. Between 1988 and 2021, people of color accounted for 73% or 391 of the 539 defendants whose cases were authorized for capital prosecution;[25] 263 of these individuals, or 49%, were Black.[26] Fifty-six percent (56%), or nine out of sixteen, of the federal death row prisoners executed since *Furman* have been people of color.[27] At the same time, for decades, federal juries have imposed death sentences at highly disproportionate rates in cases involving victims who were white women; and in nearly two-thirds (10 of 16) of the cases resulting in an execution since *Furman*, the victims were or included white women.[28]

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over 18 are eligible to be punished by death. *See* Roper v. Simmons, 543 U.S. 551, 575 (2005); *List of Federal Death Row Prisoners*, Death Penalty Info. Ctr. [hereinafter *List of FDR Prisoners*], https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/list-of-federal-death-row-prisoners (last visited Jan. 12, 2024).

23. *See Executions Under FDP*, *supra* note 2.

24. Data on file with the Federal Capital Habeas Project.

25. The 539 cases were authorized—or selected—from a broader pool of 4,274 cases eligible for capital prosecution in the federal system. Declaration of Kevin McNally, *Federal Death Penalty Resource Counsel Project* ¶ 7 (Apr. 26, 2001) [hereinafter McNally Decl.], https://fdprc.capdefnet.org/sites/cdn_fdprc/files/Assets/public/project_declarations/race__gender/declaration_location_and_frequency_of_capital_prosecutions_and_racegender_of_defendants_and_victims_mcnally_april_2021.pdf.

26. *See id.* at ¶ 9.

27. *See Executions Under FDP*, *supra* note 2.

28. *See id.* Race-of-victim analyses in the states have consistently shown that the death penalty is sought overwhelmingly where the victim of the homicide was white. *See, e.g.,* McCleskey v. Kemp, 481 U.S. 279, 286 (1987) (explaining a study of Georgia murder cases showed that those "charged with killing white victims received the death penalty in 11% of the cases, but defendants charged with killing [B]lacks received the death penalty in only 1% of the cases); Jelani Jefferson Exum & David Niven, *Where Black Lives Matter Less: Understanding the Impact of Black Victims on Sentencing Outcomes in Texas Capital Murder Cases from 1973 to 2018*, 66 St. Louis U. L.J. 677, 682 (2022) (finding capital cases with white victims were three times more likely to result in a death sentence than capital cases with African American victims); John H. Blume & Lindsey S. Vann, *Forty Years of Death: The Past, Present, and Future of the Death Penalty in South Carolina (Still Arbitrary After All These Years)*, 11 Duke J. Const. L. & Pub. Pol'y 183, 201 (2016) (noting that 81% of the death sentences imposed in South Carolina post-*Furman* were imposed in cases where the victim was white); Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980–2007,* 89 N.C. L. Rev. 2119, 2145 (2011) (showing the risk of a death sentence for those suspected of killing a white victim was three times greater than for those suspected of killing a Black victim).

B. Race and Geographic Concentration in the Application of the Federal Death Penalty

Federal death sentences and executions in the modern era have also been concentrated in a small number of federal districts and judicial circuits. They are situated primarily in states and former territories that clung to the institution of slavery and fiercely resisted Reconstruction efforts. 65% (or twenty-six of forty) of the current federal death sentences were imposed in just three of the twelve federal circuits—the Fourth, the Fifth, and the Eighth—circuits that encompass many of those same states and territories.[29] Geographic concentration has been remarkably consistent in the administration of the federal death penalty after *Furman*. Of the eighty-six federal death sentences imposed by juries from 1988 through April 15, 2021, fifty-six (or 65%) have come from these same three areas of the country.[30]

A disproportionate number (43%) of current federal death sentences also come from federal districts in just three states: Texas, Virginia, and Missouri.[31] Ten of the sixteen individuals (or 63% of those) executed by the federal government since *Furman* were sentenced in these three states;[32] six of the sixteen (38%) were sentenced in Texas alone.[33]

The extent to which non-whites have been sentenced to death in these modern era "hotspots" is staggering. In the Fifth Circuit, for example, fifteen of the twenty men who have been condemned to die in the federal system since *Furman* have been people of color.[34] In Texas, 75% of all federal death sentences imposed in the modern era,

29. *Federal Death Row Population by State & Circuit*, Fed. Cap. Habeas Project (Jan. 1, 2024), https://2255.capdefnet.org/General-Statistics/Federal-Death-Row-Population-State-Circuit. These federal circuits include, among others, the states of North Carolina, South Carolina, Virginia, Missouri, Texas, and Louisiana.

30. *See* McNally Decl., *supra* note 25, at ¶ 13. Given that the federal death penalty applies in all 50 states, the District of Columbia, and the U.S. territories, it is noteworthy that three states alone account for so great a proportion of federal death sentences. Given that the federal death penalty applies in all 50 states, the District of Columbia, and the U.S. territories, it is noteworthy that three states alone account for so great a proportion of federal death sentences.

31. *See List of FDR Prisoners*, *supra* note 22 (listing individuals under federal death sentence by name, race/ethnicity, state, year of sentence, and offense); *Geographic Boundaries of United States Courts of Appeals and United States District Courts*, U.S. Courts, https://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links (last visited Jan. 12, 2024).

32. *See Executions Under FDP*, *supra* note 2.

33. *See id.*

34. The Fifth Circuit consists of Texas, Louisiana, and Mississippi. *See List of FDR Prisoners*, *supra* note 22; *see also Case Summaries for Modern Federal Death Sentences*, Death Penalty Info. Ctr. [hereinafter *Case Summaries*], https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/case-summaries-for-modern-federal-death-sentences (last visited Jan. 12, 2024).

distributed across four federal districts, have been meted out to people of color.[35] In the Eastern District of Virginia, the Western District of Virginia, and the Eastern District of Missouri, every federal death sentence has been imposed on a person of color.[36]

These numbers should not be considered apart from the historical record of racial violence and racially discriminatory practices and laws in these same regions of the country. The federal districts where the federal death penalty is concentrated today were once hotbeds of racial terror and lethal violence and were situated in some of the most active lynching states in America.[37] In each of these modern era federal death penalty hotspots, states were employing an intricate, all-encompassing system that, among other actions, policed and criminalized "race mixing" through miscegenation laws;[38] prohibited Black people from moving about freely; and excluded them from education,[39] the political process, and the legal process.[40] Varying forms of debt peonage, like convict leasing, were also employed in these jurisdictions to subjugate and exploit already marginalized people of color.[41]

35. Data on file with the Federal Capital Habeas Project.

36. Data on file with the Federal Capital Habeas Project.

37. *See* Lynching in America: Confronting the Legacy of Racial Terror, Equal Just. Initiative 3–4 (3d ed. 2017) [hereinafter *Lynching in America*]. None of this is to say that racial bias in the administration of the federal death penalty or criminal justice generally is unique to the American South. The removal of qualified Black prospective jurors from jury pools is, for example, a ubiquitous problem in this country. *See Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors*, Berkeley L. Death Penalty Clinic (June 2020), https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf. But the concentration of death row prisoners of color in the areas historically responsible for lynchings and other acts of racialized terror cannot be ignored.

38. Meghan Carr Horrigan, *The State of Marriage in Virginia History: A Legislative Means of Identifying the Cultural Other*, 9 Geo. J. Gender & L. 379, 381–402 (2008).

39. In 1847, for example, Missouri enacted a law prohibiting "the instruction of Negroes or mulattoes, in reading or writing" and barring free persons of color from settling there; various laws mandating segregation were not repealed until 1957. *See, e.g.,* Chelsey Parkman, Missouri v. Jenkins*: The Beginning of the End for Desegregation*, 27 Loy. U. Chi. L.J. 715, 752 n.241 (1996).

40. Throughout the Reconstruction Era and well into the first half of the twentieth century—across this same southern swath of the country and in the face of legislation and constitutional amendments designed to protect the civil rights of formerly enslaved people—the use of racialized codes hardened. This resulted in Black Americans being precluded, for example, from serving on juries, testifying against a white person, or accessing public facilities. Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877, 95–115 (Harper Perennial & Modern Classics eds., 2014).

41. *See* Tamar R. Birckhead, *The New Peonage*, 72 Wash. & Lee L. Rev. 1595, 1609–26 (2015) (describing the history of American systems of peonage and its parallels to features of the modern carceral system); *see also* Jonathan A. Klusmeyer, Slavery Continued, Peonage in Missouri (2013); Dale M. Brumfield, Virginia State Penitentiary: A Notorious History (2017) (explaining that Virginia's system of forced labor, which targeted Black people, was primarily embedded in its prison system, in a penitentiary constructed in downtown Richmond, before expanding to state farm systems and state road construction projects); Donald R. Walker, Penology for Profit: A History of the Texas Prison System, 1867–1912 (1983).

Racial terror lynchings, which scholars have associated with the expanded use of the death penalty in the twentieth century,[42] were also prevalent where federal death sentences in the modern era are concentrated. Between 1877—the end of Reconstruction—and 1950, more than 4,000 documented lynchings of Black people were carried out, mainly in the South.[43] Twenty-nine documented lynchings were conducted in the counties that make up the Eastern District of Missouri, where every individual sentenced to death in the post-*Furman* era has been a person of color.[44] There were fifty-three documented lynchings in the counties that make up the Western District of Virginia and thirty-one in the counties that make up the Eastern District of Virginia.[45] Over 300 of the documented racial terror lynchings were distributed across the four federal districts in Texas: 156 in the Eastern District; eighty-one in the Western District; seventy-seven in the Southern District; and twenty-two in the Northern District.[46]

42. *See, e.g.,* Carol S. Steiker & Jordan M. Steiker, *The Rise, Fall, and Afterlife of the Death Penalty in the United States*, 3 Ann. Rev. Criminol. 299, 305 (2020); *see also* Phyllis Goldfarb, *Matters of Strata: Race, Gender, and Class Structures in Capital Cases*, 73 Wash. & Lee L. Rev. 1395, 1402 (2016); Franklin Zimring, The Contradictions of American Capital Punishment 97 (2003).

43. *See Lynching in America*, *supra* note 37, at 4. Scholars continue to unearth and document hundreds of lynchings of Native Americans, Mexican Americans, and Black Americans throughout the nineteenth century; by the 1900s, as scholars have noted, Black Americans became the primary target. *See* David V. Baker, *American Indian Executions in Historical Context*, 20 Crim. Just. Stud. 315, 321–22 (2007) (describing instances of nineteenth century Native American lynchings in central Texas and Oklahoma Indian Territory); *see also History of Lynchings of Mexican Americans Provides Context for Recent Challenges to U.S. Death Penalty,* Death Penalty Info. Ctr. (Nov. 30, 2017), https://deathpenaltyinfo.org/news/history-of-lynchings-of-mexican-americans-provides-context-for-recent-challenges-to-u-s-death-penalty (describing hundreds of lynchings of Mexican Americans in Goliad, Texas and across the West and Southwest after the Civil War); *Lynching in America*, *supra* note 37, at 56; Charles J. Ogletree & Austin Sarat, From Lynch Mobs to the Killing State: Race and the Death Penalty in America 58 (2006).

44. Data were compiled from the Equal Justice Initiative database of documented racial terror lynchings and using maps of counties in federal judicial districts. *See Lynching in America*, Equal Just. Initiative, https://lynchinginamerica.eji.org/explore/missouri (last visited Jan. 11, 2024); *see also Counties by Division*, U.S. Courts, https://www.moep.uscourts.gov/counties-division (last visited Jan. 11, 2024).

45. Data were compiled from the Equal Justice Initiative database of documented racial terror lynchings and using maps of counties in federal judicial districts. *See Lynching in America*, Equal Just. Initiative, https://lynchinginamerica.eji.org/explore/virginia (last visited Jan. 11, 2024); *see also Court Locator*, U.S. Courts, https://www.txed.uscourts.gov/?q=court-locator (last visited Jan. 11, 2024).

46. Data was compiled from the Equal Justice Initiative database of documented racial terror lynchings and using maps of counties in federal judicial districts. *See Lynching in America*, Equal Just. Initiative, https://lynchinginamerica.eji.org/explore/texas (last visited Jan. 11, 2024); *see also Court Locator*, U.S. Courts, https://www.txed.uscourts.gov/?q=court-locator (last visited Jan. 11, 2024); *Federal Courts in Texas*, Tex. Almanac (2022), https://www.texasalmanac.com/articles/federal-courts-in-texas; *About Us*, U.S. Att'ys Off. (Apr. 5, 2022), https://www.justice.gov/usao-sdtx/about-us#:~:text=First%20staffed%20in%201975%2C%20the,population%20of%20more%20than%20555%2C000; *see also* Hollie Teague, *Black and Blue in North Texas*, 49 J. Black

C. Additional Indicia of the Continuing Influence of Race in the Application of the Federal Death Penalty

Racial disparities in the composition of death row are not the only indicia of the persistent role race plays in the administration of the federal death penalty. People of color, for example, continue to be systematically excluded from participating as jurors in federal death penalty cases, notwithstanding various challenges to the jury selection practices of federal prosecutors based on *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny.

In federal capital cases, each side can exercise jury strikes called "peremptories" for any reason so long as it is not on the basis of race or gender or other protected class. Yet in case after case, federal prosecutors—as happens in the states—use those discretionary strikes to remove non-white jurors. Thus, federal capital defendants of color still find their fate decided by all-white or mostly white juries.[47] Where defense lawyers properly raise the issue,[48] the government may need to provide a "race-neutral" explanation for striking that individual. Sadly,

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STUD. 756, 757–59 (2018) (explaining that the North Texas region has been overlooked in scholarly work on racial and police violence and documenting additional lynchings in the area).

47. At least five Black men sentenced to death federally in the modern era were tried by all-white juries where the state jurisdictions had significant populations of color; others similarly situated had juries with just one or two Black members. *See Compromised Justice: How a Legacy of Racial Violence Informs Missouri's Death Penalty Today* 33, DEATH PENALTY INFO. CTR. (Dec. 1, 2023), https://dpic-cdn.org/production/documents/pdf/Final-Compromised-Justice-DPIC-Race-Report.pdf ("Norris Holder was convicted and sentenced to death in 1998 by an all-white federal jury . . . . Not only did Mr. Holder's lead defense lawyer, Charlie Shaw, fail to object to the prosecutor's peremptory strikes against all jurors of color, but Mr. Shaw himself disparaged his client using racially offensive language and stereotypes."); United States v. Lawrence, 735 F.3d 385, 400 (6th Cir. 2013) ("Lawrence is African American; Hurst was white. All twelve jurors were white."); Brief of Appellant at 12, United States v. Barnette, No. 98-5 (4th Cir. Feb. 1, 1999) ("Three potential jurors were African-American; two were struck by the Government and the jury that was eventually empaneled to try Barnette was all-white."); United States v. Barnette, 211 F.3d 803, 812 (4th Cir. 2000) ("[T]he parties only struck a total of three black jurors . . . ."); Debra Cassens Weiss, *Federal Inmate Tried by All-White Jury Is Executed after Supreme Court Lifts Execution Stay*, ABA J. (Nov. 20, 2020, 9:39 AM), https://www.abajournal.com/news/article/federal-inmate-tried-by-all-white-jury-is-executed-after-supreme-court-lifts-execution-stay ("The Supreme Court also denied three emergency requests to postpone Hall's execution . . . . One of the emergency requests concerned prosecutors' use of peremptory challenges to strike four out of five Black jurors."); *Capital Case Roundup—Death Penalty Court Decisions the Week of September 28, 2020*, DEATH PENALTY INFO. CTR. (Oct. 1, 2020), https://deathpenaltyinfo.org/stories/capital-case-roundup-death-penalty-court-decisions-the-week-of-september-28-2020 ("Hall was sentenced to death by an all-white Texas federal jury . . . . Five people were charged in the murder, and a co-defendant, Bruce Webster, was also sentenced to death."); United States v. Causey, 185 F.3d 407, 412 (5th Cir. 1999) ("All three defendants are African-American males . . . . One African-American female was seated on the twelve-member petit jury.").

48. The enforcement of *Batson* is unfortunately dependent on defense lawyers. Where they neglect to point out a pattern of strikes against people of color or accept a proffered reason that investigation would have belied, that enforcement fails.

as is more well known in state litigation,[49] federal prosecutors often offer reasons that strain incredulity, even if ultimately passing legal muster.[50]

The decision to prosecute a criminal case in the federal as opposed to the state system can also dilute the number of Black and other prospective jurors of color in capital jury pools. Throughout the modern era, the federal government has routinely prosecuted cases that could have been charged at the county level in federal districts that draw jurors from surrounding rural and suburban counties with fewer people of color. This exercise of prosecutorial discretion has resulted in several cases in which Black defendants were sentenced to death by all- or nearly all-white federal juries, although the offenses occurred in areas with significant populations of color.

Federal death penalty cases from various districts across the country reflect this trend of "whitening" jury pools.[51] For example, two cases from St. Louis,[52] where 46% of the adult population around the time of trial was Black, were prosecuted in the Eastern District of Missouri,[53]

49. *See, e.g.,* Miller-El v. Dretke, 545 U.S. 231, 240–52 (2005); Foster v. Chatman, 578 U.S. 488, 511-14 (2016).

50. *See, e.g.*, United States v. Bolden, E.D. Mo. No. 4:10-cv-02288, Motion to Vacate, Set Aside, or Correct the Judgment and Sentence, ECF 2 at 56, 58–63 (Dec. 6, 2010) (noting federal prosecutors used peremptory challenges to remove five of seven Black potential jurors in capital case based in part on "demeanor evidence" that neither court or defense counsel observed, including one Black woman whom the government claimed was offended after a prosecutor called her the wrong name; and another Black woman who was struck for her "unique" paralegal background and "legal knowledge" even though she had taken only three hours of paralegal classes and never worked for a law firm, and no similar attempts were made to strike a white prospective juror who had worked extensively in the local criminal justice system as a court clerk); United States v. Robinson, N.D. Tex. 4:00-cr-00260-Y, Motion to Vacate the Conviction and Sentence and for New Trial, ECF 2279 at 89, 95–96 (Nov. 29, 2005) (in federal capital case where one Black juror was seated, government successfully struck several Black prospective jurors, including one based on the prosecutor's "vague recollection" that he had prosecuted "some relative" of hers and because her husband pleaded guilty to a federal drug trafficking charge, even though that assertion was not proven and at least one seated white juror with close relatives in prison was not similarly questioned or challenged). *See also* United States v. Bowers, W.D. Pa. 2:18-cr-00292-RJC, Motion for Judgment of Acquittal under Fed. R. Crim. P. 29(c) and for a New Trial under Fed. R. Crim. P. 33, at 21, 25–31, 35–36 (Nov. 1, 2023) (noting in white defendant case that government peremptorily struck all four of the qualified African-American jurors, the lone qualified Hispanic juror, and the lone qualified Jewish juror in federal capital case, including one Black woman on basis of her "regal" demeanor and how she carried herself with "grace" and two Black men because of their young age and employment history, claiming the latter was an indicator of their "unreliability" even though white jurors of similar ages and with similar employment histories were not struck); Oliver Morrison, *Jury Is Seated in Synagogue Shooting Trial Without Any Black, Hispanic or Jewish Jurors*, 90.5 WESA (May 25, 2023, 4:57 PM), https://www.wesa.fm/courts-justice/2023-05-25/jury-seated-pittsburgh-synagogue-shooting.

51. G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 Wash. L. Rev. 425, 445–58 (2010).

52. United States v. Holder, 247 F.3d 741 (8th Cir. 2001); United States v. Bolden, 545 F.3d 609 (8th Cir. 2008).

53. Both cases were tried in the Eastern Division of the Eastern District of Missouri. At that time, the Eastern Division was comprised of fifteen counties and the city of St. Louis. *See* 28 U.S.C.

where only 16% of the population was Black.[54] Similarly, a case out of Orleans Parish,[55] where 56% of the adult population around the time of trial was Black, was prosecuted in the Eastern District of Louisiana, where only 31% of the adult population was Black.[56] A fourth case that involved an offense in Franklin County, Ohio,[57] where 19% of the adult population around the time of trial was Black, was prosecuted in the Southern District of Ohio, where only 10% of the adult population was Black.[58] These defendants whose crimes occurred in urban areas with sizeable Black populations thus found themselves tried by juries with few or no Black members when their cases were prosecuted federally.

This issue was noted in a 2010 study. In the Eastern District of Louisiana, the Department of Justice (DOJ) authorized ten federal capital prosecutions in the modern era for murders that occurred within Orleans Parish, where New Orleans is located. All ten of the cases involved Black or Hispanic defendants; three defendants (out of four that proceeded to trial) were sentenced to death, and all were Black men.[59] The study's authors examined the jury pool demographics, comparing the predominantly non-white urban jurisdiction (Orleans

§ 105(a)(1) (2000), https://uscode.house.gov/view.xhtml?hl=false&edition=2000&req=granuleid%3AUSC-2006-title28-section105&num=0#sourcecredit.

54. *Profile of General Demographic Characteristics: 2000*, U.S. Census Bureau, https://data.census.gov/table/DECENNIALDPSF42000.DP1?q=2000%20missouri%20race%20population&t=Race%20and%20Ethnicity&g=050XX00US29055,29065,29071,29073,29093,29099,29113,29125,29161,29183,29186,29187,29189,29219,29221,29510 (last visited Mar. 19, 2024) (enumerating the various populations of the fifteen counties and the city of St. Louis by race and age in 2000). These cases were tried in 1998 and 2006, respectively. If one were to rely on the 2010 Census in analyzing the Bolden case, the problem remains the same: Black adults made up 45% of the city then but only 17% of the federal district. *Race for the Population 18 Years and Over, 2010*, U.S. Census Bureau, https://data.census.gov/table/DECENNIALPL2010.P3?q=2010%20race%2018+%20missouri&g=050XX00US29055,29065,29071,29073,29093,29099,29113,29125,29161,29183,29186,29187,29189,29219,29221,29510 (last visited Mar. 19, 2024) (enumerating the populations of the fifteen counties and the city of St. Louis by race and age in 2010).

55. United States v. Johnson, No. 04-17, 2010 U.S. Dist. LEXIS 42618 (E.D. La. Mar. 29, 2010).

56. *Race for the Population 18 Years and Over, 2010*, U.S. Census Bureau, https://data.census.gov/table/DECENNIALPL2010.P3?q=2010%20race%2018+%20louisiana&t=Black%20or%20African%20American&g=050XX00US22007,22053,22057,22071,22075,22087,22089,22093,22095,22103,22105,22109,22117 (last visited Mar. 20, 2024) (enumerating the adult populations of the parishes comprising the Eastern District of Louisiana by race). The Johnson trial was held in 2009.

57. United States v. Lawrence, 477 F.Supp.2d 864 (S.D. Ohio 2006), *vacated*, 555 F.3d 254 (6th Cir. 2009).

58. *Race for the Population 18 Years and Over*, *2010,* U.S. Census Bureau, https://data.census.gov/table/DECENNIALPL2010.P3?q=p3 ohio 2010&g=050XX00US39009,39013,39031,39041,39045,39047,39049,39053,39059, 39067,39073,39079,39081,39083,39089, 39091,39097,39105,39111,39115,39117,39119,39121,39127, 39129,39131,39141,39159,39163,39167 (last visited Mar. 26, 2024) (enumerating by race the adult populations of the thirty counties, including Franklin County, that comprise the Eastern Division of the Southern District of Ohio). The case was tried in 2006.

59. Cohen & Smith, *supra* note 51, at 446–47.

Parish) where the case could have been prosecuted and the larger, surrounding majority-white federal district where those cases were tried:

> If jury pool eligibility remains roughly consistent with the population of a parish, then a state prosecution for a crime committed in Orleans Parish would reflect a jury pool consisting of 62% black jurors and 34% white jurors. These numbers change dramatically when the case is prosecuted federally and the jury pool draws from the entire Eastern District of Louisiana. The Eastern District encompasses a population of 1,541,720. In Eastern District of Louisiana parishes (other than Orleans), 72% of the population is white and only 24% is black. Overall, the population of the Eastern District (including Orleans Parish) is 64.4% white and 31.4% black. Federal prosecutors are able to dilute minority-concentrated populations (obtaining far whiter jury pools) simply by prosecuting the same case in federal rather than state court.[60]

The substantial reduction in minority juror representation that occurs when certain prosecutions are removed from the state system may be a uniquely federal problem. Yet these government-sanctioned barriers to minority participation in the criminal legal process also follow a long legacy of discrimination in jury selection, historically employed by state actors to keep non-whites out of the jury box.[61] Limiting minority participation among jurors in federal death penalty cases is also not the only way federal prosecutors have echoed past practices or reinforced racial stereotypes. They have, for example, also infused trial presentations and summations with negative, inflammatory, and racialized language and dehumanizing imagery to obtain death sentences, a practice that federal courts have largely tolerated,[62] notwithstanding mounting evidence about the implicit associations jurors are known to make between such imagery and a minority defendant's criminality.[63]

60. *Id.*

61. *See Illegal Discrimination in Jury Selection: A Continuing Legacy*, 9–13 Equal Just. Initiative (Aug. 2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf.

62. *See, e.g.,* United States v. Taylor, 814, F.3d 340, 365–66 (6th Cir. 2016) (upholding prosecutor's description in summation of Black defendant as "wolf" and "chameleon" in case involving murder of white restaurant owner); *see also* United States v. Ebron, 683 F.3d 105, 142–43 (5th Cir. 2012) (denying relief where prosecutor called defendant a "predator" and compared him to lions and tigers in the jungle stalking animals to kill).

63. *See* Jennifer Eberhardt et al., *Not Yet Human, Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. Personality & Soc. Change, 292–306, n.2 (2008).

III. Evidence of Racial Disparities in the Underexamined History of the Federal Death Penalty Before *Furman*

In contrast to the paucity of research examining the historical influence of race in the federal government's administration of capital punishment, the literature linking racial disparities in state capital punishment systems to the legacies of slavery, racial terror lynchings, and racial exclusion is much more developed.[64] This comparatively robust body of work has provided a foundation for considering the role race plays in the current application of the death penalty in the states,[65] as well as for mounting state and federal constitutional challenges to racial disparities in state capital punishment systems that, while largely unsuccessful in the courts,[66] have led to legislative reforms[67] and contributed in some instances to abolition.[68]

64. *See, e.g.,* James W. Marquart et al., The Rope, The Chair, and The Needle: Capital Punishment in Texas, 1923–1990 (1994); *see also* Ogletree & Sarat, *supra* note 43; Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle With Race and the Death Penalty in North Carolina*, 88 N.C. L. Rev. 2031 (2010); John Blume et al., *When Lightning Strikes Back: South Carolina's Return to the Unconstitutional, Standardless Capital Sentencing Regime of the Pre-*Furman *Era*, 4 Charleston L. Rev. 479 (2010); Vandiver & Coconis, *supra* note 10; Jennifer Adger & Christopher Weiss, *Why Place Matters: Exploring County-Level Variations In Death Sentencing In Alabama*, 2011 Mich. St. L. Rev. 659 (2011).

65. *See, e.g., Racist Roots: Origins of North Carolina's Death Penalty*, Ctr. for Death Penalty Litig., https://racistroots.org/ (last visited Jan. 11, 2024).

66. *See, e.g.,* McCleskey v. Kemp, 481 U.S. 279 (1987) (upholding death sentence of Black capital defendant who sought relief based on statistical study demonstrating racially disparate application of death penalty in Georgia because defendant could not prove purposeful discrimination on part of state actors); *see also* Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 Colum. Hum. Rts. L. Rev. 983, 1001 (2020) (noting that the "death penalty challenge in McCleskey v. Kemp was the culmination of years of legal strategy, data collection, and analysis to push the Court to squarely consider race in capital punishment."); *but see* State v. Gregory, 427 P.3d 621, 633–36 (Wash. 2018) (finding Washington administered death penalty in arbitrary and racially biased manner in violation of state constitution, based on statistical analysis).

67. *See, e.g.,* Racial Justice Act, N.C. Gen. Stat. sec. 15A-2010 (2009) (repealed). Although repealed in 2013, the North Carolina Racial Justice Act of 2009 required courts to vacate a death sentence if race was found to be a factor in the imposition of the death penalty. The North Carolina Supreme Court struck down the state legislature's attempt to retroactively repeal the law, and, as a result, capital defendants who raised Racial Justice Act-based challenges before the repeal continue to litigate their claims. *See In New Round of Racial Justice Act Litigation, North Carolina Judge Orders Prosecutors to Disclose Data on Decades of Jury Strikes,* Death Penalty Info. Ctr. (May 28, 2021), https://deathpenaltyinfo.org/news/in-new-round-of-racial-justice-act-litigation-north-carolina-judge-orders-prosecutors-to-disclose-data-on-decades-of-jury-strikes; *see also* Racial Justice Act, A.B. 2542, 2019–2020 Leg., Reg. Sess. (Cal. 2020) (providing redress for proven racial discrimination to all criminal defendants, including capital defendants).

68. In signing historic legislation to abolish the death penalty in Virginia, the first state in the South to do so, then Governor Ralph Northam explained that "[t]he death penalty is fundamentally flawed—it is inequitable . . . . and Black defendants have been disproportionately sentenced to death." *Governor Northam Signs Law Repealing Death Penalty in Virginia*, Governor of Va. (Mar. 24, 2021), https://www.governor.virginia.gov/newsroom/all-releases/2021/march/headline-894006-en.html. Similarly, Colorado Governor Jared Polis signed legislation abolishing the death penalty and commuted the sentences of the three Black men on the state's

No comparable body of empirical or historical evidence has been amassed regarding the persistent racial disparities in the federal death penalty system.[69] Much of the recent scholarship about the federal death penalty system, which followed the spate of executions in 2020 and 2021, has left the issue of race largely unexamined.[70] This is also true with regard to the application of federal capital law in the pre-*Furman* era. There is at least one important exception. Hannah Freedman, drawing from a newly-developed database that documents federal executions from 1790 to 2021,[71] has begun the process of analyzing those data.[72] Freedman's findings provide a much more expansive view of racial disparities in the administration of the federal death penalty.[73] Significantly, her work raises questions about the existing narrative that these disparities are a distinctly modern phenomenon.[74] Freedman's research indicates that in the latter half of the nineteenth century and first half of the twentieth, the federal capital system began to reflect some of the racially skewed patterns

row stating that the "death penalty, cannot be, and never has been administered equitably in the State." *Death Penalty Information Center 2020 Year-End Report*, Death Penalty Info. Ctr. (Dec. 16, 2020), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2020-year-end-report.

69. Unfortunately, for individuals sentenced to die in the federal system, efforts to obtain essential data to mount legal challenges to the racially disparate application of the punishment, the barriers to minority juror participation, and other practices have generally been stymied. Prosecutors have, for decades, aggressively defended their practices and opposed the ability of capital defendants to review case selection and jury selection data related to race; the judiciary has generally deferred to them, erecting substantial obstacles that require capital defendants to unearth solid proof of discriminatory intent on the part of government actors simply to access this information. *See* United States v. Bass, 536 U.S. 862, 863 (2002) (prohibiting discovery of DOJ's federal capital charging practices without showing of discriminatory intent and effect); *see also* United States v. Armstrong, 517 U.S. 456, 470 (1996) (to obtain discovery, defendant raising selective prosecution claim based on race must first affirmatively establish that prosecution did not charge similarly situated individuals of other races).

70. *See, e.g.,* Brendan McGraw, *A Low Bar for Death: 2020's Historic String of Federal Executions*, 72 DePaul L. Rev. 509, 509–10 (2023) (analyzing preliminary injunction standard in context of recent federal method of execution litigation); *see also* Kovarsky, *supra* note 11, at 622–23 (documenting and evaluating executions under the Trump Administration); *see also* J. Richard Broughton, *The Federal Death Penalty, Trumpism, and Civil Rights Enforcement*, 67 Am. U. L. Rev. 1611, 1618 (2018) (arguing federal government is uniquely positioned to apply federal death penalty as a tool for civil rights enforcement).

71. Freedman, *supra* note 13, at 1711–12, n.93.

72. *Id.* at 1694–95.

73. *Id.* at 1714–16.

74. *See, e.g.,* Little, *supra* note 14, at 481 (noting that 79% of those executed by the federal government between 1927 and 1963 were white); *see also* Kevin McNally, *Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DePaul L. Rev. 1615, 1615–16 (2004) (noting that historically, the federal death penalty resulted in executions in roughly the same percentage as racial groups in the population, and that the "racial landscape of the modern federal death penalty, the product of post-*Furman* 'reform' legislation, is quite different.")

that were already visible in many state capital systems, especially in the South.

While more study is needed, Freedman's research suggests that racial disparities in the federal government's exercise of capital punishment has links to both exclusionary federal policy (through the assertion of federal jurisdiction over newly acquired land) and demographic shifts associated with racial violence in the states and territories during this period.[75] Freedman notes, for example, that from the end of the Civil War to the early 1900s, in the midst of this territorial expansion and mass migration, the federal government began to exercise its jurisdiction—and its use of capital punishment—to prosecute run-of-the-mill crimes on the frontier, a stark contrast from the piracy cases that were characteristic of the early years of the federal death penalty.[76] As Freedman observes, the federal death penalty cases from this era were "different in kind," involving homicides that stemmed from "local disputes over land, property, or women."[77] During this period, the federal government's use of capital punishment was centered in Western territories, including what was at the time designated as Indian Territory.[78] More than half of the federal executions between 1865 and 1900 in what is now the Eighth Circuit—which has one of the highest rates of capital punishment today—were of Native Americans, many of them hanged in groups.[79] Moreover, in the first half of the twentieth century, according to Freedman's analysis, over 60% of federal executions (51 of 82) were of Black men.[80] The vast majority of the executions during this period were carried out in Washington, D.C.,[81] where hundreds of thousands of Black Americans

75. Freedman, *supra* note 13, at 1721.
76. *Id.* at 1720–21.
77. *Id.* at 1721.
78. *Id.* at 1720–21.
79. *Id.* at 1721.
80. *Id.*
81. Freedman's research also points to the need for deeper examination of the federal government's role in prosecuting death penalty cases in Washington, D.C. before *Furman* was decided. As Freedman explains, although Washington had a criminal code "nearly identical to a state criminal code," criminal trials in Washington were "for most of the country's history held in federal courts, prosecuted by the Department of Justice, pursuant to federal law, and were reviewed by federal courts of appeal and the federal executive branch during the clemency process." *See* Freedman, *supra* note 13, at 1713.

had migrated in the face of racial violence,[82] and over 80% (46 of 57) were of Black men.[83]

Freedman's findings also indicate that race-of-victim disparities, a feature of the federal death penalty in the modern era, are apparent across its history, just as they have been in many state systems.[84] Close to 80% of those executed by the federal government in single-victim cases before *Furman* involved white victims.[85] As Freedman explains, during periods in which federal executions were carried out most disproportionately against non-white offenders, the victims overwhelmingly were white.[86]

A more probing examination of these findings is necessary. They suggest that the federal death penalty's current disproportionate impact on people of color, including noted disparities related to race and gender of victims, may be best understood as one part of a longstanding history of differential treatment based on race in the administration of the ultimate penalty.

IV. The Federal Government's Nominal Efforts to Address the Continuing Influence of Race in its Administration of Capital Punishment

The modern demographic composition of the federal death row has not gone unnoticed. As the number of federal death-eligible crimes sharply increased in the mid-1990s, so did the number of federal death sentences. By the end of the 1990s, twenty-one people had been

82. The continuing threat of racial violence and oppression led millions of Black Americans to leave the South for urban areas such as Washington, D.C. journalist and author Isabelle Wilkerson referred to this mass migration of Black Americans as a "turning point in history" that would "transform urban America and recast the social and political order of every city it touched." *See* Isabelle Wilkerson, The Warmth of Other Suns: The Epic Story of America's Great Migration 9 (Random House) (2010). By 1919, Washington, as Freedman notes, had the largest Black population among American cities. That year, the city was also the site of a race riot that erupted after a white woman alleged that Black men had harmed her. *See* Freedman, *supra* note 13, at 1722.

83. Freedman, *supra* note 13, at 1721; *see also* Harriet Tregoning, *Indices: A Statistical Index of District of Columbia Government Services*, D.C. Gov't, at 43 tbl.2.4 (Dec. 2011) (showing that the Black population of Washington in those years ranged between 25 and 35 percent).

84. *See* Blume, *supra* note 64, at 503 (2010); *see also* Paige Ralph et al., *A Comparison of Death-Sentenced and Incarcerated Murderers in Pre-*Furman *Texas*, 9 Just. Quarterly 185, 201–02 (1992); Brent Newton, *A Case Study in Systemic Unfairness: The Texas Death Penalty, 1973–1994*, 1 Tex. F. on C.L. & C.R. 13 (1994) (noting that "practically every victim was white" in the pre-*Furman* era capital punishment system in Texas); *see also* Deborah Fins, *Death Row USA Fall 2022*, Legal Def. Fund, at 3 (Oct. 1, 2022), https://www.naacpldf.org/wp-content/uploads/DRUSAFall2022.pdf (over 75% of American executions in the modern era have been for killings involving white victims).

85. Freedman, *supra* note 13, at 1716.

86. *Id.*

condemned to die.[87] Of those, 67% (14) were Black and 76% (16) were people of color.[88] Around that time, Attorney General Reno, heading the Justice Department responsible for initiating and defending these cases, began the first in a series of limited inquiries into race and the implementation of the federal death penalty. Those studies are discussed below.

A. The Federal Surveys and Studies: 2000–2006

The type of survey conducted or commissioned by the Justice Department, as well as the extent to which the DOJ has seen racial disparities as an issue of concern, has varied by administration. None of these efforts, however, has involved a thorough inquiry into how these disparities came to be or has sought to address them.

The first DOJ study, conducted in 2000 under Attorney General Reno, surveyed federal death penalty cases from 1988 to 2000, separating the data into two periods—one from 1988 to 1994, when the decision to seek the death penalty in a specific case was left to the discretion of the U.S. Attorney in that jurisdiction, and another from 1995 to 2000, when more centralized policies and procedures commonly known as the death penalty "protocol" were established and the final decision as to whether to seek the death penalty was made by the Attorney General.[89] The death penalty protocol was developed at the direction of Attorney General Reno and introduced language mandating that "characteristics such as race, ethnicity, or religion will not inform any stage"[90] of the DOJ's decision-making process in any capital case.[91]

The Reno study, among other findings, revealed consistent racial disparities across the entire twelve-year period, even after the protective measures of the protocol were introduced. From 1988 to 1994, of the fifty-two cases in which the federal government sought the death penalty, 87% involved non-white defendants.[92] From 1995

87. *Case Summaries*, *supra* note 34.

88. *Id*.

89. *The Federal Death Penalty System: A Statistical Survey (1988-2000)*, U.S. Dep't Just. 1-2 (Sept. 12, 2000) [hereinafter DOJ Statistical Survey], https://www.justice.gov/sites/default/files/dag/legacy/2000/09/13/_dp_survey_final.pdf.

90. U.S. Dep't of Just., Just. Manual, § 9-10.030 (2023), https://www.justice.gov/jm/jm-9-10000-capital-crimes#9-10.030; *see also* Little, *supra* note 14, at 440 (discussing "race-blind" policies).

91. The protocol, which is still in place today with a few amendments, requires U.S. Attorneys to submit any case involving a defendant who has been charged with an offense eligible for the death penalty for review by a Capital Case Review Committee (CCRC) within the Department; the CCRC then makes a recommendation to the Attorney General about whether the death penalty should be pursued. *See* DOJ Statistical Survey, *supra* note 89, at 2.

92. *Id.* at 6.

to 2000, following the implementation of the death penalty protocol, 74% of the cases in which the government sought the death penalty involved a non-white defendant.[93] When the study was released, Attorney General Reno said the findings "sorely troubled" her and called for deeper examination by independent experts; Eric Holder, the Deputy Attorney General at the time (later Attorney General in the Obama Administration), likewise noted, "no one reading this report can help but be disturbed, troubled, by" the disparities.[94] President Bill Clinton, citing concerns about the findings, issued a reprieve for Juan Raul Garza before Garza's scheduled execution in December 2000.[95]

Less than a year later, the DOJ, then led by Attorney General John Ashcroft, released a second, supplementary study that incorporated an additional set of data. For this report, U.S. Attorneys submitted information on cases in their offices that they determined would have supported a capital charge, but which were not charged as capital crimes or submitted to the DOJ for review. This new information expanded the number of death-eligible cases from 682, the pool in the previous DOJ study, to 973; in this broader group, 17% (166) were white, 42% (408) were Black, and 36% (350) were Hispanic.[96]

Although the report acknowledged the overrepresentation of minorities in federal death penalty prosecutions, it concluded that these disparities were not due to racial or ethnic bias. They were found instead to reflect federal law enforcement priorities as well as "the normal factors that affect the division of federal and state prosecutorial responsibility."[97]

This Ashcroft-era analysis was narrowly framed. It included no data on the federal cases that were purportedly death-eligible but not charged capitally, on the underlying facts of the crimes, or on the backgrounds of the defendants. The conclusions it drew

93. *Id.* at 19.

94. Marc Lacey & Raymond Bonner, *Reno Troubled by Death Penalty Statistics*, N.Y. Times (Sept. 13, 2000), https://www.nytimes.com/2000/09/13/us/reno-troubled-by-death-penalty-statistics.html.

95. Henry Weinstein & Eric Lichtblau, *Clinton Stays Execution for Racial Study*, L.A. Times (Dec. 8, 2000, 12:00 AM), https://www.latimes.com/archives/la-xpm-2000-dec-08-mn-62953-story.html ("The president said he ordered the reprieve for Juan Raul Garza to give the Justice Department time to study 'racial and geographic disparities in the federal death penalty system.'"). Garza was executed six months later on June 19, 2001, during the George W. Bush administration.

96. *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review*, U.S. Dep't Just. Part II.C. (June 6, 2001), https://www.justice.gov/archive/dag/pubdoc/deathpenaltystudy.htm.

97. *Id.* at Introduction.

about law enforcement priorities were not based on any evidence.[98] If nothing else, the supplementary report raised further questions about racial bias at the earliest stages of the process that required further examination.[99]

Reportedly in response to criticism garnered by the supplementary analysis, Attorney General Ashcroft then ordered the National Institute of Justice (the research arm of the DOJ) to initiate an inquiry into how death penalty cases were brought into the federal system to begin with. In 2006, the RAND Corporation released conclusions based on its study of whether federal capital charging decisions were related to the race of the defendant or victim. Although the study asserted that factors aside from race, such as the heinousness of an offense, likely better predicted whether a case was selected for federal capital prosecution, its authors also made clear that these findings were far from conclusive. Their "analytic methods," they explained, "could not provide definitive answers about race effects in death-penalty cases."[100] This analysis was roundly criticized even from within. All but one of the expert consultants for the RAND review took the extraordinary step of submitting a letter to the president of RAND expressing serious reservations about the study's methodology and findings, including that its conclusions were drawn from a very limited set of data that focused on only part of the capital case selection process—the small fraction of cases in which a U.S. Attorney had already decided to charge a defendant with a capital crime in federal court.[101]

98. Cohen & Smith, *supra* note 51, at 434–35.

99. *See id.* ("By looking solely at death-authorized defendants and not attempting to appreciate how or why black defendants were over-represented in the pool of federal defendants, Ashcroft's approach was akin to checking the back of the bus to see whether blacks were being discriminated against, and determining that no discrimination existed because blacks were over-represented as bus-riders."); *see also* McNally, *supra* note 74, at 1633 (faulting death penalty protocol's "race blind" review policy as ineffectual in rooting out bias at local law enforcement and charging stages, and arguing that the "race blind" policy exacerbates inequality in the federal death penalty system).

100. Stephen P. Klein et al., *Race and the Decision to Seek the Death Penalty in Federal Cases*, Rand Corp., at 128–29 (July 2006), https://www.rand.org/pubs/technical_reports/TR389.html ("The possibility of bias in charging decisions in federal capital cases is a particularly complex problem.").

101. The letter raised additional concerns about unscientific and atypical peer review procedures utilized in the study and misleading claims made in a press release that accompanied its publication. *See* Letter from David Baldus et al., to James Thompson, President, RAND Corporation (Oct. 9, 2006) (on file with Federal Capital Habeas Project).

B. The Aftermath of the Studies

Since the last governmental study of race and the federal capital system nearly eighteen years ago, few scholarly and no DOJ-sanctioned efforts have followed. Nor have any remedial measures been instituted in the wake of these reviews. In 2014, President Barack Obama directed then Attorney General Holder to study the implementation of the death penalty in the United States. While that decision followed on the heels of a botched execution in Oklahoma, the President specifically cited racial bias as a "significant problem" that required close examination.[102] It is unclear if that study ever took place; none has ever been referred to publicly, much less released. More recently, the White House and Attorney General Merrick Garland have echoed similar concerns about race-based disparities.[103] But they too have not committed to any course of action to examine or address these issues. As such, the problems—including especially pronounced racial disparities in certain federal districts where use of the federal death penalty is concentrated; the recurrence of all or mostly white juries deciding the fate of Black federal defendants in areas with large minority populations; and the significant loss of people of color from jury pools when homicide cases are tried federally rather than in state court—remain wholly unaddressed.

V. Conclusion

Most commentary and scholarship on the death penalty understandably focuses on the states. This necessarily includes inquiries into what role race may be playing in the administration of the ultimate punishment. Scholars, practitioners, and some lawmakers who have examined these issues at the state level have rooted persistent racial disparities as well as practices that exclude people of color from juries

102. Peter Baker, *Obama Orders Policy Review on Executions*, N.Y. Times (May 2, 2014), https://www.nytimes.com/2014/05/03/us/flawed-oklahoma-execution-deeply-troubling-obama-says.html.

103. For example, when Attorney General Garland announced early in his tenure that he was ordering a moratorium on executions pending review of the federal government's method-of-execution policies and procedures, he prefaced his directive with a note about the "disparate impact on people of color." *See* Merrick Garland, *Moratorium on Federal Executions Pending Review of Policies and Procedures*, Off. of Att'y Gen., at 1 (July 1, 2021), https://www.justice.gov/opa/file/1557511/dl?inline; *see also Advancing Equity and Racial Justice Through the Federal Government*, White House, https://www.whitehouse.gov/equity/#criminal-justice (last visited Jan. 12, 2024) (stating that Black and brown people, as well as the poor, face systemic disparities in the administration of criminal justice, and that the Biden Administration is "working to . . . end racial disparities in the criminal justice system").

in the jurisdiction's history of racial violence and discriminatory policies sometimes dating back centuries.

It is well past time for the federal government to be subject to the same scrutiny. Its implementation of capital punishment cannot be divorced from history, and too many questions about potential racial bias and the federal death penalty, as this Article demonstrates, remain unanswered. The federal government must undertake its own close examination of the role race of both defendant and victim play in the federal capital case selection and review process and should consider making available currently inaccessible information relating to those procedures. This includes data related to what factors drive a decision to decline the death penalty in one case but not another; how the decision is made to prosecute federally when state prosecution is available; and why some districts impose the death penalty so disproportionately, and sometimes only, against people of color. By doing so, scholars and practitioners might begin to understand how people of color, and Black men especially, end up chronically overrepresented on federal death row. The Department of Justice should also review and reconsider the federal practices that drain capital juries of people of color in light of the history of racial discrimination in jury participation. And, critically, scholars must delve into the underexamined history of the federal death penalty, unique and otherwise, that shaped the development of the racially skewed system we have today.

Capital Punishment Unmasked: Shades of Justice in America's Grim Theater

By Akin Adepoju*

I. Introduction

At the core of America's story lies a sobering reality: laws, whether overt or masked by neutrality, have been instrumental in upholding white supremacy.[1] The nation's history, legal frameworks, and institutions created a system of hierarchy. Slavery, the Three-Fifths Compromise in the Constitution, and the application of the death penalty are interconnected by a common thread: the devaluation of Black lives.

A prime example of a law, initially overtly racist and subsequently veiled in a façade of impartiality, is the death penalty. While proponents argue that the death penalty serves as a deterrent and retribution for heinous crimes, critics point to a glaring issue that undermines its credibility: the persistent and deeply troubling racial discrimination in its administration. Despite substantial legal and societal advancements, racial prejudice has undeniably wielded an immense influence over the death penalty throughout our history. Confronting racism necessitates a profound examination of its origins.

Virtually every American institution champions diversity—a distinct concept not to be confused with equality[2]—as a core value

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1. Kindly be aware that this article includes racial slurs. We carefully considered whether to include the offensive language from court cases or the terms used by judges, jurors, lawyers, when referring to people of color. We understand that each repetition can cause harm, but we also recognize that masking the stark reality of racial slurs has contributed to concealing societal prejudices. As a result, we have decided to directly cite these slurs as they were originally used, recognizing that this approach is not without its flaws.

2. Diversity encompasses the presence of a wide variety of identities, backgrounds, perspectives, and characteristics within a group, organization, or community. Equality, on the other hand, emphasizes fairness and equal opportunities for all, regardless of those differences. Both concepts are crucial in creating inclusive and equitable environments, whether in workplaces, communities, or societies. *See, e.g.*, F. Michael Higginbotham, *An Open Letter from Heaven to*

critical to their success. Regardless of where one falls on the ideological continuum on how best to achieve equality, it is difficult to deny that diversity and inclusion are important ingredients to achieving equality. Diversity enhances educational experiences, stimulates equitable policies, and equips people to navigate our interconnected world.

From corporations[3] to educational institutions, from government bodies[4] to cultural organizations, the concept of diversity has become firmly etched as a core value to achieving success. However, a stark contrast emerges when we turn our attention to courthouses across the nation. In many instances, legal institutions maintain a disconcerting resemblance to their century-old counterparts in many respects. The racial makeup is similar, with predominantly white judges, white prosecutors, white defense attorneys, white jurors, and white court staff—even in communities boasting significant African American populations.

While recognizing the significance of diversity in all its dimensions,[5] this Article will center its exploration and analysis on racial diversity. Racial diversity is important.[6] So by concentrating on racial diversity, this Article aims to contribute to a deeper understanding of its implications, offer insights into fostering inclusivity, and provide a platform for discussions that can drive positive change in this specific dimension of diversity. This Article explores the historical context, the present state of affairs, and potential pathways to rectify the deeply rooted problem of racial bias within America's death penalty system.

Barack Obama, 32 U. HAW. L. REV. 1, 12 (2009) (acknowledging racial inequities in housing, education, economics, criminal justice, and political empowerment).

3. *See e.g.*, Brief for 65 Leading American Businesses as Amici Curiae Supporting Respondents at 1, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516) [hereinafter American Businesses Brief] ("The existence of racial and ethnic diversity in institutions of higher education is vital to amici's efforts to hire and maintain a diverse workforce, and to employ individuals of all backgrounds who have been educated and trained in a diverse environment.").

4. *See* F. Michael Higginbotham, *A Military Strike Against Racism*, BOS. GLOBE, JULY 25, 1998, at A15 (stating that "the military is one of the most racially integrated institutions in the country.").

5. Diversity encompasses a wide range of identities, backgrounds, perspectives, and characteristics, such as race, gender, age, ethnicity, sexual orientation, religion, socioeconomic status, abilities, and more. It is important to note that the intention is not to diminish the importance of other dimensions of diversity, but rather to facilitate a more focused and thorough examination of the subject matter at hand.

6. *See e.g.*, Consolidated Brief for Lieutenant General Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents at 1, 5, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516), Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) ("Based on decades of experience, amici have concluded that a highly qualified, racially diverse officer corps educated and trained to command our nation's racially diverse enlisted ranks is essential to the military's ability to fulfill its principal mission to provide national security.").

II. Historical Context and Racist Roots[7]: From Slavery to Jim Crow

Black people were forcibly brought to America, stripped of their humanity, and endured unimaginable atrocities. Slavery laid the foundation for the racial hierarchies that continue to cast a profound and enduring shadow on contemporary issues of racial injustice and inequality. The legacy of these policies and practices has seeped into the criminal legal system, where people of color, particularly African Americans, have long faced systemic bias. Throughout the twentieth century, instances of wrongful convictions, unfair trials, and racially biased jury selection have revealed the death penalty system as an unfair form of punishment.

A. Slavery and The Three-Fifths Compromise

The racist roots of the death penalty system can be traced back to the nation's history of slavery and Constitution. The Constitutional Convention of 1787 saw the birth of the United States Constitution, but it also gave rise to a compromise that devalued the humanity of enslaved people. The Three-Fifths Compromise counted enslaved individuals as three-fifths of a person for purposes of taxation and representation. This Constitutional provision solidified the idea that Black lives were worth less than those of white lives.

Racism was also inherent in criminal laws as "certain crimes committed against whites were punishable by death for Black offenders but not for white [offenders]."[8] For instance, in Virginia, over seventy crimes were punishable by death if the perpetrator was Black, compared to only one—first degree murder—for whites.[9] In colonial Georgia, the criminal code provided for an automatic death sentence for Blacks who committed murder, while others committing murder could receive a life sentence.[10] Similarly, under Georgia law, "the rape of a white female by a [B]lack man 'shall be' punishable by death, while the rape of a

7. The 'Racist Roots' language is inspired by the Center for Death Penalty Litigation's *Racist Root* project, which reveals the North Carolina death penalty system's deep entanglement with racism. *See Racist Roots* https://racistroots.org/ (last accessed Dec. 8, 2023).

8. William J. Bowers, Benjamin D. Steiner, & Maria Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 175 (2001).

9. State v. Loftin, 157 N.J. 253, 405–06 (1999) (Handler, J., dissenting) (internal citations omitted).

10. McCleskey v. Kemp, 481 U.S. 279, 329 (1987) (Brennan, J., dissenting).

white female by anyone else was punishable by a prison term."[11] In stark contrast, the "rape of a [B]lack woman was punishable 'by fine and imprisonment, at the discretion of the court.'"[12] These pre-Civil War formal racial classifications within the legal system extended beyond just the Southern states.

Black people were legally prohibited from testifying in cases involving white people.[13] Black people were also prohibited from testifying in their own defense when accused and from serving on juries.[14] The combined impact of these legal tenets granted white people immunity to commit violent crimes and appalling acts of carnage against Black people, with the assurance that neither the victim nor any Black witnesses could provide testimony against them.

B. Reconstruction

The Three-Fifths Compromise counted enslaved individuals as three-fifths of a person for purposes of taxation and representation, ultimately granting slaveholding states disproportionate political power. This compromise perpetuated the idea that Black lives were worth less than those of white Americans, a notion that still reverberates in the contemporary struggle for racial equality.

Five days after the Civil War ended, John Wilkes Booth shot President Abraham Lincoln. He died on April 15, 1865, and Vice President Andrew Johnson assumed the presidency.[15] The task of reuniting the nation fell squarely on his shoulders. As a Southerner, Johnson favored a swift readmission of the Southern states into the Union. Under his Reconstruction policies, which began in May 1865, the former Confederate states were required to uphold the abolition of slavery made official by the Thirteenth Amendment to the U.S. Constitution.[16] In 1868, the Fourteenth Amendment granted

11. Stephen B. Bright, *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 439 (1995).

12. *Id.*

13. Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 267 (1996) (discussing how slaves and free Blacks were prohibited from testifying against whites). Beginning in 1801, Ohio law formally prohibited any Black person from "be[ing] sworn or giv[ing] evidence in any court of record where either party is a white person, or in any prosecution … against any white person."

14. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 13–101 (1990).

15. Kline v. Green Mount Cemetery, 677 A.2d 623, 625–27 (Md. Ct. Spec. App. 1996) (recounting conventional history surrounding President Lincoln's assassination).

16. *See* U.S. CONST. amend. XIII.

Black people equal protection under the law.[17] Black people took on leadership roles like never before. They held public office and sought legislative changes for equality, including the right to vote. But this push for racial equality angered white people and another process of racialized hierarchy began.

The formal end of slavery clearly would not end the unmistakable racial discrimination within the criminal legal system. Southern states enacted what came to be known as the Black Codes, a maneuver that effectively reinstated a dual system of criminal prosecution which placed people of color at the bottom of the racial hierarchy, despite ratification of the Thirteenth Amendment.[18] For instance, states criminalized Black men who were out of work, or who were not working at a job that did not meet the approval of white people.[19] The police became the enforcement mechanism and continue to be an oppressive symbol in communities of color.[20] The Black Codes gave birth to the first wave of mass incarceration.[21] It also ushered in a period of terrorism, where white people severely beat and publicly lynched people of color.

One such incident is the Colfax Massacre of 1873 during which whites killed over two hundred Blacks—graphically demonstrating the level of racial terrorism in the South and the inadequacy of responses from legal authorities, including the Supreme Court.[22] On Easter Sunday 1873, a group of armed white men, known as the "White League,"

17. *See* U.S. Const. amend. XIV, § 1. The first sentence of the Fourteenth Amendment makes "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof . . . citizens of the United States and of the State wherein they reside." *Id.* The Privileges and Immunities Clause of Article IV provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *Id*. art. IV, § 2.

18. *See* Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 409 (Marshall, J., dissenting) (discussing the facially neutral status of many Black Codes)*; see also* Darren Lenard Hutchinson, "*Continually Reminded of Their Inferior Position": Social Dominance, Implicit Bias, Criminality, and Race*, 46 Wash. U. J.L. & Pol'y 23, 75–76 (2014) [hereinafter Inferior Position] (discussing Black Codes); *see also* Christopher R. Adamson, *Punishment After Slavery: Southern Penal Systems,* 1865–1890, 30 Soc. Probs. 555, 558–59 (1983) (analyzing race and criminal law enforcement during Reconstruction).

19. Inferior Position, *supra* note 18, at 75; *see also* Adamson *supra* note 18, at 559 ("Those without labor contracts or who broke their contracts were prosecuted as vagrants and sentenced to hard labor on local plantations.").

20. *See* Amna A. Akbar, *Toward A Radical Imagination of Law*, 93 N.Y.U. L. Rev. 405, 449 (2018) ("With regard to Black life, the role of police expanded over time: from patrolling slaves and runaway slaves to enforcing of the Black Codes and Jim Crow.").

21. *See* Darren Lenard Hutchinson, "*With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 Cal. L. Rev. 371, 384 (2022) ("The enforcement of Black Codes had a tremendous impact on the prison population in southern states, with the number of incarcerated individuals tripling in some jurisdictions during periods of two to four years.").

22. Michael T. Morley, *The Enforcement Act of 1870, Federal Jurisdiction over Election Contests, and the Political Question Doctrine*, 72 Fla. L. Rev. 1153, 1177 (2020) (discussing the Colfax Massacre).

attacked the Colfax Courthouse, which was being defended by Black veterans and white militia members. A large group of whites, armed with weapons that included a cannon, overwhelmed the defenders, set fire to the county courthouse where Black people refused to leave. They killed at least 150 Black people who had surrendered. White men shot unarmed Black people as they sought to escape from the flames and fire through the streets and then had them summarily executed. Ninety-seven people were indicted in connection with the massacre, yet only nine ultimately stood trial. Out of these nine, six were acquitted of all charges. The remaining three were cleared of murder charges but were convicted under the 1870 Enforcement Act for conspiring to violate their victims' constitutional rights, including the right to bear arms. The Supreme Court reversed all of the convictions.[23] The Colfax Massacre stands as another grim testament of the extreme racial violence against Black people during the Reconstruction era without legal consequences.

C. 20th Century Onward

The government did not declare a War on Terror.[24] Instead, law enforcement sometimes turned Black people over to angry mobs, participated in the brutality, or turned a blind eye to it.[25] The problem of systematic racial violence against Black people and many other acts of racial discrimination would inspire the civil rights movement that took place mainly during the 1950s and 1960s for people of color to gain equal rights under the law. This led to the passage of the Civil Rights Act of 1964.

23. United States v. Cruikshank, 92 U.S. 542, 544–45, 553 (1876) (refusing to recognize the legality of indictments against three white people who conspired, with about 100 other whites, to deny Blacks their voting rights at a political gathering pursuant to Section 6 of the 1870 Enforcement Act).

24. The Colfax Massacre is an example of terrorism driven by extremist political ideologies and racial animus due to several key factors, including: (1) The massacre was carried out with the intention of achieving political objectives. White supremacists were seeking to regain power in Louisiana, used extreme violence to intimidate and suppress the African American population and their white allies; (2) The victims of the Colfax Massacre were predominantly unarmed civilians, including African American men, women, and children, who were seeking refuge in the courthouse; (3) The massacre aimed to instill fear and terror in the African American community and its political supporters. By brutally attacking a symbol of justice (the courthouse) and killing a significant number of people, the White League sought to discourage African Americans from participating in politics, voting, and asserting their rights.

25. *See* Hutchinson, *supra* note 21.

Over the years, lynchings declined.[26] In the wake of dwindling lynchings, a somber shift emerged: the rise of death sentences in the courts.[27] The once-public brutal spectacles of lynchings became masked behind death sentences in courtrooms. The courthouse became America's grim theater.

III. Data Confirms That Capital Punishment Disproportionately Impacts Black Defendants and Privileges White Victims.

A substantial body of research and scholarship has shown that capital punishment disproportionately impacts Black defendants and privileges white victims.[28] The unmasked data reveals a troubling truth: the death penalty has disproportionately targeted young Black men for offenses against white people, exposing a brutal hierarchy entrenched in American society.[29]

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26. Several factors contributed to the decline of lynchings. These included growing public awareness and condemnation of the brutality, increased media coverage shedding light on these atrocities, changes in social attitudes, legal reforms, efforts by civil rights activists advocating for racial equality, and a shift towards a more organized and formalized criminal punishment system.

27. *See, e.g.,* Scott W. Howe, *Atoning for Dred Scott and Plessy While Substantially Abolishing the Death Penalty*, 95 Wash. L. Rev. 737, 741 (2020) ("Leading scholars have frequently contended that the modern use of the death penalty links to the long era of violent degradation of African Americans."); Lee Kovarsky, *The American Execution Queue,* 71 Stan. L. Rev. 1163, 1171–72 (2019) (discussing how the executions that quickly followed death sentences in the South were "legal lynchings"); Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate,* 100 J. Crim. L. & Criminology 643, 648 (2010) ("The ever-present threat of lynching led reformers to urge speeding up the criminal process to allow for immediate trials followed by instant executions, pressures that created the practice known derogatorily as 'legal lynching,' a process that was often only a hairsbreadth away from the illegal version.").

28. David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 Crim. L. Bull. 194, 208–09 (2003) (discussing sentencing disparities influenced by race); Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990-2008,* 71 L.a. L. Rev. 647 (2011); Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999,* 46 Santa Clara L. Rev. 1 (2005); Scott Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era,* 50 Hous. L. Rev. 131 (2012).

29. *See, e.g.*, Charles J. Ogletree, *Black Man's Burden: Race and the Death Penalty in America*, 81 Or. L. Rev. 15, 16 (2002) ("Like the entire criminal justice system, the administration of the death penalty in America places a disproportionate burden on African Americans."); Federal Death Penalty Resource Counsel Project, *Current Statistics re Use of Federal Death Penalty* (Sept. 29, 2021), https://fdprc.capdefnet.org/doj-activity/statistics/current-statistics-re-use-of-federal-death-penalty-february-2017#FN1 [hereinafter Death Penalty Statistics]; Death Penalty Info. Ctr., *Executions by Race and Race of Victim,* https://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim (last visited Sept. 11, 2023); U.S. Dep't of Justice, The Federal Death Penalty System: A Statistical Survey (1988-2000) 8, 15–17 (2000) [hereinafter DOJ Survey], http://www.justice.gov/dag/pubdoc/dpsurvey.html (describing patterns of race discrimination in the federal death penalty system, including the fact that 80% of all cases in which a federal prosecutor requested permission to seek the death penalty, the defendant was non-white, and that the Attorney General authorized the death penalty against non-white defendants in 72% of cases).

Black people make up 41% of America's federal death row.[30] This holds true across states with the death penalty as well. Below is the breakdown of the United States death row population as of January 1, 2023[31]:

Race	Number	Percentage
Black	961	41%
Latinx	325	14%
White	978	42%
Other	67	3%

A synthesis of more than two dozen studies conducted by the United States Government Accountability Office ("GAO") in a 1990 report found "a pattern of evidence indicating racial disparities in the charging, sentencing and imposition of the death penalty after the Furman decision."[32] Since 2001, more Black men have been executed by the federal government than any other group.[33] Similarly, a study of race in Tennessee's death penalty found that half of Tennessee's death row population is Black, even though only 17% of Tennessee's population is Black.[34]

Disparity is also evidenced when the race of the victim is considered.[35] Nationally, three-quarters of the murder victims in cases resulting in an execution were white.[36] For instance, in Louisiana, the odds of a death sentence were 97% higher in cases involving white

30. Death Penalty Info. Ctr., List Of Federal Death Row Prisoners, https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/list-of-federal-death-row-prisoners (last accessed Apr. 1, 2024). Most people on federal death row are convicted in states that have since abolished the death penalty.

31. Death Penalty Info. Ctr., Racial Demographics: Current U.S. Death Row Population By Race (Oct. 2022), https://deathpenaltyinfo.org/death-row/overview/demographics (showing that as of Oct. 2022, 42% of people on death row in the United States are white, 41% are Black; 14% are Latinx; and 3% are not identified by race).

32. U.S. Gov't Accountability Off., GGD-90-57, Death Penalty Sentencing: Research Indicates Pattern Of Racial Disparities 5 (1990), https://www.ojp.gov/ncjrs/virtual-library/abstracts/death-penalty-sentencing-research-indicates-pattern-racial-0 (last accessed Dec. 8, 2023).

33. Death Penalty Info. Ctr., Federal Death Penalty: Executions Under The Federal Death Penalty, https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/executions-under-the-federal-death-penalty (last accessed Apr. 1, 2024).

34. Death Penalty Info. Ctr., Doomed To Repeat: The Legacy Of Race In Tennessee's Contemporary Death Penalty 36 (2023).

35. *See* David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception,* 53 DePaul L. Rev. 1411, 1413 (2004) (explaining research proved "that race-of-victim discrimination" "appears to characterize many, but not all" capital punishment systems after Furman).

36. Death Penalty Info. Ctr., Fact Sheet (Apr. 2024), https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf.

victims.[37] Similarly, a study of North Carolina found that the odds of receiving a death sentence rose 3.5 times in cases involving white victims.[38] There have been 305 executions of Black defendants when their cases involve a white victim, compared with just twenty-one executions of white defendants who murdered Black victims.[39] An analysis of death-eligible cases adjudicated in North Carolina between 1980 and 2007 found that defendants accused of killing whites were more likely to be sentenced to death than similarly situated others.[40] Similarly, an examination of capital sentencing in South Carolina in the 1990s revealed that prosecutors were significantly more likely to seek the death penalty in cases involving white victims.[41]

Research conducted in Philadelphia also highlights the significant impact of both the defendant's race and the victim's race in determining the imposition of the death penalty, with Black defendants being sentenced to death 40% more often than other death-eligible defendants.[42]

Although the Georgia-specific statistics did not afford Mr. McCleskey relief from the Supreme Court of the United States, the findings of the Baldus study were revealing: the death penalty was assessed in 22% of the cases involving Black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving Black defendants and Black victims; and 3% of the cases involving white defendants and Black victims.[43] The study also found that Georgia prosecutors sought the death penalty in 70% of the cases involving Black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving Black defendants and Black victims; and 19% of the cases involving white defendants and Black victims.

37. *Id.*
38. *Id*.
39. *Id*.
40. Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980-2007*, 89 N.C. L. Rev. 2119, 2140–42 (2011).
41. Michael J. Songer & Issac Unah, *The Effect of Race, Gender and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. Rev. 161 (2006).
42. 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, 1675–1710 (1998) (presenting extensive empirical evidence that the imposition of the death penalty in Philadelphia was affected by the race of both the defendant and the victim, and that prosecutors used peremptory strikes to keep blacks off juries). *See also* Death Penalty Info. Ctr., The Death Penalty In Black And White: Who Lives, Who Dies, Who Decides (June 4, 1998) https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/the-death-penalty-in-black-and-white-who-lives-who-dies-who-decides.
43. McCleskey v. Kemp, 481 U.S. 279, 286–87 (1987).

In short, the death penalty is disproportionately sought and imposed in cases involving Black defendants and white victims. As Justice John Paul Stevens, the pivotal figure in the *Gregg v. Georgia* decision that reinstated the death penalty four years after it was deemed unconstitutional, later remarked: "That the murder of Black victims is treated as less culpable than the murder of white victims provides a haunting reminder of once-prevalent Southern lynchings."[44]

IV. Structural Inequalities: Lack of Diversity Among Courtroom Actors

The courtroom often presents a stunning lack of diversity, especially among those individuals who play key roles within the legal system. Defense counsel, prosecutors, judges,[45] and jurors are overwhelmingly white.

In 2020, white lawyers accounted for 86% of the profession.[46] African Americans constituted 5% of all practicing attorneys, despite representing 13.4% of the entire U.S. population.[47] This percentage remained unchanged over the past decade, highlighting a persistent underrepresentation of African Americans in the legal field. "Nearly all people of color are underrepresented in the legal profession compared with their presence in the U.S. population."[48] This underrepresentation extends to most people of color in the legal field.[49]

A. Need for Diversity Among Attorneys Representing People Facing Death Penalty

When it comes to representing people facing the death penalty, a concerning lack of diversity among defense attorneys and other defense

44. John P. Stevens, *On the Death Sentence*, N.Y. Rev. Books, Dec. 23, 2010, at 8, 14 (reviewing David Garland, Peculiar Institution: America's Death Penalty in an Age of Abolition (2010)).

45. Akin Adepoju, *All-White Benches Persist in Federal District Courts*, Federal Defender Services Latest News, https://www.fd.org/news/all-white-benches-persist-federal-district-courts (last accessed Dec. 8, 2023) ("Of the 94 federal district courts, 25 have never had a non-White judge.").

46. Am. Bar Ass'n, Legal Profile of the Legal Profession 37 (2020), https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf ("In 2020, 86% of all lawyers were non-Hispanic whites[]…. By comparison, 60% of all U.S. residents were non-Hispanic whites in 2019.").

47. *Id.* at 33.

48. *Id.*

49. *Id*. ("Nearly all people of color are underrepresented in the legal profession compared with their presence in the U.S. population.")

professionals[50] is a glaring issue that demands immediate attention. Beyond defender organizations' diversity mission statements, diversity value statements, and diversity training, there has been little progress made to diversify the legal profession, including prosecutor and defender offices, and people representing those facing the death penalty.

Statistical data also reveals that within the demographic of defense attorneys, the prevailing ethnicity is White, accounting for 75.5% of the population, followed by Hispanic or Latinx (7.8%), Asian (6.4%), and Black or African American (5.6%).[51]

B. The Significance of Diversity in Legal Representation

Diversity in the defense bar is not just a matter of optics; it directly affects the quality of representation and the fairness of outcomes. A diverse defense bar fosters empathy, allowing defense professionals to better understand their clients' experiences, leading to more effective representation.

In cases where life and death hang in the balance, the ability of defense professionals to relate to their clients on cultural, racial, and social levels can profoundly impact the effectiveness of their defense strategies. Representing a diverse range of clients requires an understanding of various backgrounds, experiences, and perspectives that can only be achieved through a diverse pool of defense professionals.

C. Racist Prosecutors

Racial discrimination has been observed repeatedly in the prosecution of death penalty cases.[52] Countless studies have demonstrated that prosecutors were more likely to seek the death penalty where the

50. Defense professionals include a broad range of professionals that fulfill the defense function: attorneys, investigators, mitigation specialists, paralegals, legal assistants, and more.

51. *Criminal Defense Lawyer Demographics and Statistics in the US,* Zippia, https://www.zippia.com/criminal-defense-lawyer-jobs/demographics/#race-statistics (last visited Dec. 8, 2023). The data also reveals that 4.4% are unknown, and American Indian and Alaska Native make up 0.3%.

52. *See* 140 Cong. Rec. S12309-02, S12311 (daily ed. Aug. 23, 1994) [hereinafter Violent Crime Act Debate] (statement of Sen. Leahy) (stating that issues of race, class, and quality of counsel influence who receives death penalty); *See* Callins v. Collins, 510 U.S. 1141, 1153 (1994) (Blackmun, J., dissenting from denial of certiorari) (stating that "even under the most sophisticated death pen alty statutes, race continues to play a major role in determining who shall live and who shall die"); McClesky v. Kemp, 481 U.S. 279, 334–35 (1987) (Brennan, J., dissenting) (finding that Georgia's legacy of racism in criminal justice system influences current racial disparities in death penalty cases); David E. Baldus et al., Equal Justice and the Death Penalty: A Legal and Empirical Analysis (1990) (discussing racial bias in death penalty implementation).

defendant was Black and the victim was white.[53] The racial biases of prosecutors are not often readily apparent due to the lack of transparency in prosecutorial practices in most jurisdictions.[54] In one case, a defense attorney testified that during a conversation with the prosecutor, the prosecutor stated, "I hope they fry that nigger."[55] Even in instances where racial disparities are linked to specific practices, the Supreme Court has denied the discovery and disclosure of such information,[56] despite its "imperative to purge racial prejudice from the administration of justice."[57]

In addition, long after the Supreme Court struck down a law excluding Black people from jury service, prosecutors have used peremptory challenges to remove people of color during jury selection.[58] One of the most widely recognized instances illustrating this issue revolves around a training conducted for prosecutors in the Philadelphia District Attorney's Office, which occurred roughly a year after the *Batson* case was decided.[59] During the training, the prosecutor, Jack McMahon, trained Philadelphia prosecutors about the strategic exclusion of Black jurors while providing explanations that appeared race-neutral and could withstand examination.[60] The training video was recorded and ultimately leaked during Jack McMahon's campaign to

53. Paul Butler, *Starr Is to Clinton as Regular Prosecutors Are to Blacks*, 40 B.C. L. Rev. 705 (1999). Kenneth Williams, *The Death Penalty: Can It Be Fixed?*, 51 Cath. Univ. L. Rev. 1177, 1180 (2002).

54. *See, e.g.*, In re Spivey, 345 N.C. 404, 408, 419, S.E.2d 693, 695, 701 (N.C. 1997) (upholding removal of a white district attorney's from office after an incident at a bar in which he "loudly and repeatedly addressed a black patron . . . using [a] derogatory and abusive racial epithet," specifically calling the patron a "nigger").

55. Thompson v. State, 958 S.W.2d 156, 168 (Tenn. Crim. App. 1997).

56. *See* United States v. Bass, 536 U.S. 862, 862 (2002) (per curiam) (reversing an order allowing discovery of information relating to the prosecution's practices in federal capital cases); United States v. Armstrong, 517 U.S. 456, 458, 461 (1996) (concluding Black defendants must demonstrate that the government failed to prosecute similarly situated non-Black defendants to prevail on a selective prosecution claim).

57. Peña-Rodriguez v. Colorado, 580 U.S. 206, 221 (2017).

58. *See, e.g.*, Snyder v. Louisiana, 552 U.S. 472, 475, 483 (2008) (finding a *Batson* violation when the prosecutor struck all five Black prospective jurors in the venire, but accepted white jurors with "conflicting obligations" that were "at least as serious" as a stricken Black juror); Miller-El v. Dretke, 545 U.S. 231, 241, 265 (2005) (finding a *Batson* violation where the evidence of discrimination included a disproportionate use of strikes to remove ten of eleven Black people, and the reasons for striking Black people applied equally to whites).

59. *See* Wilson v. Beard, 426 F.3d 653, 656–59 (3d Cir. 2005) (discussing the training on jury selection given to Philadelphia prosecutors). *See also* Prosecutor's Tape on Juries Results in Mistrial, N.Y. Times (Apr. 4, 1997), https://www.nytimes.com/1997/04/04/us/prosecutor-s-tape-on-juries-results-in-mistrial.html [https://perma.cc/L7GS-YY5C].

60. *See Prosecutor's Tape on Juries Results in Mistrial*, N.Y. Times (Apr. 4, 1997), https://www.nytimes.com/1997/04/04/us/prosecutor-s-tape-on-juries-results-in-mistrial.html [https://perma.cc/L7GS-YY5C].

serve as the District Attorney of Philadelphia.[61] This explicit training in racist and sexist jury selection was designed "to get jurors that are as unfair and more likely to convict than anybody else."[62] This example and other types of tactics led an Illinois court to characterize the *Batson* process as a "charade," suggesting "new prosecutors are given a manual titled, 'Handy Race Neutral Explanations' or '20 Time-Tested Race Neutral Explanations.'"[63]

Though constitutionally prohibited from making racially biased arguments, prosecutors often do so subtly. Courts, however, have not addressed this problem head-on.[64] For example, some courts have outright avoided addressing racism in prosecutorial arguments entirely by calling the argument "inflammatory" rather than "racist."[65] Similarly, courts have excused such language by considering the presumed intent of the prosecutor, rather than actually examining the impact of the words chosen.[66] Additionally, using coded-language can trigger stereotypes without directly addressing race.[67] For instance, during the sentencing phase of a capital trial in South Carolina, the prosecutor emphasized the defendant's race, mentioned his prior relationship with a white woman and referred to him as "King Kong" and "Caveman."[68]

D. Racist Defenders

Criminal defense attorneys, especially public defenders, are often regarded as champions of justice, tirelessly working to protect the rights of marginalized people within a challenging criminal legal system. Their dedication to representing those who cannot afford private legal counsel is commendable and their work is invaluable in a legal system that is often stacked against those with limited resources. However, due to their

61. *Id.*; *see also* journalists4mumia, *McMahon Philadelphia DA Training Video (excerpts)*, YouTube (Nov. 8, 2007), https://www.youtube.com/watch?v=rv9SJPa_dF8 [https://perma.cc/9YSU-ENB2] [hereinafter Training Video].

62. Training Video, *supra* note 61. Studies show that diverse juries better critically weigh evidence. Juries are less likely to convict African American defendants when at least one juror is Black. *See, e.g.,* Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. Econ. 1017, 1032, 1048 (2012) (finding that difference in conviction rates for Black and white defendants, 81% and 66%, respectively, disappeared when the jury pool included at least one Black person).

63. People v. Randall, 671 N.E.2d 60, 65 (Ill. App. Ct. 1996).

64. Mary Nicol Bowman, *Seeking Justice: Prosecution Strategies for Avoiding Racially Biased Convictions, 32* S. Cal. Interdisc. L.J. 515, 519–20 (2023).

65. *Id.*

66. *Id.*

67. *Id.* at 527.

68. State v. Bennett, 632 S.E.2d 281, 285 (S.C. 2006) (noting that the solicitor compared a Black defendant to "King Kong" during closing arguments).

noble mission, defenders sometimes evade scrutiny regarding racial biases. There is an underlying assumption that their sincere concern for marginalized communities shields them from perpetuating or engaging in racially biased practices.[69] This assumption has led to the inadvertent neglect of crucial racial justice issues in the defender community.

In capital cases, it is not just uncommon for defendants to be represented by counsel insufficiently skilled in capital cases or in criminal law generally,[70] defendants are sometimes represented by lawyers using racial epithets.[71] In one case, defense counsel referred to his Black client as "little old nigger boy" in closing argument.[72] Another defense counsel referred to his client as an unpredictable and irresponsible "wet-back" in front of an all-white jury.[73]

Another lawyer referred to his Black clients as "n[****]rs" and an Asian-American judge as a "f[***]king J[*]p" who should "remember Pearl Harbor."[74] That lawyer, Donald Ames, said all those things and more while representing Black people as a public defender in criminal cases, including death penalty cases.[75] By all accounts, "Ames was an

69. These biases can manifest in subtle ways, such as prioritizing cases or clients based on personal assumptions or stereotypes. *See, e.g.*, Jeff Adachi, *Public Defenders Can Be Biased, Too, and It Hurts Their Non-white Clients*, Wash Post. (June 7, 2016), https://www.washingtonpost.com/posteverything/wp/2016/06/07/public-defenders-can-be-biased-too-and-it-hurts-their-non-white-clients/?utm_term=.c9379db861bf [https://perma.cc/S7DP-7EEM].

70. *See, e.g.*, Paradis v. Arave, 954 F.2d 1483, 1490 (9th Cir. 1992) (noting that the state trial court assigned a capital case to a lawyer who had passed the bar examination only a few months earlier); Tyler v. Kemp, 755 F.2d 741, 746 (11th Cir. 1985) (noting the defense lawyer had been a member of the bar for only six months); Bell v. Watkins, 692 F.2d 999, 1008 (5th Cir. 1982) *(*noting that the lawyer appointed in the death penalty case had never finished a criminal trial of any kind); Smith v. State, 581 So. 2d 497 (Ala. Crim. App. 1990) (noting the defense lawyer asked for extra time between the guilt and sentencing phases of a capital case to read the state death penalty statute for the first time); Leatherwood v. State, 548 So. 2d 389 (Miss. 1989) (noting that a third-year law student was allowed to handle most of a capital trial). Indeed, death sentences have been affirmed in cases where defense attorneys were either asleep, intoxicated, or under the influence of drugs. *See* Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 Neb. L. Rev. 425, 455–60 (1996).

71. Jones v. Campbell, 436 F.3d 1285, 1291 (11th Cir. 2006). *See e.g.*, Mayfield v. Woodford, 270 F.3d 915, 924–25, 940 (9th Cir. 2001) (en banc) (recounting evidence of defense counsel in capital case using racial epithets in reference to minority clients); *see* Dobbs v. Zant, 720 F. Supp. 1566, 1577 (N.D. Ga. 1989) (involving defense attorney who testified during habeas corpus proceedings that Black people would not make good teachers but made good basketball players; attributed deteriorating neighborhoods and schools to integration; described a section of Chattanooga as a "black boy jungle"; and implied that Black people had inferior morals), *aff'd*, 963 F.2d 1403 (11th Cir. 1991), *rev'd* and *remanded* on other grounds, 506 U.S. 357 (1993).

72. *See, e.g.*, Goodwin v. Balkcom, 684 F.2d 794, 805 n.13 (11th Cir. 1982) (involving defense counsel's opening statements referring to the defendant as a "nigger" and "little old nigger boy" in closing argument) cert. denied, 460 U.S. 1098 (1983).

73. Ex parte Guzmon, 730 S.W.2d 724, 736 (Tex. Crim. App. 1987).

74. Ellis v. Harrison, 947 F.3d 555, 555–56 (9th Cir. 2020) (en banc).

75. *Id.*

offensive and abusive human being, even by the accounts of those who knew him best."[76]

Another lawyer, in conversation with one client regarding another client, stated that the "little nigger deserves the death penalty."[77] In a recent case, a white lawyer representing a Black man of Muslim faith, demanded that his client remove "that shit"—an apparent reference to his client's prayer cap known as a kufi.[78] The defense lawyer also made and shared several racist and bigoted public postings on his social media account, openly displaying bias against Black people and persons of the Muslim faith. Some of the lawyer's own words most accurately capture the depth of his bigotry:

1. A shared post of a photograph of a pig with engorged testicles, captioned, "Dear Muslims … Kiss our big bacon balls";
2. A post stating, "I just became a bigger Hockey fan … I guess Canadians want to protect their citizens, I wish our government would …," accompanying a photograph of a Canadian hockey announcer, with a quotation: "If hooking up one raghead terrorist prisoner's testicles to a car battery to get the truth out of the lying little camel shagger will save just one Canadian life then I [***6] …";
3. A shared post of a picture of a pointing military officer, captioned, "You tell those goat fuckers with the laundry on their heads that it's wash day, and we're bringing the fucking Maytag!"[79]

Some of these and other racist statements were "made at the courthouse while he was serving clients in his professional capacity."[80]

In other circumstances, defense attorneys have presented racially biased expert testimony.[81] A troubling manifestation of this occurred during the sentencing phase of Duane Buck's death penalty case, where

76. *Id.* at 574 (Callahan, J., dissenting).

77. Osborne v. Terry, 466 F.3d 1298, 1303–04, 1316–17 (11th Cir. 2006) (describing the state court's denial of relief where defense attorney reportedly remarked about his client that "the little nigger deserves the death penalty."); *See also* Frazer v. United States, 18 F.3d 778, 783 (9th Cir. 1994) (noting defense counsel called a defendant "stupid nigger son of a bitch" and threatened to provide substandard performance if defendant chose to exercise right to trial).

78. Commonwealth v. Dew, 492 Mass. 254, 255 (2023) (finding that defense lawyer once refused to speak to his client because the client was wearing a kufi prayer cap in contravention of counsel's directive).

79. *Id.* at 257 n.9.

80. *Id.* at 266.

81. *See, e.g.,* Buck v. Davis, 580 U.S. 100, 109 (2017).

his defense attorney introduced an expert witness, Dr. Walter Quijano. Dr. Quijano, a psychologist, testified that Mr. Buck's race—African American—made him more likely to pose a future danger, a critical factor in determining whether Buck should receive the death penalty.[82]

Although the defense expert ultimately concluded Mr. Buck was unlikely to be a future danger, he also provided a report that indicated that Mr. "Buck was statistically more likely to act violently because he is black."[83] This type of deeply flawed testimony brings prejudice into the courtroom, reinforces[84] harmful stereotypes, perpetuates racial bias, and, most egregiously, it was used as a basis to determine whether a person lives or dies. As the Supreme Court aptly observed, particularly concerning racial bias and the death penalty, "[s]ome toxins can be deadly in small doses."[85] The lethal influence of toxic racial bias has no place in a system that seeks justice and fairness for all.

E. Racist Judges

The cornerstone of a just and fair legal system is the impartiality of its judges. Gathering evidence of judges displaying racism is challenging due to their secretive and closed-door work environment. Nonetheless, there have been several documented instances of judges using racist and prejudiced language. In one death penalty case, immediately after the defendant was convicted and the parties were discussing procedure for the penalty phase with the judge, the trial judge commented: "Since the nigger mom and dad are here anyway, why don't we go ahead and do the penalty phase today instead of having to subpoena them back at cost to the state."[86] Another person heard the comment as: "Since

82. *Id.* at 108 (describing that the expert believed that "the race factor, black, increases the future dangerousness" factor).

83. *Id.* at 104–07 (noting the report "read, in relevant part: 'Race. Black: Increased probability'").

84. The prosecutor reinforced the testimony on cross examination. *Id.* at 108 ("After opening cross-examination with a series of general questions, the prosecutor likewise turned to the report. She asked first about the statistical factors of past crimes and age, then questioned Dr. Quijano about the roles of sex and race: 'You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?' . . . Dr. Quijano replied, 'Yes.'" (quoting J.A. at *170a, *Id.* at *170a (No. 15-8049), 2016 WL 4120631, at *170a)).

85. *Id*. at 121–22 ("There were only 'two references to race in Dr. Quijano's testimony'—one during direct examination, the other on cross. . . . But when a jury hears expert testimony that expressly makes a defendant's race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record.").

86. Peek v. State, 488 So. 2d 52, 56 (Fla. 1986).

the niggers are here, maybe we go ahead with the sentencing phase."[87] Either variation of the use of the slur is racist.[88]

In December 2021, a video of Louisiana criminal court judge Michelle M. Odinet went viral showing the judge using the N-word while watching a video of a car break-in at her home with her family.[89] At one point, she said, "We have a n ***er, It's a n***er, like a roach," while laughing.[90]

In 2020, the Supreme Court denied certiorari in a death penalty case.[91] Years after the trial, media reports described the Texas trial judge, Vickers Cunningham, who sentenced the defendant, a Jew, as both racist and antisemitic.[92] The report showed that Judge Cunningham frequently used derogatory language, including the use of the N-word when referring to Black defendants, and "T.N.D."—short for "'Typical N*** Deals'—to refer to criminal cases involving Black defendants."[93] Witnesses recounted that the judge had referred to the Jewish defendant with derogatory terms like "f***n' Jew" and that he ran for judge to that "save" his city from "'n***s,' 'wetbacks,' Jews, and dirty Catholics."[94]

In 2016, then-Judge Mark Hulsey III, a Florida circuit court judge, faced allegations of racism and inappropriate conduct.[95] He said Black people should "get back on a ship and go back to Africa" and made other racially insensitive remarks.[96] These actions led to his suspension and, eventually, his resignation from the bench a day before the House Public

87. *Id.*

88. *See* United States v. Henley, 238 F.3d 1111, 1121 (9th Cir. 2001) ("We have considerable difficulty accepting . . . that, at this time in our history, people who use the word 'nigger' are not racially biased.").

89. Tim Stelloh, *Louisiana Judge to Take Unpaid Leave After Home Video Captures Racial Slurs*, NBC News (Dec. 15, 2021, 9:29 PM), https://www.nbcnews.com/news/us-news/louisiana-judge-take-unpaid-leave-home-video-captures-racial-slurs-rcna8956.

90. *Id*.

91. Halprin v. Davis, 140 S. Ct. 1200 (2020).

92. *Id*. at 1200–01 (Sotomayor, J., statement respecting denial of certiorari) (noting "a news outlet published that Cunningham had created a living trust for his children that would have withheld payments had they married non white non-Christians. (Halprin is Jewish, a fact that featured prominently at his trial)").

93. *Id*.

94. *Id.*; *See also* In re Halprin, 788 F. App'x. 941, 942 n.2 (5th Cir. 2019) (per curiam) (recognizing evidence of "horrible" "racism and bigotry" that, if true, would be "completely inappropriate for a judge.").

95. Debra C. Weiss, *Florida Judge is Accused of Making Derogatory Comments, Overrelying on Staffers,* ABA J. (Jul. 22, 2016), https://www.abajournal.com/news/article/florida_judge_is_accused_of_making_derogatory_comments_overrelying_on_staff/.

96. Debra C. Weiss, *Florida Judge Accused of Racist and Sexist Remarks Resigns Before Impeachment Probe*, ABA J. (Jan. 26, 2017), https://www.abajournal.com/news/article/florida_judge_accused_of_racist_and_sexist_remarks_resigns_before_impeachme.

Integrity & Ethics Committee was scheduled to open an investigation into his behavior that could have led to his impeachment.[97]

Another judge, Mark V. Tranquilli of Allegheny County, Pennsylvania, who previously served as a prosecutor, questioned a prosecutor as to why he had allowed a "knucklehead" and a Black female juror, referring to her as "Aunt Jemima," on the jury, after the jury acquitted the defendant.[98] The judge then told the DA he "knew darn well when she goes home to her baby daddy, he's probably slinging heroin, too."[99] The judge resigned before his misconduct trial.[100]

Other instances of racism were found in disciplinary processes. For instance, in one case, a South Carolina magistrate judge said one of the courthouse clerks was dating "'niggers' and that there was 'no telling what we might catch using the same bathroom as her.'"[101] In another, a Mississippi judge told Black lawyers that "all you African-Americans can go to hell" while working on a drug court project with several people.[102] Likewise, in another case, when a parking lot attendant approached the judge and informed him that judges are now required to pay for their parking spaces and asked the judge's name, the judge responded, "Can't you read, black mother-f—er?" or "Nigger, can't you f—ing read?"[103] "An Oklahoma judge who was upset with his Mexican roofers called them 'nothing but filthy animals,' who 'deserve to all be taken south of the border with a shotgun to their heads.'"[104] In another case, a New Jersey judge, with a history of telling a prosecutor of Nigerian descent that most Nigerians appearing in court are in handcuffs, remarked to another prosecutor after a hung jury that the prosecutor would have

97. *Id.*; Larry Hannan, *Jacksonville Judge Accused of Racist and Sexist Comments Resigns,* (Jan. 23, 2017), Florida Times-Union, https://www.jacksonville.com/story/news/crime/2017/01/23/jacksonville-judge-accused-racist-and-sexist-comments-resigns/15739895007/.

98. Matt Miller, *Pa. Judge Who Called Black Juror 'Aunt Jemima' Hit with Disciplinary Charges Over Inappropriate Comments*, Penn Live (Aug. 12, 2020), https://www.pennlive.com/news/2020/08/pa-judge-who-called-black-juror-aunt-jemima-hit-with-disciplinary-charges-over-inappropriate-comments.html.

99. *Id.*

100. In re Mark v. Tranquilli Court of Common Pleas 5th Judicial Dist. Allegheny Cty., 2020 Pa. Jud. Disc. LEXIS 28, *1 ("finding Respondent's resignation and pledge not to ever serve as a judge again are binding and irrevocable.").

101. In re Hutchins, 378 S.C. 14, 18 (2008).

102. Miss. Comm'n on Jud. Performance v. Boland, 975 So. 2d 882, 8–85 (Miss. 2008).

103. In re Lowery, 999 S.W.2d 639, 646 (Tex. Rev. Trib. 1998).

104. Nolan Clay, *Attorney's Affidavit Expands on Claims of Unfairness Against Judge in Ersland Case*, The Oklahoman (Jan. 7, 2011), https://www.oklahoman.com/story/news/2011/01/07/attorneys-affidavit-expands-on-claims-of-unfairness-against-judge-in-ersland-case/61190559007/; *see* *Judge Refuses to Recuse Himself from Trial, Says He's Not a Racist*, News 9 (Dec. 13, 2010), https://www.news9.com/story/5e34fe2ae0c96e774b368f69/judge-refuses-to-recuse-himself-from-trial-says-hes-not-a-racist.

secured a conviction had she not allowed two "lower-class blacks" on the jury.[105] The judge was ultimately reprimanded for making derogatory, antisemitic, and racist comments.[106]

In the hallowed halls of justice, where fairness and impartiality should reign supreme, instances of racial discrimination or remarks made by judges often go unaddressed for several reasons. One of the primary reasons why racial discrimination by judges remains unchecked is the fear attorneys harbor about potential repercussions. Lawyers rely on judges for favorable rulings and consequently, they may be reluctant to challenge a judge's behavior for fear of jeopardizing their current case or future cases before that judge. The prospect of being on the wrong side of a judge's displeasure can be daunting, leading many to prioritize their own careers over addressing racial bias. Another contributing factor is the social dynamics that often exist within legal circles, where lawyers and judges are often socially friendly with each other. Such relationships can create a sense of loyalty and camaraderie that discourages attorneys from taking a stand against a judge's racially biased conduct. They may be hesitant to hurt the judge's feelings or concerned it could tarnish their reputation or strain their personal connection.

G. Consequences of Homogeneity

The lack of diversity among defense professionals representing people facing the death penalty can lead to a range of negative consequences. First, it may hinder effective communication between attorneys and their clients, who often come from marginalized and disadvantaged backgrounds. A diverse legal team is better equipped to understand the unique challenges and experiences faced by their clients, leading to a more holistic defense strategy. On the other hand, a defense team that has ineffective communication and limited cultural competence is unable to present a robust defense that takes into account the intricate socio-cultural factors that are crucial in capital cases. Achieving greater success in representing capital clients necessitates the active involvement of diverse people bringing different voices and perspectives in matters of life and death.

105. Formal Complaint at 2–4, In re Wertheimer, 13 A. 3d 355 (N.J. A.C.J.C. 2009) (ACJC No. 2009-245) (dismissed, 13 A.3d 355 (N.J. 2011)).

106. *Id.*

Second, the lack of diversity impacts case analysis and defense strategy. Clients from varied backgrounds often find it easier to communicate and trust legal professionals who share or understand their cultural contests and experiences. Defense attorneys, the majority of whom are white, may not consistently understand when others employ racialized practices against their clients.[107]

Third, a diverse defense bar can better challenge systemic biases within the legal system. Different backgrounds bring varied perspectives, fostering innovative problem-solving and strategy development.

F. Impact on Jury Selection and Trial Proceedings

Jury selection is a crucial phase where unconscious racial biases may come into play. Studies have shown that both defense and prosecution attorneys may be influenced by unconscious biases when selecting jurors. Racial bias can affect the perceived credibility and trustworthiness of witnesses, defendants, and even the victim. This can lead to jury compositions that are more likely to produce death sentences for defendants of certain racial backgrounds, undermining the impartiality and integrity of the legal process. On the other hand, racially diverse juries ensure that the perspectives and experiences of individuals from different racial backgrounds are considered during deliberations.

V. Legal and Policy Reforms

It is important to recognize how homogeneity and biases, both explicit and implicit, advance a disproportionate imposition of the death penalty on Black people. But recognition of the problem does not solve it. This section seeks to provide actionable tools for resolution.

A. Diversifying Juries

The role of a jury in a death penalty case is one of immense responsibility, as it determines whether a human being lives or dies. Yet, jurors have demonstrated their prejudice and racism. In one case,

107. Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 Fordham L. Rev 2081, 2091–93 (2005) (describing a situation in which a white defense attorney failed to discuss race with his Black client, or argue to the court that the police officer's treatment of his client was racially motivated); L. Song Richardson & Phillip A. Goff, *Implicit Racial Bias in Public Defender Triage*, 122 Yale L.J. 2626, 2636 (2013) (noting that "when clients are Black or otherwise criminally stereotyped, [implicit biases] can influence evidence evaluation, potentially causing [public defenders] to unintentionally interpret information as more probative of guilt").

a juror used a racial epithet to disparage the testimony of an African-American defense witness, saying, "I don't believe a word those niggers said."[108] Another juror reported to the court that before opening statements, while in the jury room, another juror "used the term 'nigger.'"[109] Examples of jurors' racial and ethnic slurs can be readily multiplied.[110] A jury's composition significantly influences the outcome of a trial, and the importance of racial diversity within the jury cannot be overstated.[111] In capital cases where jurors are tasked with evaluating mitigating factors, a white juror might assign minimal or no significance to compelling mitigating factors when presented by a Black defendant, whereas they might attribute greater weight to the same factors if they were presented by a white defendant. Research has demonstrated that people often do not naturally experience empathy towards people they consider "social outgroup members," commonly defined as those from a different race or ethnicity, unless they make a conscious and intentional effort to do so.[112]

Racial diversity on capital juries is crucial and courts must work harder to promote and increase such diversity.

B. Grant Discovery to Determine Prosecutorial Racism

Severe restrictions on litigating claims of racial discrimination against the prosecution coupled with the denied access to discovery is

108. Pace v. State, 904 So. 2d 331, 342 (Ala. Crim. App. 2004).

109. State v. Jones, 29 So. 3d 533, 535 (2009).

110. *See e.g.,* Tharpe v. Ford, 139 S. Ct. 911, 911 (2019) (Sotomayor, J., statement respecting denial of certiorari) ("Tharpe has presented a signed affidavit from the juror in question, who stated, among other things, that 'there are two types of black people: 1. Black folks and 2. Niggers,' and that Tharpe, 'who wasn't in the "good" black folks category in [his] book, should get the electric chair for what he did.'" (quoting Tharpe v. Sellers, 138 S. Ct. 545, 546 (2018) (per curiam)); United States v. Henley, 238 F.3d 1111, 1113 (9th Cir. 2001) (jurors using racial epithet); United States v. Heller, 785 F.2d 1524, 1526 (11th Cir. 1986) (finding "existence of numerous racial and religious slurs made by several members of the jury," including the word "nigger"); People v. Rivera, 759 N.Y.S.2d 136, 137 (N.Y. 2d. App. Div. 2003) (same); Marshall v. State, 854 So. 2d 1235, 1239 (Fla. 2003) (per curiam) (discussing how some jurors said they would vote for a "life sentence because they wanted Marshall to return to prison to kill more black inmates."). Of course, this is not limited to jurors in criminal cases. *See, e.g.,* Wright v. CTL Distribution Inc, 650 So. 2d 641, 642 (Fla. 2d. Dist. Ct. App. 1995) (finding several members of the jury say they would not "award anything to Wright because she was a fat black woman on welfare who would simply blow the money on liquor, cigarettes, jai alai, bingo or the dog track.").

111. Cass R. Sunstein & Christine Jolls, *The Law of Implicit Bias*, 94 Cal. L. Rev. 969, 981 (2006) ("A significant body of social science evidence supports the conclusion that the presence of population diversity in an environment tends to reduce the level of implicit bias.").

112. *See* Jennifer N. Gutsell & Michael Inzlicht, *Intergroup Differences in the Sharing of Emotive States: Neural Evidence of an Empathy Gap*, 7 Soc. Congitive & Affective Neuroscience 596, 601–02 (2012) (finding that people generally do not experience empathy for outgroup members on the same intuitive basis that they do for ingroup members).

another example of the courts' failure to address the impact of race on the outcomes in capital cases.[113] The Supreme Court created a nearly impossible standard in *McCleskey,*[114] where it rejected compelling statistical data that demonstrated widespread racial disparities in Georgia's death penalty system.[115] Instead, the Court required that the defendant provide "exceptionally clear proof" of intentional discrimination by a particular prosecutor in the specific case before the Court.[116] This standard is virtually impossible to meet and to my knowledge, there has never been a successful racial discrimination claim against a prosecutor in a capital case. Later, the Supreme Court required that "a defendant who seeks discovery on a claim of selective prosecution must show some evidence of both discriminatory effect and discriminatory intent."[117]

Despite the foundational principles of fairness and impartiality, racism persists within our legal system. Shedding light on these biases is crucial, and courts must acknowledge the critical role of defense access to discovery in unearthing and rectifying prosecutorial racial biases. Yet, the court will only grant discovery if the defendant first provides evidence of discriminatory intent. Essentially, unless a defendant has explicit proof, such as an admission by the prosecution that they are seeking the death sentence because of the defendant's race, discovery will be denied.

Courts should allow defendants to prove racially selective prosecution in seeking death sentences by showing disparate impact, regardless of discriminatory intent and permit the use of statistical evidence to show racially discriminatory practices, similar to practices allowed in civil cases. The current prohibitions of proving discrimination through disparate impact and statistical evidence makes litigating racial discrimination in capital cases almost impossible and deprives the court of addressing discrimination claims on the merits.[118]

113. *See* Stephen B. Bright, *Symposium: Cruel and Unusual Punishment: Litigating Under the Eighth Amendment: The Failure to Achieve Fairness: Race and Poverty Continue to Influence Who Dies,* 11 U. Pa. J. Const. L. 23, 27, n. 16 (2008) ("United States v. Bass, 536 U.S. 862, 862–63 (2002) (per curiam) (reversing an order allowing discovery of information relating to the prosecution's practices in federal capital cases); United States v. Armstrong, 517 U.S. 456 (1996) (holding that defendants are not entitled to discovery of changing prosecutorial practices in cases involving crack and powdered cocaine)").

114. McCleskey v. Kemp, 481 U.S. 297 (1987).

115. Alison Siegler et al., *Reforming the Federal Criminal System: Lessons from Litigation,* 25 J. Gender Race & Just. 99, 112 (2022) [hereinafter *Reforming the Federal Criminal System*].

116. *Id.*

117. Bass, 536 U.S. at 863 (2002) (per curiam) (citing Armstrong, 517 U.S. at 465.

118. *See* Siegler et al., *supra* note 115, at 111 n.36, "*See e.g.*, United States v. Brown, 299 F. Supp. 3d 976, 991-93 (N.D. Ill. 2018) (alleging ATF reverse-sting stash house operation constituted racially selective law enforcement); United States v. Lopez, 415 F. Supp. 3d 422, 425 (S.D.N.Y.

The prosecution wields immense power within our legal system. However, when this authority is wielded with implicit biases or discriminatory motives, it not only harms individuals but tarnishes the foundational goals of our legal system. The absence of meaningful defense discovery rights obstructs the unveiling of these biases, concealing unjust practices that perpetuate racial disparities in convictions, sentences, and the overall administration of justice. Allowing discovery to challenge discriminatory practices and giving the prosecution the opportunity to respond would bolster the credibility of convictions, ensuring that they are not rooted in biases or prejudice.

C. Specific Strategies to Increase Jury Racial Diversity

1. **Overcoming Challenges in Jury Selection:** *Batson v. Kentucky* prohibits the use of peremptory challenges based on race.[119] Courts should rigorously examine the use of peremptory strikes to exclude people of color during jury selection, ensuring that such challenges are not racially motivated despite the facially neutral reasons that may have been given to the court. Modern behavior prohibits overt acts of racial prejudice, which has forced prejudiced persons to disguise their bias by hiding behind seemingly neutral language. Therefore, courts may not simply accept purportedly impartial language at face value as showing an absence of prejudice. They must vigorously scrutinize justifications[120] and statements, particularly in capital cases, to ensure the absence of prejudice.

2. **Diverse Jury Pools:** Courts can implement policies to ensure that jury pools are representative of the racial composition of the community and selected from a broad cross-section of the community. Historically, voter registration lists have been the

2019) (alleging a DEA reverse-sting stash house operation constituted racially selective law enforcement)."

119. Batson v. Kentucky, 476 U.S. 79 (1986). *See also* Miller-El v. Dretke, 545 U.S. 231, 236 (2005) (explaining application of *Batson* standard). *See* Pamela A. Wilkins, *Transcripts from the C. Edwin Baker Lecture on Liberty, Equality, and Democracy: Article: Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. Va. L. Rev. 305, 315 (2012) ("Under *Batson*, prosecutors must offer race-neutral explanations for their peremptory challenges, after which the court must determine whether the defendant has established purposeful discrimination.")

120. *See* Bright, *supra* note 113, at 29 n.22 *("See e.g.*, Purkett v. Elem, 514 U.S. 765 (1995) (per curiam) (finding no *Batson* violation where the prosecutor said he struck one black juror because he had long curly hair, a goatee, and mustache, and another black juror because he also had a goatee and mustache").

primary source for selecting potential jurors. Courts should expand the pool of sources for jury selection to include Driver's License and Identification records, tax records, utility bills, public assistance records. These sources should be used to supplement jury pools, ensuring a more inclusive, broader representation.

3. **Community Outreach:** Courts should engage with ethnicities and communities that are historically underrepresented on juries, addressing their concerns, and encouraging jury participation. This can be achieved through more inclusive and extensive juror outreach efforts, including partnering with local organizations, conducting public awareness campaigns, hosting informational sessions, and dispelling misconceptions about jury duty.
4. **Transparency**: Courts should be transparent in their selection processes, providing clear data on the racial composition of jury pools, the reasons for challenges, and the final composition of juries.
5. **Enhanced Voir Dire:** Racial diversity on death penalty juries is not just a noble aspiration; it is an imperative for achieving justice. By ensuring that juries are racially diverse, courts take a significant step toward fair and impartial trials. This inclusivity reduces the risk of bias, upholds public trust, and helps avoid wrongful convictions. The strategies outlined above represent tangible steps that courts can take to promote racial diversity within death penalty juries.

D. Instructing and Educating Jury on Bias

It is important for every player in the courtroom—lawyers, judges, jurors, and staff—to be aware of and educated about implicit bias.[121] Several states now require diversity and inclusion continuing legal education for all attorneys. While training is not a cure-all for bias within the legal system, psychological research consistently supports the idea that recognizing one's own implicit bias and demonstrating a willingness to address it can significantly reduce the impact of bias.[122] To combat the detrimental effects of racial bias in the courtroom, education is a

121. *See* Wilkins, *supra* note 119, at 311, 362 (arguing capital jurors' implicit racial biases may be addressed through defense lawyers' intentional anti-racist narrative during trial); Jerry Kang, *Implicit Bias: A Primer for Courts*, National Center or State Courts 1, 4–6 (2009).

122. Cynthia Lee, *Awareness as a First Step Toward Overcoming Implicit Bias,* G.W. L. 289, 290–91 (2017).

good step.[123] Courts should take proactive measures to educate jurors about biases and their potential impact on their decision-making.

E. Challenges to Diversity

While the benefits of a diverse legal system are evident, achieving such diversity poses certain challenges. Efforts to diversify must address these challenges through:

1. **Inclusive Policies:** Implementing policies that actively promote diversity, such as targeted recruitment, mentorship programs, and equal opportunity initiatives.
2. **Educational Reform:** Promoting diversity in law schools and providing support to underrepresented students to ensure a diverse pipeline of future legal professionals.
3. **Changing Cultural Norms:** Encouraging cultural change within the legal profession to foster an environment where diversity is celebrated and embraced.
4. **Implicit Bias Training:** Requiring ongoing training to legal professionals to better understand implicit bias and equip them with tools to mitigate its effects. While a few hours of training cannot undo a lifetime of bias, this is another important tool reminding professions to slow down decision-making processes, actively challenge assumptions, and consider alternative perspectives.[124]

No individual practice or training is a standalone solution, but rather as a complementary tool in a broader effort to combat bias.

VI. Conclusion

Modern prejudice is a master of subtlety, often wearing a mask of neutrality in its deceitful dance with language. While the contemporary American death penalty no longer openly discriminates based on race, its practice remains a powerful tool of racial oppression. The path to a more just and equitable legal system is multifaceted, but promoting

123. *Id.*

124. No training can eliminate bias. There are several critics of implicit bias training, and they all raise important points. *See, e.g.*, Mahzarin R. Banaji and Anthony G. Greenwald, Blindspot: Hidden Biases of Good People 152 (2013) (indicating that after the conclusion of implicit bias training, implicit associations tend to return to pre-exposure level).

diversity within the legal profession and judiciary is a critical step. A diverse legal system is better equipped to identify and combat implicit bias, ultimately leading to fairer legal outcomes for all.

Dismantling Structural Racism to End Capital Punishment

By Diann Rust-Tierney*

History, as nearly no one seems to know, is not merely something to be read. And it does not refer merely, or even principally, to the past. On the contrary, the great force of history comes from the fact that we carry it within us, are unconsciously controlled by it in many ways, and history is literally present in all that we do.

James Baldwin (1965)

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.

Justice William Brennan, dissenting in *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987)

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I. Introduction

Imagine the entrance to a grand old house, with six columns supporting the porch and the second-floor balcony. If we painted one of the columns green, the structural integrity of the porch and balcony would not be affected. Only removing the green column would cause the porch and balcony to sink and eventually collapse under their own weight.

The slave economy that existed from the waning eighteenth century to the end of the American Civil War was enormously profitable. It made the United States an economic leader in the world.[1] By the beginning of the Civil War, the South had become one of the wealthiest regions of the country. The Mississippi River Valley produced more millionaires per capita than any other region.[2] If we think of the institution of slavery as the grand old house in this wealthy country, what would be the pillars holding it up?

Judge A. Leon Higginbotham Jr. identified "Ten Precepts of American Slavery Jurisprudence"[3] that he argues can be reduced to

1. P.R. Lockhart, *How Slavery Became America's First Big Business*, Vox (Aug. 16, 2019), https://www.vox.com/identities/2019/8/16/20806069/slavery-economy-capitalism-violence-cotton-edward-baptist.

2. *Id.*

3. *See* A. Leon Higginbotham Jr., *The Ten Precepts of American Slavery Jurisprudence: Chief Justice Roger Taney's Defense and Justice Thurgood Marshall's Condemnation of the Precept of Black Inferiority*, 17 Cardozo L. Rev. 1695 (1996); A. Leon Higginbotham Jr. & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimization of Racial Powerlessness through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. Rev. 969, 975 (1992).

three: inferiority, property, and powerlessness.[4] Judge Higginbotham's precepts were distilled from reading thousands of statutes and every antebellum slave case. His thesis was that a comprehensive framework of laws, customs, and practices had to be constructed to support and maintain an otherwise morally untenable and unworkable business model that was based on extracted labor, where people and their descendants were legally defined as property in perpetuity.

The death penalty, by its design and placement in the law, defined and enforced the core precepts of inferiority, property, and powerlessness necessary to create and maintain the institution of slavery.

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4. Higginbotham & Jacobs, *supra* note 3, at 975. The full ten precepts were:

1. Inferiority: *Presume, preserve, protect, and defend the ideal of the superiority of whites and the inferiority of Blacks.*

2. Property: *Define the slave as the master's property*, maximize the master's economic interest, disregard the humanity of the slave except when it serves the master's interest, and deny slaves the fruits of their labor.

3. Powerlessness: *Keep Blacks—whether slave or free—as powerless as possible* so that they will be submissive and dependent in every respect, not only to the master, but to whites in general. Limit Blacks' accessibility to the courts and subject Blacks to an inferior system of justice with lesser rights and protections and greater punishments than for whites. Utilize violence and the powers of government to assure the submissiveness of Blacks.

4. Racial "Purity": *Always preserve white male sexual dominance*. Draw an arbitrary racial line and preserve white racial purity as thus defined. Tolerate sexual relations between white men and Black women; punish severely sexual relations between white women and nonwhite men. With respect to children who are products of interracial sexual relations, the freedom or enslavement of the Black child is determined by the status of the mother.

5. Manumission and Free Blacks: *Limit and discourage manumission in order to minimize the number of free Blacks in the state*. Confine free Blacks to a status as close as possible to slavery.

6. Family: *Recognize no rights of the Black family; destroy the unity of the Black family*; deny slaves the right of marriage; demean and degrade Black women, Black men, Black parents, and Black children; and then condemn them for their conduct and state of mind.

7. Education and Culture*: Deny Blacks any education, deny them knowledge of their culture*, and make it a crime to teach those who are slaves how to read or to write.

8. Religion: *Recognize no rights of slaves to define and practice their own religion*, to choose their own religious leaders, or to worship with other Blacks. Encourage them to adopt the religion of the white master and teach them that God is white and will reward the slave who obeys the commands of his master here on earth. Use religion to justify the slave's status on earth.

9. Liberty: *Resistance. Limit blacks' opportunity to resist*, bear arms, rebel, or flee; curtail their freedom of movement, freedom of association, and freedom of expression. Deny Blacks the right to vote and to participate in government.

10. By Any Means Possible: *Support all measures, including the use of violence, which maximize the profitability of slavery and which legitimize racism.* Oppose, by the use of violence if necessary, all measures which advocate the abolition of slavery or the diminution of white supremacy.

Higginbotham, *supra* note 3, at 1697–98.

Carol S. Steiker and Jordan M. Steiker write:

> The explicitly race- and slave-based capital codes prevalent in the South, as well as the especially torturous modes of execution used for slave revolts and other serious crimes by blacks, not only reflected prevailing racist attitudes and institutions but also helped produce those attitudes by using the fearsome spectacle of public executions to imbue race and slave status with the utmost significance. From early colonial times through the Civil War, racial attitudes were hardened and entrenched "by mobilizing race-encoding categories of punishment: Who is whipped, who is hanged, and who is burned at stake?"
>
> As a result, in effect if not in explicit intent, "one of the functions of the death penalty . . . was to create race: to segregate the myriad social positions of the New World into hard and fast categories of white and black, free and enslaved."[5]

In other words, the death penalty provided explicit, palpable support for the proposition that enslaved and free Black people were inferior, no more than property, and ultimately powerless.

II. Overview

This Article describes the history of capital punishment in colonial and antebellum times. It will demonstrate that racial disparities in death sentences and executions are not significantly different from those produced by laws that defined criminal conduct and punishment based on the race of the defendant and the race and gender of the victim.

The Article will argue that because the death penalty was part of the legal infrastructure maintaining slavery and the racial hierarchy it required, death penalty abolition in the United States must be pursued within the context of the broader project of identifying and dismantling all the structures that perpetuate a racial hierarchy and inequality.

This Article is situated within legal history scholarship, connecting the death penalty's racially disparate outcomes to the legacy of slavery. Some of this scholarship was discussed compellingly in Justice Brennan's dissent in *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987). Judge A. Leon Higginbotham Jr. and others have made an enormous contribution to our understanding of racial disparities in the administration of the

5. *See* Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In) Visibility of Race*, 82 U. Chi. L. Rev. 243, 248–49 (2015) (quoting Stephen John Harnett, 1 Executing Democracy: Capital Punishment & The Making of America, 1683–1807, at 20 (2010).

death penalty today and their connection to racial disparities that were once explicitly required by law.

This Article also builds on decades of empirical research[6] that demonstrates overwhelmingly that the so-called "modern death penalty" is administered in a racially skewed manner. This body of research includes the award-winning work of Professor David Baldus[7] and other scholars, such as Professors Catherine M. Grosso,[8] Barbara O'Brien,[9] and Frank Baumgartner.[10] This Article seeks to inform our understanding of what capital punishment in the United States is and is not, based on this body of research and scholarship. The death penalty is not a public safety response to crime. It is a tool of violence fashioned to subjugate and define categories of people as non-human—as no more than chattel that could be bought, sold, bred, and worked to enrich others. If we are to end the death penalty completely and prevent its return, we must expose and address the foundational narrative of inequality it still supports. The Article ends with global recommendations for moving our society forward.

III. The Legal and Social History of the Death Penalty in the United States

The history of capital punishment in the United States can be traced back to the legal and social perspectives of seventeenth and eighteenth-century colonists, who were accustomed to England's "bloody code" and incorporated these norms into American law.[11] Early capital statutes

6. Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. 807, 839–840 n.66 (2008) (citing "exemplary research" in the field on race and capital punishment.").

7. Adam Liptak, *David C. Baldus, 75, Dies; Studied Race and the Law*, N.Y. TIMES (June 14, 2011), https://www.nytimes.com/2011/06/15/us/15baldus.html. Professor David C. Baldus held the position of Joseph B. Tye Professor of Law at the University of Iowa from 1969 until his death in 2011.

8. *Faculty & Staff*, MICH. STATE UNIV. COLL. OF L., https://law.msu.edu/faculty_staff/profile.php?prof=595 (last visited Mar. 5, 2024). *See, e.g.*, *Furman at Fifty: California's Failure's to Narrow Death-Eligibility*, 43 AMICUS J. 36 (2022); Catherine M. Grosso, Barbara O'Brien & Julie C. Roberts, *Local History, Practice, and Statistics: A Study on the Influence of Race on the Administration of Capital Punishment in Hamilton County, Ohio (January 1992–August 2017)*, 51 COLUM. H.R. L. REV. 905 (2020); Barbara O'Brien, Catherine M. Grosso, George Woodworth, & Abijah Taylor, *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990–2009*, 94 N.C. L. REV. 1997 (2016); Catherine M. Grosso, Barbara O'Brien, Abijah Taylor, & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 525 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 3d ed. 2014).

9. *Faculty & Staff*, MICH. STATE UNIV. COLL. OF L., https://www.law.msu.edu/faculty_staff/profile.php?prof=492 (last visited Mar. 5, 2024).

10. *Distinguished Service Medal Citation*, CAROLINA ALUMNI, https://alumni.unc.edu/richard-j-richardson/ (last visited Mar. 5, 2024).

11. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 5 (2002). England's criminal code became the harshest law in Europe during the eighteenth century. The development of the

authorized the death penalty for a long list and wide variety of offenses, including homicide, robbery, nonhomicidal crimes, and social infractions.[12] The scope and use of capital statutes enacted by the colonists varied by region.[13]

A. The Slave Codes, Black Codes, Jim Crow

When the first Africans were brought to the North American continent in 1619, a system of laws and customs was constructed to justify and support the fiction that kidnapped Africans were not people and could be forced to work and live as chattel. Colonial laws created two sets of rules—one for white workers and one for African workers. That legal framework would "become the social, political, and economic system of America."[14] Legal historian Ariela J. Gross describes "the unique brand of American slavery" this way: "For the first time in history, one category of humanity was ruled out of 'the human race' and into a separate subgroup that was to remain enslaved for generations in perpetuity."[15]

In her book *Caste: The Origins of Our Discontents*, Isabel Wilkerson describes the myriad ways in which law and custom normalized the status of enslaved people and elevated the status of white people, according to their economic, political, and social rank in society. She concludes that these laws and customs created an American caste system, which she describes as follows:

> [a]n artificial construction, a fixed and embedded ranking of human value that sets the presumed supremacy of one group against the presumed inferiority of other groups on the basis of ancestry and often immutable traits, **traits that would be neutral in the abstract, but are ascribed life-and-death meaning in a hierarchy favoring the dominant caste whose forebearers designed it. A caste system uses rigid, often arbitrary boundaries to keep the ranked groupings apart, distinct from one another and in their assigned places.**[16]

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law in the American colonies reflect the trend toward expanding the number of capital crimes, but to a lesser extent. *Id*. at 7.

12. *Id*. at 6.

13. *Id*. Unlike the northern colonies that enacted their own criminal codes influenced by English law, most southern colonies simply adopted the approach English law to capital crimes. *Id*. at 9.

14. Isabel Wilkerson, Caste: The Origins of Our Discontents 41 (2020).

15. David Thomas Konig, *The Persistence of Caste: Race, Rights, and the Legal Struggle to Expand the Boundaries*, 67 Wash. U. J.L. & Pol'y 147, 155–56 (2022) (citing Ariela Gross, What Blood Won't Tell: A History of Race on Trial in America 22–23 (2008)).

16. Wilkerson, *supra* note 14, at 17.

She writes further:

> The caste system instructs us all as to whose lives and opinions should bear the most weight and take precedence in any encounter. **One of its teachers is the criminal justice system, which descends from the criminal codes of the slavery era**.[17]

During the eighteenth century, the American colonies expanded the list of capital offenses that were applicable only to Black people.[18] The first of these statutes was enacted in New York in 1712 in response to a slave revolt. However, most death penalty statutes targeting enslaved and free Black people were enacted in the South, where enslaved and free Black people outnumbered the white population.[19] For example, in 1740, a South Carolina law was enacted to make "burning or destroying grain, commodities or manufactured goods" a capital offense.[20] "Enticing other slaves to run away" and "maiming or bruising whites" were also capital offenses in South Carolina.[21] Harboring a fear that enslaved people would poison plantation owners, Virginia lawmakers, in 1740, made it a capital offense for enslaved people to "prepare or administer medicine."[22]

These explicit racial distinctions in punishment were designed to help enslavers and the slave-labor economy in disciplining the growing population of enslaved people.[23] According to Georgia lawmakers, the status of being enslaved itself required a different regime of punishment "peculiar to the condition and circumstance of this province."[24] Similarly, Maryland's legislature conjectured that "'The Laws in Force, for the Punishment of Slaves' . . . were 'insufficient."[25]

Unsurprisingly, executions of enslaved people outnumbered executions of southern white people. For example, North Carolina executed at least one hundred enslaved people between 1748 and 1772.[26] The number of executions of enslaved people in North Carolina

17. *Id.* at 240–41.
18. Banner, *supra* note 11, at 8–9.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 9.
23. *See* Steiker & Steiker, *supra* note 5, at 245; s*ee also* State v. Mann, 13 N.C. 263, 267–68 (1829) ("The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance, usurped; but is conferred by the laws of man at least, if not by the law of God… this dominion is essential to the value of slaves as property, to the security of the master, and the public tranquility, greatly dependent upon their subordination; and in fine, as most effectually securing the general protection and comfort of the slaves themselves.").
24. *See* Banner, *supra* note 11, at 9.
25. *Id.*
26. *Id.*

during this twenty-four-year period is more than the number of white people executed during the entire colonial history of North Carolina, which lasted more than one hundred years.[27]

The difference in punishment was thus delineated starkly by race, with whites benefiting from a judicial leniency that stood in vivid contrast to the legal burdens placed upon enslaved people. Legal historian Stuart Banner makes an interesting observation regarding this dynamic:

> The long list of capital crimes for slaves is, paradoxically, more readily understandable today than the shorter list for whites. **Harsh punishments were obviously useful to those in power for disciplining a captive labor force**. People who were already enslaved had little to lose and were understood to have less incentive than whites to follow the law. People who were believed to have less faith than whites in the Christian system of eternal rewards and penalties were thought to need more conspicuous penalties in this life. But how can we explain the death penalty for so many crimes committed by whites?[28]

The answer to Banner's paradox is hiding in plain view. The capital-sentencing schemes developed at the time were not only dual systems of justice—defining crimes and punishment based on race and status—but the purpose of these dual systems differed. The system prescribed for white people was based on the seventeenth- and eighteenth-century understanding of human nature, societal rights, and obligations. While the capital punishment regime imposed on enslaved and free Black people incorporated elements of the death penalty system prescribed for white people, including the view that capital punishment, in part, served to "facilitate the criminal's repentance,"[29] the outsized death penalty and expedited capital procedures for enslaved and free Black seemed to focus on incapacitation and deterrence.

When early efforts to abolish capital punishment succeeded in some places in the North, and the number of capital offenses was reduced more broadly for white people, the number of capital crimes for enslaved and free Black people was not. The number of capital offenses for enslaved and free Black people increased during this period, especially in Southern states.

27. *Id.*
28. *Id.* (emphasis added).
29. *See* BANNER, *supra* note 11, at 16.

A review of representative slave codes and antebellum laws further illustrates this point and reveals the existence of two systems of justice: one for enslaved and free Black people, and another for white people.

In antebellum Virginia, for example, the law explicitly defined crimes and prescribed punishment based on the race of the defendant and the victim. In particular, "free African Americans (but not whites) could get the death penalty for rape, attempted rape, kidnapping a woman, and aggravated assault—all provided the victim was white; slaves in Virginia were eligible for death for . . . a mind-boggling sixty-six crimes,"[30] whereas "whites in Virginia could face the death penalty for just four crimes."[31]

A Virginia statute expressly stated that "a slave would be punished with death for any offense that, if committed by a free person, would be punishable by imprisonment for not less than three years."[32] Consequently, in Virginia, "free persons convicted of disturbing or obstructing a railroad" faced two to five years in prison, whereas enslaved people faced a death sentence.[33]

30. *See* Steiker & Steiker, *supra* note 5, at 248.

31. *Id.*; s*ee also* K.M.M. & A.J.S., *Capital Punishment in Virginia*, 58 Va. L. Rev. 95, 105 (1972). *See also* State v. McCarn, 30 Tenn. 494 (1851). In *McCarn*, the Court found that an enslaver, Daniel McCarn—who had ordered his enslaved captive named David to murder his wife, was liable as an accessory before the fact and punishable as a principal under the law of accessories. However, Daniel could only be punished to the extent that a white man could be punished for such a crime, which at the time was an extended term in prison. David, on the other hand, was punishable for first-degree murder as a principal even though he had been ordered by his enslaver to commit the crime. The Court reasoned that "the slave may lawfully resist his command to perpetrate a crime . . . and it is no excuse or defense for him, that he was acting under the orders of his master." *Id*. at 497. Under the law, upon conviction, David was required to be punished by death by hanging. *See also* State v. Bonner, 39 Tenn. 135, 138–39 (1858). In Tennessee, it was a misdemeanor crime for an enslaved person to sell liquor, punishable by "a limited number of stripes to be inflicted by order of a justice." The white defendant in *Bonner* was found to be an accessory in the unlawful sale of liquor by an enslaved person and punishable as a principle. The Court ruled, that the white defendant "is liable to be prosecuted and punished in the same manner as if the offence charged upon the slave had been committed by a white man." Bonner therefore was entitled to be punished less severely because of his race. In 1843, Alabama treated the killing of an enslaved person by an overseer as second-degree murder, providing: "If any person being the overseer or manager of any slave or slaves, or having the right to correct such slave or slaves, shall cause the death of the slave by such barbarous or inhuman whipping or beating, or by any other cruel or inhuman treatment, although without intention to kill, or shall cause the death of any such slave or slaves by the use of an instrument in its nature calculated to produce death, though without intention to kill . . . ." *See* State v. Flanigan, 5 Ala. 480 (1843). The import being that so long as there was no proven *intent* to kill it is not first-degree murder to so brutally assault an enslaved people that they died. Said more plainly, some level of lethal violence against enslaved people was expected and literally to some degree tolerated.

32. Higginbotham & Jacobs, *supra* note 3, at 1022.

33. *Id.* at 1022 n.298 (reporting that these "discrepancies in the substantive criminal law were abolished in 1866.").

Georgia's "criminal code required a death sentence for any murder committed by a slave or free person of color," but created an option for a life sentence for white people who committed murder.[34] The punishment for rape was statutorily determined based on the race of the defendant and the victim. The "[r]ape of a white woman by a Black person carried a mandatory death sentence, but a white man faced a two- to twenty-year prison term" for the same crime. In contrast, the rape of a Black woman "could be punished a 'by fine and imprisonment, at the discretion of the court'" without regard to the race of the defendant.[35]

Enslaved people in Texas could be executed for insurrection, arson, attempted murder, rape, attempted rape, robbery, attempted robbery, and assault with a deadly weapon if the victim were white. Free Black people faced capital punishment for the same offenses as well as for kidnapping a white woman. The death penalty was not a possible punishment for white people convicted of the same offenses.[36]

The differences often went beyond disparities in the severity of the punishments and extended to such fundamental procedural protections as the right to a jury trial or the right to testify in one's own defense. Virginia and other colonies with large numbers of enslaved people used expedited procedures for their trials. In 1692, Virginia began using local justices of the peace instead of legally trained judges for capital trials against enslaved people.[37] An enslaved person in Virginia could be sentenced to death and executed without a trial.[38] South Carolina's

34. McCleskey v. Kemp, 481 U.S. 279, 329 (1987) (Brennan, J., dissenting).

35. *Id* at 330. *See also,* Ngozi Ndulue, Death Penalty Info. Ctr., Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty 9 (2020), https://documents.deathpenaltyinfo.org/pdf/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf. The famous case of State of Missouri v. Celia, a Slave (1855) is instructive: Celia, an enslaved, pregnant, nineteen-year-old killed Robert Newsom, the enslaver who had raped her since she was fourteen years old. Celia killed Newson when he entered her cabin demanding sex over her objections and warning that she would hurt him. Celia was convicted of first-degree murder and hanged on December 21, 1855. Notably, Missouri law stated that resistance to taking "any woman unlawfully against her will and by force, menace or duress, compel her to be defiled," would **have been considered a justifiable excuse for a woman to kill a man.** State of Missouri v. Celia makes it clear that an enslaved woman had no such right and for these purposes, fell outside the definition of "woman." *See* Melton A. McLaurin, Celia, A Slave: A True Story (1991).

36. Banner, *supra* note 11, at 141. *See also* Steiker & Steiker, *supra* note 5, at 248; State v. Davidson, 42 Tenn. 184, 187–88 (1865) ("By reference to the Code, sec. 4610, we find rape is defined to be the unlawful carnal knowledge of a woman, forcibly and against her will. Sec. 4611 declares that 'whoever is convicted of the rape of any female of the age of ten years or upwards, shall undergo imprisonment in the Penitentiary, not less than ten, nor more than twenty-one years.' By sec. 2625, it is provided, among other things, that rape, when committed by a slave upon a free white female, shall be capital, and punished with death by hanging.").

37. Banner, *supra* note 11, at 9.

38. Higginbotham & Jacobs, *supra* note 3, at 984.

legal system, like Virginia's, weighed . . . heavily against enslaved people accused of crimes.[39]

Judge Leon Higginbotham Jr. describes these legal frameworks as follows:

> Characterizing the judiciary's treatment of slaves and free blacks as a "system of justice" is almost a semantic illusion. Free whites were guaranteed an elaborate system of procedural rights and protections, but blacks suffered under an equally elaborate regime of injustice and harsh penalties. The result was implicit justice for whites and explicit injustice for blacks. White Virginians implemented this bifurcation in the legal system by denying slaves and, during some periods, free blacks the basic legal rights they themselves took for granted.[40]

Statutorily explicit differences in punishment based on the race of the victim and the defendant carried through to the methods of execution. Black people were much more likely to be subjected to the most grotesque and extreme forms of execution compared to white people who were sentenced to death.[41] The 1729 Maryland legislature found that "the ordinary manner of executing criminals . . . is not sufficient" for the execution of Black people and therefore "authorized its judges to sentence slaves in cases of murder or arson 'to have the right Hand cut off, to be hang'd in the usual Manner, the Head severed from the Body, divided into Four Quarters, and the Head and Quarters set up in the most publick Places of the County where such Fact was committed."[42] The death penalty was a key component of a legal and social framework that used unrelenting violence to maintain the racial hierarchy necessary to extract the economic benefits of slavery.

The point here is not that the death penalty was created solely as an instrument of enforcing and maintaining chattel slavery. History demonstrates that it was not. The death penalty in the United States predated the kidnapping of the first Africans brought to the colonies. white people have certainly been and continue to be subjected to death as punishment. Capital punishment was used as an implement of slavery, much like the shackles used to constrain the movement of enslaved people and signify their status. The result was the creation of essentially two capital punishment regimes—one for white people and another for enslaved and free Black people. As the scope and use of the

39. *Id.* at 1015.
40. *Id.* at 984.
41. Steiker & Steiker, *supra* note 5, at 246.
42. *See* Banner, *supra* note 11, at 75.

death penalty have narrowed over time and declined, the race-encoded death penalty has somehow remained.

B. Capital Punishment and Lynching

Even after Emancipation, both judicial and extrajudicial violence were used to perpetuate the oppression and exploitation of Black people by thwarting full political participation in the democratic process.

Southern whites, especially, were committed to this project and by any means necessary. Lynching "was part of a system of White supremacist terror and domination following Reconstruction."[43] Daniel Byman writes:

> White supremacist violence destroyed the remarkable political progress that had been made by the formerly enslaved. During Reconstruction, 17 Black Americans served in the U.S. Congress, more than 600 in state legislatures, and hundreds more in local offices throughout the South. Voters in Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, and South Carolina all elected Black leaders to national office. By the end of the century, this number had declined to a few scattered local officeholders. Not until 1967, almost 100 years after Reconstruction ended, did Black Americans return to the Senate, when Edward Brooke of Massachusetts won his seat. [44]

Byman writes further: Throughout this period, violent plagued the South in Louisiana alone, a congressional report found that white supremacists had killed more than 1,000 people, mostly Black Louisianans, between the April and November 1868 elections, and that they had killed or wounded 2,000 more in the weeks before the 1871 election.[45] In Arkansas, white supremacists killed more than 2,000 people in connection with the 1868 presidential election.[46]

The Equal Justice Initiative has documented 4,084 terror lynchings in twelve southern states between the end of Reconstruction and 1950,

43. Daniel Byman, *White Supremacy, Terrorism, and the Failure of Reconstruction in the United States*, 46 Int'l Sec. 53, 54 (2021). *See also* Charles J. Ogletree Jr., *Black Man's Burden: Race and the Death Penalty in America*, 100 Or. L. Rev. 437, 440–41 (2022) (noting that "[i]n a sense, to take a historical view, the racially disproportionate application of the death penalty can be seen as being in historical continuity with the long and sordid history of lynching in this country. It is also notable in this regard that the states of what is often called the 'Death Belt'—the southern states that together account for over 90% of all executions carried out since 1976—overlap considerably with the southern states that had the highest incidence of extra-legal violence and killings during the Jim Crow era.").

44. Byman, *supra* note 43, at 54.

45. *Id.* at 81.

46. *Id.*

and more than 300 in other states.[47] Public officials, at times, promised judicial executions to persuade lynch mobs to stand down.[48]

Lynching was prevalent in the South in the late nineteenth and early twentieth centuries.[49] In Kentucky, between 1865 and 1940, there were 229 executions and 353 lynchings. Lynchings outnumbered executions eighty-two to six in the 1870s and ninety-two to forty in the 1890s.[50]

Moreover, the legal impunity with lynching occurred —often with tacit or explicit support from public officials—demonstrates the degree to which violence against Black people was normalized and tolerated.[51] It is worth noting that, despite decades of effort the Emmett Till Antilynching Act[52] was only signed into law in 2022.

IV. Current Status of the Death Penalty in the United States

A. The availability and scope of authority to seek the death penalty

According to the Death Penalty Information Center (DPIC), twenty-seven jurisdictions in the United States authorize death as a possible punishment for murder.[53] The death penalty is not an authorized punishment in twenty-three states.[54] Six states have gubernatorial

47. Equal Just. Init., Lynching in America: Confronting the Legacy of Racial Terror (3d ed. 2017), https://eji.org/reports/lynching-in-america/.

48. Ndulue, *supra* note 35, at 8.

49. Banner, *supra* note 11, at 229. Ndule, *supra* note 35, at 6.

50. Banner, *supra* note 11, at 229. Ndule, *supra* note 35, at 6.

51. *See generally*, Equal Just. Init., *supra* note 47.

52. Pub. L. No. 117–107, 136 Stat. 1125 (2022). The law finally passed the US Senate by unanimous consent after being delayed by Senator Rand Paul of Kentucky. Ali Zaslav & Clare Foran, *Rand Paul Says He'll Back Emmett Till Antilynching Act of 2022 after Holding up Previous Bill,* CNN (Mar. 2, 2022), https://www.cnn.com/2022/03/02/politics/rand-paul-emmett-till-antilynching-act-senate/index.html. Three Republican Representatives—Andrew Clyde from Georgia, Thomas Massie from Kentucky, and Chip Roy from Texas—were the sole dissenters to the bill when it passed the House. *See* Ewan Palmer, *These Three Republicans Voted Against Making Lynching a Hate Crime,* Newsweek (Mar. 1, 2022, 4:30 AM), https://www.newsweek.com/emmet-till-antilynching-act-three-republicans-vote-1683518.

53. *State by State*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Aug. 13, 2023). As of January 1, 2023, approximately 2331 people are on death row, including those at the federal level. Deborah Fins, Legal Def. Fund, Death Row USA Winter 2023 (2023), https://www.naacpldf.org/wp-content/uploads/DRUSAWinter2023.pdf. David Rigby and Charles Seguin studied whether where capital punishment is used reflects a history of lynching or a history of slavery. They found that a history of slavery was *the* predictor of executions. According to Rigby and Seguin, "capital punishment is more commonly practiced in states where slavery was legal as of 1860." They argue that "slavery's state-level institutional legacy is central to contemporary capital punishment." David Rigby & Charles Seguin, *Capital Punishment and the Legacies of Slavery and Lynching in the United States*, 694 Annals Am. Acad. Pol. & Soc. Sci. 205 (2021).

54. *State by State*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/state-and-federalinfo/state-by-state (last visited Aug. 13, 2023).

moratoriums on executions in place: California, Pennsylvania, Oregon, Arizona, Ohio, and Tennessee.[55]

Within states authorizing death as punishment, only a few jurisdictions sentence people to death and execute them. The death penalty is being imposed on a small number of increasingly geographically isolated people. In 2023, for the ninth consecutive year, fewer than thirty people were executed and less than fifty people were sentenced to death.[56]

These executions took place in Texas, Florida, Missouri, Oklahoma, and Alabama.;[57] In 2023, Texas executed eight people; Florida executed six people; Oklahoma and Missouri each executed four people; and Alabama executed two people.[58]

There has been progress limiting the scope of the death penalty in the twenty-seven states that retain capital punishment. In 2019, Oregon narrowed the number of aggravating factors—facts that would justify a death sentence—from nineteen to four.[59] This action by the legislature formed the basis of Oregon Governor Brown's 2022 commutations of seventeen death sentences. Governor Brown's actions continued a moratorium on executions in Oregon that began in 2011.[60]

Kentucky and Ohio excluded people with serious mental illness from capital punishment[61] in 2022 and 2021, respectively. The Texas House of Representatives approved and sent to the Senate a bill that would limit eligibility for the death penalty under the "Texas Law of Parties" to major participants in a capital murder who acted with reckless indifference to human life. No action was taken in the Senate.[62]

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55. *Id.*

56. Death Penalty Info. Ctr., The Death Penalty in 2023: Year End Report (2023), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2023-year-end-report#executive-summary (last visited Mar. 19, 2024) [hereinafter Death Penalty Info. Ctr., 2023 Report].

57. *Id.*

58. Executions by State and Year, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year (last visited Mar 19, 2024).

59. American Bar Association, The State of Criminal Justice 2023, at 206 (Elizabeth Kelly et al. eds., 2023).

60. *Id.* at 205–06.

61. Death Penalty Info. Ctr., The Death Penalty in 2022: Year End Report, https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-deathpenalty-in-2022-year-end-report (last visited Sept. 25, 2023). Legislation was introduced to prohibit people with mental illnesses from being punished with death in Arizona, Arkansas, and Texas. The measures failed in Arizona and Arkansas. The Texas bill was approved by the Texas House. Death Penalty Info. Ctr., 2023 Report, *supra* note 56, at 16.

62. *88(R) Actions for HB 1736*, Texas Legislature Online, https://capitol.texas.gov/BillLookup/Actions.aspx?LegSess=88R&Bill=HB1736 (last visited Mar. 20, 2024).

However, there was also movement in the opposite direction to make it easier to execute people in states where the death penalty remains entrenched. Alabama voters amended their state constitution to require the governor to notify the attorney general and make reasonable efforts to notify a designated family member of homicide victims before granting a temporary stay of execution or commuting a death sentence to life. Failure to do so renders the temporary reprieve from execution or commutation to life void and invalid.[63] Eighty-nine percent of Alabama voters approved the measure, which came out of the Alabama legislature with overwhelming support.

In 2023, Florida revised its death-penalty statute to make it easier to execute people.[64] Among the measures enacted was a revision to its death-penalty statute permitting the death sentence to be imposed when only eight of twelve jurors recommend a sentence of death—the lowest threshold for imposing death in the country.[65] Florida also enacted a measure that would authorize the death penalty for sexual battery and prevent a judge from reducing a jury recommendation of death to life.[66] Florida, Idaho, South Carolina, and Mississippi expanded secrecy around executions as well.[67] Finally, Tennessee amended its

63. Death Penalty Info. Ctr., 2023 Report, *supra* note 56. *See also Alabama Amendment 3, Notice to Victim's Family Required for Commutation or Reprieve of Death Sentences Amendment*, Ballotpedia, https://ballotpedia.org/Alabama_Amendment_3,_Notice_to_Victim%27s_Family_Required_for_Commutation_or_Reprieve_of_Death_Sentences_Amendment_ (last visited July 10, 2023); S.B. 196, Reg. Sess. (Al. 2022) (Alabama constitutional amendment requiring the Governor to provide notice to interested parties prior to granting a reprieve or commutation).

64. The State of Criminal Justice 2023, *supra* note 56, at 218.

65. *Florida Legislature Rescinds Unanimous-Jury Requirement in Death Sentencing*, Death Penalty Info. Ctr. (Apr. 18, 2023), https://deathpenaltyinfo.org/news/florida-legislature-rescinds-unanimous-jury-requirement-in-death-sentencing.

66. *2023 Legislative Activity*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/stories/2023-legislation-activity (last visited July 12, 2023).

67. *See* Ron Tabak, Capital *Punishment*, *in* The State of Criminal Justice 2023, at 220 (Elizabeth Kelly ed. 2023). Idaho added the firing squad as a method of execution in March 2023. *See* H.B. 186, 67th Leg., 1st Reg. Sess. (Idaho 2023). South Carolina would hide the identities of members of the execution team and suppliers of lethal drugs. *See* S.B. 120, 125th Assemb., 1st Reg. Sess. (S.C. 2023). *See also 2023 Legislative Activity, supra* note 66. The Florida law would hide the identity of "any person or entity" participating in an execution, including those compounding or otherwise securing or supplying execution drugs. *See* Fla. Stat. Ann. § 945.10 (1)(g),(j)(1) (LexisNexis 2023). Idaho law conceals the identities of "any persons or entities involved in the planning, training, or performance of an execution including, "[t]he on-site physician and members of the escort team or medical team; and [a]ny person or entity who compounds, synthesizes, tests, sells, supplies, manufacturers, stores, transports, procures, dispenses, or prescribes the chemicals or substances for use in an execution or that provides the medical supplies or medical equipment for the execution process". *See* H.B. 658, 66th Leg., 2nd Reg. Sess. (Idaho 2022). The on-site physician and members of the escort team or medical team; and [a]ny person or entity who compounds, synthesizes, tests, sells, supplies, manufactures, stores, transports, procures, dispenses, or prescribes the chemicals or substances for use in an execution or that provides the medical supplies or medical equipment for the execution process." *Id.* A second provision directs that the concealed

death-penalty statute to allow a jury to expedite executions and require that they take place within thirty business days of the end of any appeals or post-conviction relief.[68]

While the federal government continues to seek death sentences, Attorney General Merrick Garland issued a memorandum on June 30, 2021, pausing executions because of serious concerns about the death penalty on several grounds, including the disparate impact of the punishment on people of color.[69] There are approximately forty-one prisoners on federal death row. Sixteen federal executions have been conducted since 1972—including thirteen between July 2020 and January 2021.[70]

Even with some procedural retrenchment and efforts to expand the death penalty in some states, the decline of capital punishment has been remarkably consistent and durable. Unlike the 1990s, when perceptions about high crime rates seemed to bolster support for capital punishment, current political rhetoric and public concern about crime has not had that effect.[71] According to the 2023 Year End Report of the Death Penalty Information Center, current support for capital punishment remained at a near-half century low of 53% and opposition stood at 44%.[72]

For the past nine consecutive years, fewer than thirty people have been executed and fewer than fifty people sentenced to death

information "shall not be admissible as evidence or discoverable in any proceeding before any court, tribunal, board, agency, or person." *Id.* A July 2022 law gives Mississippi corrections officers broad discretion to select from lethal injection, electrocution, firing squad and nitrogen hypoxia as the execution method. *See* Miss. Code Ann. § 99-19-51 (2023).

68. *Recent Legislative Activity*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/facts-and-research/recent-legislative-activity (last visited July 12, 2023). *See also* H.B. 289, 113th Gen. Assemb. (Tenn. 2023).

69. *Department of Justice Formally Pauses Federal Executions to Review Trump Death-Penalty Regulations*, Death Penalty Info. Ctr. (July 6, 2021), https://deathpenaltyinfo.org/news/department-of-justice-formally-pauses-federal-executions-to-review-trump-death-penalty-regulations. Attorney General Garland indicated that DOJ would review three changes made during the Trump Administration under Attorney General Barr and Jeffrey Rosen to the protocols for executions, including replacing a three-drug protocol with barbiturate pentobarbital and, in some instances, authorizing executions using the electric chair, firing squad, nitrogen hypoxia, or cyanide gas. *See id.*

70. *Federal Death Penalty*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty (last visited Aug. 21, 2023).

71. *See* John Gramlich, *What the Data Says (and Doesn't Say) About Crime in the United States*, Pew Rsch. Ctr. (Nov. 20, 2020), https://www.pewresearch.org/short-reads/2020/11/20/facts-about-crime-in-the-u-s/; *see also* Megan Brenan, *Record-High 56% in U.S. Perceive Local Crime Has Increased*, Gallup (Oct. 28, 2022), https://news.gallup.com/poll/404048/record-high-perceive-local-crime-increased.aspx.

72. Death Penalty Info Ctr., 2023 Report, *supra* note 56. *See also* American Bar Association, *supra* note 59, at 193.

each year.[73] As a benchmark for comparison, in 1996, 315 people were sentenced to death, and in 1999, ninety-eight people were executed.[74] Notably, 50% of Americans think the death penalty is applied unfairly.[75]

B. Racial disparities in death sentences and executions

Despite capital punishment's decline in use and popularity and the marked increase inopposition to it, racial disparities in death penalty outcomes remain. Across death-penalty jurisdictions, including the federal government, as of October 2022, 41% of people on death row are Black (961; 14% are Latinx (325); 42% are white (978 and 3% are not identified as either Black, Latinx, or white.[76] The racial distribution of people on death row is markedly disproportionate to the U.S. population, in which 61.6% of the population is white and only 12.4% is Black.[77]

As has been true since its inception, when the victim is white, the death penalty is more likely to be invoked. David Baldus¸ George Woodworth, and Charles Pulaski demonstrate that the odds of receiving a death sentence in Georgia are more than four times more likely if at least one of the victims is white.[78] The death penalty continues to operate within and perpetuate a racial hierarchy that deems crimes against white victims as inherently more serious and deserving of the most severe punishment. This hierarchy also considers defendants of color and Black defendants, especially, to be more culpable and therefore more deserving of death as punishment than others.

The racial disparities identified in Georgia are not limited to that state. They exist in virtually every state that uses capital punishment. The U.S. General Accounting Office (GAO) in 1990 reviewed decades of empirical research regarding death-sentencing outcomes. The GAO

73. Death Penalty Info. Ctr., 2023 Report, *supra* note 56, at 2.

74. *Id. supra* note 61, at 11.

75. Megan Brenan, *New 47% Low Say Death Penalty Is Fairly Applied in U.S.*, Gallup.com (2023), https://news.gallup.com/poll/513806/new-low-say-death-penalty-fairly-applied.aspx (last visited Mar. 20, 2024).

76. *Race and the Death Penalty by the Numbers*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/policy-issues/race/race-and-the-death-penalty-by-the-numbers (last visited Aug. 27, 2023).

77. *See generally* Nicholas Jones, Rachel Marks, Roberto Ramirez & Merarys Ríos-Vargas, *2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. Census Bureau (Aug. 12, 2021), https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html.

78. David C. Baldus, Charles Pulaski, and George Woodworth, *Comparative Review of Death Sentences: an Empirical Study of the Georgia Experience*, 74 J. Crim. L. & Criminology 661 (1983); *see also* Ndulue, *supra* note 35, at 20.

found that Black defendants were punished more severely with death than similarly situated non-Black defendants. They also found that defendants whose victims were white were more likely to be punished with death.[79] Later reviews of data covering 1990 to 2013 found the same patterns of discrimination to be present throughout the period studied.[80] These findings of racial disparities are consistent and persistent.

Researchers Jeffrey Fagan, Garth Davies and Raymond Paternoster analyzed first-degree-murder convictions in Georgia from 1995 to 2004. They sought to confirm, first, that "the persistent arbitrariness . . . and the racial inequality in the selection of defendants and cases for capital punishment" that existed fifty years ago when *Furman v. Georgia*[81] was decided remained.[82]

In *Furman*, the Supreme Court ruled that then existing death statutes posed too great a risk of arbitrariness to be consistent with the dictates of the 8th Amendment. Consequently, death penalty statutes at the state and federal level were invalidated and the death penalty ended for a short period. However, four years later, the Court declined to rule that the death penalty violated the Constitution under all circumstances, when it approved revised death penalty statutes in Georgia, Florida and Texas which were supposed to address concerns about arbitrariness and discrimination.[83] The question that remains today is whether the leap of faith taken by the Court was justified and borne out by the facts. The research demonstrates clearly that it was not.

Fagan, Davies, and Paternoster's research sought further to identify the locus of arbitrariness and discrimination in the process where the race of the victim, especially if the victim is a white female, determines who is sentenced.[84] They found that statutory mechanisms that are supposed to circumscribe arbitrariness and discrimination, such as aggravating factors, failed to do so. They found also that the statutory

79. Jeffrey Fagan, Garth Davies & Raymond Paternoster, *Getting to Death: Race and the Paths of Capital Punishment After Furman*, 107 Cornell L. Rev. 1565, 1571 (2022). *See id.* at 1571 n.27 ("[I]n 82% of the studies, defendants who murdered white people were more likely to be sentenced to death than those who murdered Black people, regardless of the study design, sampling, and analysis methods." (Citing U.S. Gen. Acct. Off., GAO/GGD-90-57, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities 5–6 (1990)).

80. *Id.*

81. 408 U.S. 238 (1972).

82. Fagan, Davies & Paternoster, *supra* note 79, at 1565.

83. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976). *But see* Woodson v. North Carolina, 428 U.S. 280 (1976) (holding that mandatory death sentences are unconstitutional).

84. Fagan, Davies & Paternoster, *supra* note 79, at 1571–82 n.70.

aggravating factors themselves were often race-encoded, resulting in white life being treated as inherently more valuable when lost and justifying the harshest punishment.[85]

Moreover, as executions have become rarer, racial disparities have become even more pronounced. Researchers Scott Phillips and Justin Marceau found that defendants convicted of killing white victims were more likely to be sentenced to death than defendants convicted of killing Black victims. Of defendants who were convicted of killing a white victim, 2.26% were executed. This is compared to 0.13% of defendants who were convicted of killing a Black victim and ultimately executed. These figures represent an overall execution rate for defendants convicted of killing a white victim that is seventeen times greater for defendants convicted of killing Black victims.[86] It is worth noting that most studies of racial disparities have focused on rates of death sentencing and not the final outcomes in these cases, for a variety of reasons.[87] This finding, that racial disparities that persist through execution and are even greater than at earlier stages, challenges the assumption that bias and discrimination would be addressed at later stages in the process, through appeals.[88] While the amount of research on this point is not as extensive as the research focused on sentencing outcomes, it is consistent with findings of racially disparate outcomes at earlier stages of the death sentencing process.

Taking an longer view of trends in capital sentencing, we see that current death-sentencing patterns are much like those found before *Furman*. A study of capital trials for rape from January 1, 1945 to the summer of 1965 found that Black defendants with white victims were at much greater risk of receiving a death sentence than any other racial category of cases.[89] These results are consistent with data from 1930 to 1970 that indicates that 89% of the 455 defendants executed nationwide for rape, largely in the South, were Black.[90] Unadjusted data from research that predated the *Furman* decision further illustrates a pattern of race-based sentencing: 49% of the 3,334 defendants executed for murder during this same period were Black. Data collected by Watt

85. *Id*. at 1614, 1582 n.70.
86. Scott Phillips & Justin F. Marceau, *Whom the State Kills*, 55 Harv. C.R.-C.L. L. Rev. 585, 587 (2020).
87. *Id*. at 594.
88. *See id*. at 587.
89. Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 Annals Am. Acad. Pol. & Soc. Sci. 119, 130 (1973).
90. *Id.* at 123.

Espy indicates that from the 1910s to the 1950s, between sixty and seventy percent of the people executed for murder in the South were Black.[91] Another study of Georgia before the *Furman* decision also revealed strong race-of-defendant and race-of-victim effects among defendants convicted of murder.[92]

Cases involving white victims are consistently far more likely to be charged capitally and to result in a death sentence and/or execution than other cases, regardless of the race of the person committing the homicide.[93] As will be discussed next, these patterns of death sentencing, and executions do not reflect a proportional response to the level of victimization among races.

The graphics[94] that follows illustrate the racial patterns that have consistently been a feature of the death penalty in the United States further illustrate the geographic distribution[95] of racially identifiable death sentences.

91. David C. Baldus, George Woodworth, David Zuckerman, & Neil Alan Weiner, *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, 1658 n.61 (1998). David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DePaul L. Rev. 1411 (2004).

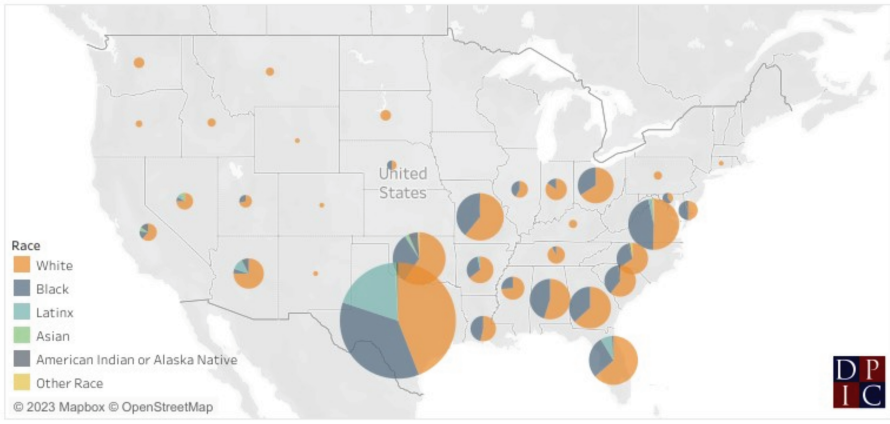
92. Baldus & George Woodworth, *supra* note 91, at 1415.

93. These longstanding patterns of racially identifiable death sentencing are consistent with the well-documented findings of Gunnar Myrdal published nearly 80 years ago in his groundbreaking book An American Dilemma: The Negro Problem and Modern Democracy. He writes about the functioning of the American legal system connecting it back to the nation's history of slavery: "As long as only Negroes are concerned and no whites are disturbed, great leniency is shown in most cases . . . . For offenses which involve actual or potential danger to whites, however, Negroes are punished more severely than whites . . . . When Negroes commit crimes against whites, however, there is good reason to believe that the sentences are unusually heavy. The South makes the widest application of the death penalty and Negroes come in for more than their share of executions." Gunnar Myrdal, Richard Sterner & Arnold Marshall Rose, An American Dilemma: The Negro Problem and Modern Democracy 551, 554 (1944).

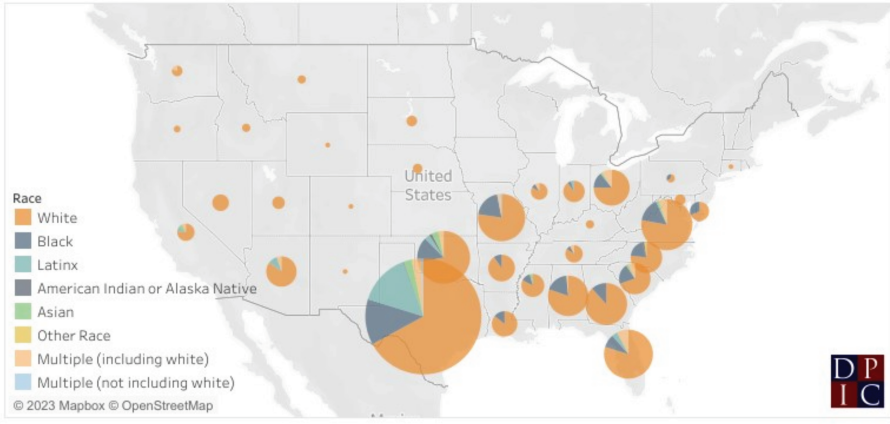
94. *Race and the Death Penalty by the Numbers*, Death Penalty Info. Ctr., *supra* note 76.

95. *Race*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/policy-issues/race (last visited Aug. 27, 2023).

U.S. Executions by Race of Defendant

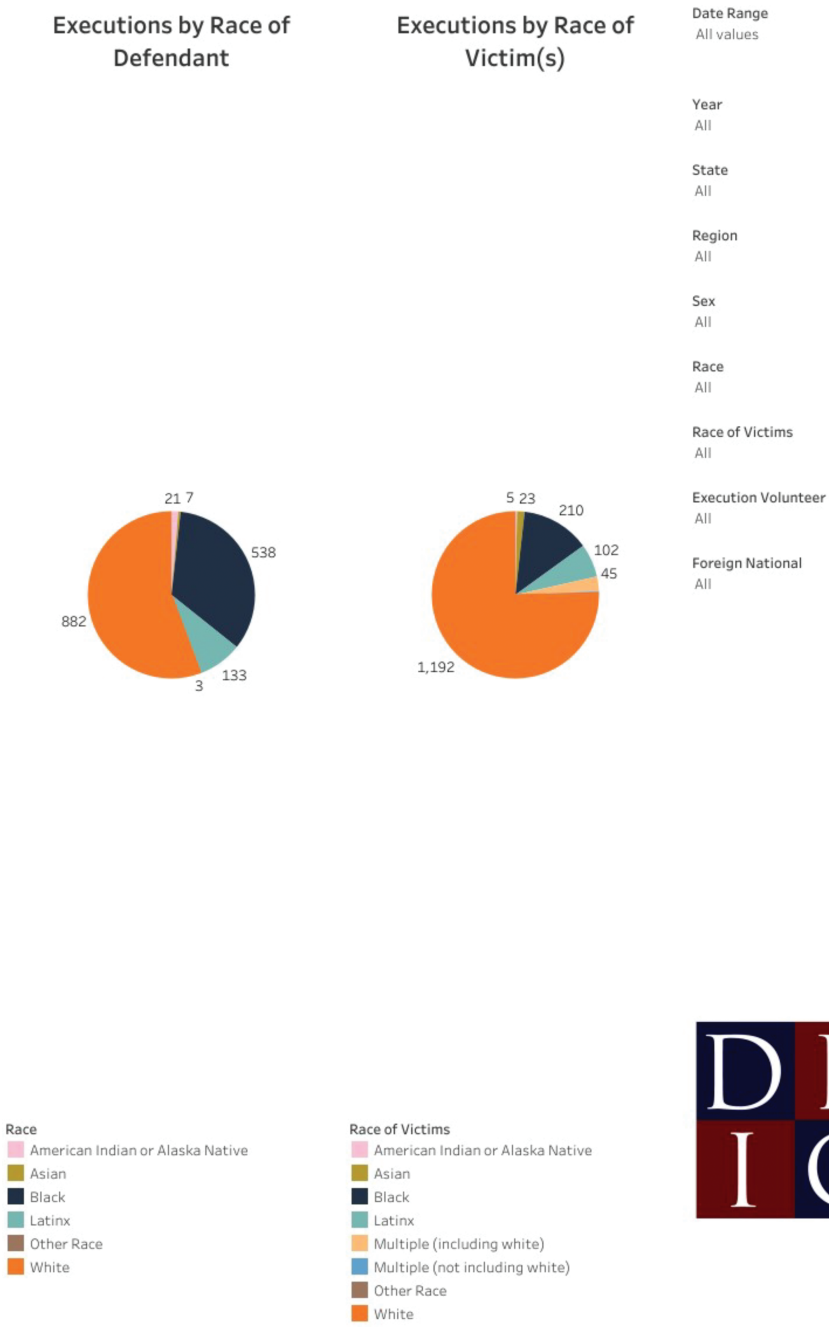


U.S. Executions by Race of Victim



Date Range	State	Race	Sex	Execution Volunteer
All values	All	All	All	All

Year	Region	Race of Victims	Foreign National
All	All	All	All


Executions by Race of Defendant
21 7
538
882
133
3
Executions by Race of Victim(s)
5 23
210
102
45
1,192
Date Range
All values
Year
All
State
All
Region
All
Sex
All
Race
All
Race of Victims
All
Execution Volunteer
All
Foreign National
All
Race
American Indian or Alaska Native
Asian
Black
Latinx
Other Race
White
Race of Victims
American Indian or Alaska Native
Asian
Black
Latinx
Multiple (including white)
Multiple (not including white)
Other Race
White
D P
I C

The import of the racial disparities in sentencing and executions described is revealed when one understands the historical context in which the death penalty was developed in the United States. A consistent body of research reveals a pattern of death sentences based on race that mirrors and continues outcomes created by explicit distinctions in colonial and antebellum slave codes.

C. The disconnect between the death penalty and public safety

Policy and political debates about capital punishment have been framed as narratives about public safety.[96] However, even a cursory review of the way in which the death penalty is used demonstrates that the death penalty is not a public-safety tool.[97] We have seen this incongruity elsewhere in the criminal legal system.

In her groundbreaking book *The New Jim Crow*, Michelle Alexander demonstrates that the War on Drugs did not have a legitimate law-enforcement objective. She does this by demonstrating the misalignment between the focus of the War on Drugs, declining crime rates, and the racial breakdowns for drug criminality. She describes the War on Drugs and the approach taken to it by law enforcement as a racialized policy designed to enforce second-class status on Black people.[98] Alexander writes:

> The more things change, the more they remain the same." In each generation, new tactics have been used for achieving the same goals—goals shared by the Founding Fathers. Denying African Americans citizenship was deemed essential to the formation of the original union. Hundreds of years later, America is still not an egalitarian democracy. The arguments and rationalizations that have been trotted out in support of racial exclusion and discrimination in its various forms have changed and evolved, but the outcome has remained largely the same. An extraordinary percentage of black men in the United States are legally barred from voting today, just as they have been throughout most of American history. They are also subject to legalized discrimination in employment, housing, education, public

96. *The Death Penalty Today: Defend It, Mend It or End It?*, Pew Rsch. Ctr. (July 21, 2006), https://www.pewresearch.org/religion/2006/07/21/the-death-penalty-today-defend-it-mend-it-or-end-it/.

97. Death Penalty Info. Ctr., Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis (2009), https://dpic-cdn.org/production/legacy/CostsRptFinal.pdf.

98. Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 11, 97–103 (2012); s*ee also id*. at 7 (citing sociologists saying that governments use criminal justice as a means of social control and not crime control). So it is not surprising that there is a misalignment between crime rates and where law enforcement resources are focused.

> benefits, and jury service just as their parents, grandparents and great grandparents once were. What has changed since the collapse of Jim Crow has less to do with the basic structure of our society than with the language we use to justify it. In the era of colorblindness, it is no longer socially permissible to use race, explicitly as a justification for discrimination, exclusion, and social contempt. So we don't. Rather than rely on race, we use our criminal justice system to label people of color "criminals" and then engage in all the practices we supposedly left behind.[99]

Alexander's observations and conclusion about the impact of the War on Drugs and mass incarceration on racial equality is instructive for two reasons. First, it helps to explain the apparent tolerance for racial disparities in the administration of the death penalty, which was explicitly accepted by the Supreme Court in *McCleskey v. Kemp*.[100]

Second, the approach used by Alexander to demonstrate that the so-called "War on Drugs" was not a legitimate effort to address a drug criminality is a useful approach to determine whether, similarly, the death penalty is really about a public safety response to homicide.

The misalignment between homicide and the way the death penalty is deployed is comparable to what Alexander found regarding the focus of the War on Drugs.[101]

In *Deadly Justice: A Statistical Portrait of the Death Penalty*, the authors make the clarifying point that one must first understand homicide in America to understand the death penalty.[102] This is at once both an obvious and profound statement. Understanding the nature of homicide is critical because it tells us what the death penalty is and what it is not.

According to provisional data released by the Centers for Disease Control (CDC), the homicide rate in the United States was 7.6% for every 100,000 people at the end of the third quarter of 2022.[103] This rate is lower than the homicide rate of 7.9% for the third quarter of 2021.[104]

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99. *Id*. at 1–2.

100. "Apparent disparities in sentencing are an inevitable part of our criminal justice system." McCleskey v. Kemp, 481 U.S. 279, 312 (1987).

101. Alexander, *supra* note 98, at 5–8.

102. Frank Baumgartner et al., Deadly Justice: A Statistical Portrait of the Death Penalty 49–65 (2018).

103. *Quarterly Provisional Estimates for Mortality Dashboard*, Nat'l Ctr. for Health Stats. (2023), https://www.cdc.gov/nchs/nvss/vsrr/mortality-dashboard.htm (last visited Sept. 2, 2023); s*ee also Country List*, U.N. Off. On Drugs & Crime, https://dataunodc.un.org/content/country-list (last visited Sept. 2, 2023).

104. Nat'l Ctr. for Health Stats., *supra* note 103.

Young men are more likely to commit homicides and also are more likely to be victims of homicide than other demographics.[105] Seventy percent of homicide victims are men, divided equally between whites and Blacks. In 1999, 37% of victims were black men, 36% were white men, 15% were white women, 9% were Black women, and 4% of victims, who were not identified as either Black or white, were aggregated together and classified as "other." To put it plainly, the homicide victimization rate among Black males is more than five times higher than for any other group.[106]

Most homicides occur within the same race.[107] The number of Black and white homicide offenders and victims are similar, although Black people make up a smaller share of the population.[108] White women on average represent 2.7% of homicide victims for every 100,000 people compared to 7.7% for white men, 55.6 % for Black men and 12.2% for Black women.

Baumgartner et al. observes that "women are less victimized than men, but Blacks are much more victimized than whites. Black women are victimized at alarming rates, many times more than white women and significantly more than white men. . . . [H]owever, those who kill white women, the group least likely overall to be victimized, are particularly likely to be executed. Those who kill Black women have a significantly lower rate of execution."[109] These victimization rates for women, taken together with death sentencing and executions rates demonstrates how markedly the use of the death is misaligned with the harm it is supposedly used to address.

Women themselves are a small minority of homicide victims.[110] As we have seen, though, after controlling for factors that should explain racial disparities, across the board, death sentences and executions do not align with the distribution of homicide victims and defendants. white killers of Black victims are almost never punished with death.[111] However, the chances of being sentenced to death and executed are greatest if the victim is white, especially if the defendant is Black.

105. Baumgartner et al., *supra* note 102, at 49, 52. According to the Bureau of Justice Statistics, the national violent-crime-victimization rate, which includes murder, was 3.96% per 1,000 persons, with a murder and non-negligent murder rate of 0.7 per 1000 people; s*ee* Rachel E. Morgan & Erica L. Smith, Bureau Just. Stats., The National Crime Victimization Survey and National Incident-Based Reporting System: A Complementary Picture of Crime in 2021 (2022).

106. Baumgartner et al., *supra* note 102, at 49, 55.

107. *Id.*

108. *Id.*

109. *Id.* at 55.

110. *Id.*

111. *Id.* at 69.

As Baumgartner et al. conclude, "[D]eath sentences are particularly focused on those rare cases where Black offenders cross the racial lines and kill whites, particularly women. In the opposite case, where white people kill Black people, the odds of execution are vanishingly small."[112] These findings and observations are consistent and do not diverge substantially from current raw data regarding homicide rates and the victimization among populations.

It is worth restating, furthermore, that death sentences and executions are exceedingly rare in comparison to the number of homicides punished with other sentences. As indicated earlier, death sentences and executions have become increasingly rare and more geographically isolated. The rarity with which death sentences are imposed even in aggressive death-penalty jurisdictions is further evidence that capital punishment is not a true response to homicide.

The misalignment between the use of the death penalty and homicide rates is supported by research looking at the geographic concentration of death sentences. Lee Kovarsky examined the geographic concentration of death sentences and found that the "concentration of [death sentences] does not reflect population or the distribution of homicides and it does not happen because juries effectively transmit a community's punishment norms through verdicts.[113] Korvarsky attributes the observed concentration of death sentences to "muscle memory,"[114] which he describes as "some combination of extreme bureaucratic path dependence—such as the inherited practices of a large DA's office—and otherwise correlated decisionmaking exercised by stakeholders at multiple sites of local discretion."[115] In other words, the sentencing outcomes that we observe occur because these are the outcomes that have always been produced by the machinery in place.

In sum, far from being specifically focused on where the most harm is occurring or even on those crimes that are most serious and deserving of the most severe punishment, death sentences and executions bolster a legal hierarchy where white life is valued above all others.

Just as Michelle Alexander demonstrated that the "War on Drugs" had precious little to do with an actual "drug crisis," an informed understanding of homicide and victimization demonstrates that the death penalty has nothing to do with public safety.

112. *Id.* at 65.
113. Lee Korvarsky, *Muscle Memory and the Local Concentration of Capital Punishment*, 66 DUKE L.J. 259, 285, 287 (2016).
114. *Id*. at 286.
115. *Id*.

V. The Significance of Recognizing That Capital Punishment in the United States was an Integral Part of the Institution of Slavery

The death penalty was central to the institution of slavery. That centrality defines what the death penalty is and is not today. It explains why racially biased death sentences and executions remain intractable, despite efforts to address some of the most egregious manifestations of unfairness and bias.[116]

The death penalty was part of a comprehensive structure of laws and customs designed to impose social control on Black people through violence that included lynching.[117] This history of physical violence is aligned with the violence of social neglect, political disenfranchisement, and economic deprivation designed to deny formerly enslaved and free Black people access to the full rights of citizenship promised by the 13th and 14th Amendments.[118]

Situating the death penalty within the legal and social framework designed to impose a racial hierarchy exposes the emptiness of the claim that the death penalty is a law-enforcement tool. Scholars continue to delineate the myriad ways in which the death penalty today is connected to and descends directly from the history of slavery in the United States. For example, William Lofquist, after analyzing a variety of factors that might explain why some states retain the death penalty and pursue it aggressively while it is all but abandoned in other states, concluded that "historical practices of executions and race-based lethal violence, and underlying patterns of social relations rooted in slavery, are at least as important as contemporary measures of social conditions in shaping death penalty intensity."[119] The sum total of what we have learned is this: today's death penalty is essentially the same death penalty that has existed since it was first used to subjugate enslaved and free Black people. The continuation of the practice in full view

116. Perhaps part of the reason for the Supreme Court's lack of success in eradicating embedded racial bias in the administration of the death penalty is because the Court's efforts might be described as half-hearted if not disingenuous. *See* Steiker & Steiker, *supra* note 5, at 293. Despite the death penalty being "soaked" in racism, "the Supreme Court opinions addressing the American death penalty … are soaked in euphemism, addressing problems of 'arbitrariness,' 'caprice,' and 'disproportionality.'" *Id*. at 294.

117. *See* William S. Lofquist, *Putting Them There, Keeping Them There, and Killing Them: An Analysis of State-Level Variations in Death Penalty Intensity*, 87 Iowa L. Rev. 1505, 1548–49 (2002).

118. *See id*. As has been seen elsewhere, historically and dating back to colonial and antebellum periods the frequency with which violence was employed whether through aggressive and expansive use of capital punishment or aggressive social neglect, coincided with the perceived threat of and increased Black population and "minority economic and political power." *Id*.

119. *See id*. at 1510.

of this history demonstrates that we have not directly faced and fully confronted the legal and social frameworks that required and endorsed the death penalty in the first instance. Moreover, the choice to maintain capital punishment as a component of our legal system demonstrates an acceptance, if not an endorsement, of the legal and social hierarchy it embodies.

VI. Recommendation

Because the death penalty was and is part of a legal infrastructure designed to maintain the racial hierarchy necessary to perpetuate the enslavement of Black people, the struggle to end the death penalty must be waged within and embrace the broader struggle to identify all such structures and dismantle them. If we see that the death penalty in the United States is a pillar of our racial caste system, we see that seeking to end the death penalty without dismantling this framework is as ineffectual as weeding a garden without digging up the roots of the weeds. The root of the problem and the reason for the continuation of the death penalty today is the racial hierarchy that it buttresses. We must dismantle the American caste system, which limits and restricts the distribution of access to wealth and political power according to ethnicity and class, even beyond race.[120]

Moreover, seeing the effort to end the death penalty as part of a larger struggle to dismantle barriers to equality and redistribute political and economic power—creating a truly diverse multi-racial democracy—is the best hope to ensure that the death penalty's demise is permanent.

Changes the Supreme Court personnel the Court's departure from its role balancing majoritarian rule against the rights of the minority render it an unlikely ally in curtailing and ending capital punishment and slow legal gains.[121] Indeed, the most effective way to end the death penalty may be through engaging in the political process to empower decision-makers at every level who are committed to redesigning

120. *See, e.g.*, WILKERSON, *supra* note 14, at 29 ("I use language that may more commonly be associated with people in other cultures, to suggest a new way of understanding our hierarchy: *Dominant caste, ruling majority, favored caste, or upper caste,* instead of, or in addition to *white. Middle castes* instead of, or in addition to, *Asian or Latino. Subordinate caste, lowest caste, bottom caste, disfavored caste, historically stigmatized* instead of *African American. Original, conquered, or indigenous peoples* instead of, or in addition to, *Native American. Marginalized people* in addition to, or instead of, women of any race, or minorities of any kind.").

121. *See* Carol S. Steiker & Jordan M. Steiker, *The Court and Capital Punishment:Abolition in Waiting*, 29 WASH. & LEE J. CIV. RTS. & SOC. JUST. 1, 37–54 (2023).

the architecture of current law to produce outcomes that reflect and promote values of equity and equality. Indeed, the most effective way to end the death penalty may be through engaging in the political process to empower decision-makers at every level who are committed to redesigning the architecture of current law to produce outcomes that reflect and promote values of equity and equality.

As part of dismantling structural racism, we must examine those elements of the legal system in which the death penalty is embedded for their impact in perpetuating inequality and racial hierarchy. We must analyze these systems and propose solutions that go beyond their impact on capital-punishment outcomes. Such an examination should include jury selection; prosecutorial discretion; racial make-up of decision makers; federalism; deference to state definitions of crime and punishment; and the acceptance of a patchwork-quilt approach to rights that vary by state.

VII. Conclusion

Legal historians and scholars have long recognized the connection between slavery and the racially identifiable outcomes produced by the death penalty today. However, the problem is more than a failure to extricate race from consideration in capital cases. The problem is that larger social and legal context in which the death penalty operates has also failed to fully address the influence of race as well.

Advocates for ending the death penalty must broaden our focus to include working against structural racism more broadly. We must take care that, in our narrow efforts to end the death penalty, we do not inadvertently feed the beat of racial hierarchy by repeating and echoing its discriminatory underpinnings.

The payoff for taking a broader view of our work, informed by a deeper understanding of history, is that the promise of a victory that will be lasting. When we systematically replace the legal and social elements of society that deny the full humanity of all people, the death penalty will, of necessity, be abolished because it has no place in such a world.

ESSAY

Disqualifying Death: Why Capital Abolitionists Should Look Back to Move Forward

Darryl E. Williams, Jr.*

Abstract

For decades, capital defendants have been playing against a stacked deck. Death qualification—a process through which capital prosecutors may strike potential jurors based on their hesitancy to imposing a death sentence—lies at the heart of this problem. Because death-qualified juries tend to be less diverse and more prosecution-friendly, then vote to sentence defendants to death at a higher rate than would a jury that represented a true cross-section of society. But rather than on the impact death-qualified jurors have in individual cases, this essay focuses on how death qualification affects the larger capital punishment landscape and does so from the perspective of two groups of scholars: capital abolitionists and constitutional originalists. After outlining the abolitionist argument about the Eighth Amendment's "evolving standards of decency" and the originalist argument about the Sixth Amendment's "historical tradition," this Essay proposes a path forward where the two groups could join together in pursuit of their shared interest.

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I. Introduction

"*[T]he decision that capital punishment is the appropriate sanction" must be committed to "a representative cross section of the community. . . . In no other way can an unjustifiable risk of an excessive response be avoided*."

Justice John Paul Stevens, concurring in *Spanizo v. Florida*, 468 U.S. 447, 481 (1984)

In October 2019, a North Carolina jury voted to sentence Mikel Brady to death.[1] A few months earlier, however, a public opinion poll revealed that only 25% of North Carolinians believed that death was the best punishment for murder.[2]

Question: How—in a state where nearly three-quarters of the eligible jurors do not support the death penalty—did a jury of twelve randomly selected North Carolinians *unanimously* agree that Mr. Brady should join the other 136 people[3] that will face the ultimate punishment?

Answer: Death qualification—a process by which prosecutors remove from the jury those who exhibit conscientious objections to capital punishment.

For a while, state prosecutors deployed the death-qualification process without any constitutional guardrails. Indeed, many states allowed jurors to be excused if they displayed almost any aversion to imposing the death penalty.[4] That near-free-for-all, however, was halted (briefly) after the Supreme Court decided *Witherspoon v. Illinois* in 1968.[5] There, the Court affixed the guardrails that were missing and

1. *See North Carolina Department of Adult Correction Offender Public Information, Mikel Brady*, N.C. Dep't of Pub. Safety, https://tinyurl.com/2jhdbhzs (last accessed Mar. 3, 2024).

2. *See Only 25% of North Carolina Voters Favor the Death Penalty as Punishment for Murder*, Death Penalty Info. Ctr. (Feb. 6, 2019), https://tinyurl.com/y2ns64vh. And worse than that, this phenomenon is not unique to Brady or North Carolina. For example, a 2019 poll revealed that only 31% of Californians believe death is the appropriate punishment for murder. *See State Polls and Studies, California*, Death Penalty Info. Ctr. (last accessed Dec. 3, 2021), https://tinyurl.com/2p8etawt. Yet, that same year, Miguel Crespo, John Felix, and Rigoberto Villanueva joined the 690 other people now sitting on California's death row. *See* CDCR Condemned List, Cal. Dep't of Corr. And Rehab. (last accessed Mar. 3, 2024), https://tinyurl.com/2a59vd49.

3. *See Death Row Roster*, N.C. Dep't of Pub. Safety, https://tinyurl.com/2yb497dv (last accessed Mar. 3, 2024).

4. Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court's Evolving Standard of Decency for the Death Penalty*, 23 Hastings Const. L.Q. 455, 542 (1996) ("In its quest to procure a jury that will enforce the death penalty, the prosecution can constitutionally exclude those segments of society who would not or who simply might not enforce it.").

5. Witherspoon v. Illinois, 391 U.S. 510, 522 (1968).

limited death-aversion-based strikes to only those that made it clear that—regardless of the facts presented at trial—they would *never* vote to sentence a defendant to death.[6] *Witherspoon* was received as a progressive decision.[7] But by accepting that death qualification was allowable in some cases, the *Witherspoon* court left the door open for some belief-based exclusions.

For a while, that opening seemed benign. But more recently, it has been exploited, and a new majority has removed the door altogether. After those cases, we find ourselves in a world where a prosecutor's power to remove is nearly boundless.[8] And as a result, capital juries tend to be more prosecution-friendly and death-prone than their counterparts,[9] meaning that capital verdicts often defy the prevailing community values.[10]

Critics have called death qualification one of the "most striking and distinctive features" of the American capital punishment system.[11] This essay deals with two such critiques. The first comes from a predictable source: capital abolitionists who believe that death qualification should be done away with because its negative effects pervade all Eighth Amendment jurisprudence. The second group of critics, however, is less predictable. That group is made up of constitutional originalists who believe that death qualification is a deviation from the Framing-era understanding of criminal juries.

Intended to be only an introduction to the issue, this Essay begins by walking through the evolution of the modern death-qualification process. It then outlines the abolitionist's Eighth Amendment critiques. Next, the Essay explains how an originalist approach grounded in the historical tradition of the Sixth Amendment jury right can serve the abolitionists' goals. The Essay ends by highlighting a trend in the Supreme Court's cases that suggest an unlikely majority of justices could be cobbled together to end or substantially limit death qualification as we know it.

II. Modern Death Qualification

The modern death-qualification scheme unfolded in a series of smaller steps, which can be captured through a discussion of three cases:

6. *See infra* notes 18–25 and accompanying text.
7. *See infra* note 26 and accompanying text.
8. Aliza P. Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 Ind. L. J. 113, 120 (2016) (describing the standard as a "relatively lax" one).
9. *See infra* note 53 and accompanying text.
10. *Id.*
11. Cover, *supra* note 8, at 115.

Witherspoon v. Illinois,[12] *Wainwright v. Witt*,[13] and *Uttecht v. Brown*.[14] Respectively, those cases represent the origin, (d)evolution, and final resting place of the Supreme Court's death-qualification jurisprudence.

Beginning decades after the founding,[15] there was a time when prosecutors would regularly deploy for-cause strikes on jurors that exhibited reservations about imposing a sentence of death.[16] In 1968, however, the Court "abruptly contracted" that practice in *Witherspoon v. Illinois*.[17] In that case, the Court faced a state statute that gave prosecutors the authority to strike a juror for cause if they showed even the slightest hesitation toward imposing a death sentence.[18] Using that authority, the prosecutor in *Witherspoon* struck nearly half of the jury pool based on hesitation about the death penalty.[19] The trial court allowed it. And unsurprisingly, the seated jury—purged of all conscientious objectors—ultimately voted, first, to convict the defendant, then, to sentence him to death.[20]

The defendant challenged his sentence because he believed that, after death qualification, his case was decided by the kind of jurors who would too readily ignore the presumption of innocence and accept the prosecution's version of the facts.[21] The Supreme Court agreed.

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12. *See* Witherspoon v. Illinois, 391 U.S. 510, 542 n.21 (1968) (announcing that a potential juror in a capital case may be removed for cause only if they make it "unmistakably clear" that they are unable to abide by their oath, *i.e.*, no matter the facts, they will never vote to sentence a defendant to death).

13. *See* Wainwright v. Witt, 469 U.S. 412, 424 (1985) (removing *Witherspoon*'s requirement that a juror's inability to abide by their oath must be made "unmistakably clear").

14. *See* Uttecht v. Brown, 551 U.S. 1, 7 (2007) (holding that, regardless of a potential juror's assurances, trial judges may conclude a juror is unable to abide by their oath and appellate courts are to defer to that determination).

15. United States v. Cornell, 25 F. Cas. 650, 654 (C.C.D.R.I. 1820) (No. 14,868) (first reported case discussing death qualification of a jury).

16. *See* Welsh S. White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries*, 58 Cornell. L. Rev. 1176, 1176–77 (1973) ("Prior to 1968, it was almost universal practice for a state to authorize the exclusion of veniremen who evidenced conscientious scruples against capital punishment.").

17. *See* Richard Salgado, *Tribunals Organized to Convict: Searching for a Lesser Evil in the Capital Juror Death-Qualification Process in* United States v. Green, 2005 BYU L. Rev. 519, 523 (2005); *see also* SR Gross, *Determining the Neutrality of Death-Qualified Juries: Judicial Appraisal of Empirical Data*, 8 Law & Hum. Behav. 7, 9 (1984) ("*Witherspoon* held that death qualification—if it was to continue at all—must be greatly curtailed.") (cleaned up).

18. Witherspoon v. Illinois, 391 U.S. 510, 512–13 (1968).

19. *Id.* at 513.

20. *Id.* at 512.

21. *Id.* at 516–17. Specifically, the petitioner claimed that the jury was "unperturbed by the prospect of sending a man to his death, he contends, is the kind of juror who would too readily ignore the presumption of the defendant's innocence, accept the prosecution's version of the facts, and return a verdict of guilt." *Id.*

In a 6–3 decision, the majority concluded the trial jury, stripped of anyone who expressed reservations toward the death penalty, was "uncommonly willing to condemn a man to die."[22] Thus, the Court concluded general objections to the death penalty, standing alone, could not support a potential juror's removal.[23] At the same time, the Court recognized it needed to strike a balance between a defendant's constitutionally protected rights and the governmental interest in excluding jurors who could not follow the law. The Court, therefore, held that, although a juror's aversions to the death penalty may be relevant, exclusion based on "any broader basis" than a juror's unambiguously expressed inability to follow instructions and abide by their oath would violate the defendant's constitutional guarantees.[24] Put differently, "[t]he most that can be demanded from a [potential juror] in this regard is that [they] be *willing to consider* all penalties provided by state law."[25] In holding as it did, the Court necessarily believed the risk to a defendant's Sixth Amendment rights outweighed the risk to the government's interest.

Witherspoon was received as a progressive decision. Indeed, when it came down, many people—including members of the Court—thought that it effectively shut the door on the death penalty.[26] And for decades, that was considered a fair reading of the case: *Witherspoon*'s follow-on cases all reaffirmed its core reasoning, centering the analysis on whether voir dire uncovered a juror's inability to follow the law.

Adams v. Texas bears mentioning. There, the Court rejected the government's justification for excluding a juror who admitted the prospect of a capital sentence would "affect" their deliberations.[27] Calling back to *Witherspoon*, the *Adams* Court held that—by excluding jurors based only on the juror's objections to the death penalty—the government "crossed the line of neutrality."[28] The Court reached that conclusion after cataloging the line of cases relying on *Witherspoon*.[29]

22. *Id.* at 521.
23. *Id.* at 522.
24. In doing so, the Court imposed what it has since called an "extremely high burden of proof": jurors could not be excluded unless they made it "unambiguous" or "unmistakably clear" that they could not carry out their duties because, for example, they would automatically vote to against a death sentences. *See* Wainwright v. Witt, 469 U.S. 412, 421 (1985) (discussing *Witherspoon*).
25. *Id.* at 542 n.21 (emphasis added).
26. Dissenting in *Witherspoon,* Justice Black argued that the decision "ma[de] it impossible for States to get juries that will enforce the death penalty." Witherspoon v. Illinois, 391 U.S. 510, 532 (1968) (Black, J., dissenting).
27. *See* Adams v. Texas, 448 U.S. 38, 40 (1980).
28. *Id.* at 43–44 (citing *Witherspoon*, 391 U.S. at 520–21).
29. *Id.* at 44–45 (discussing Boulden v. Holman, 394 U.S. 478 (1969) and Lockett v. Ohio, 438 U.S. 586 (1978)).

Synthesizing those cases, the Court explained that, together, they "established the general proposition that a juror may not be challenged based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties in accordance with his instructions and his oath."[30]

That all changed just two decades after *Witherspoon* when a newfound majority sought to "clarify [the *Witherspoon* test]" in *Wainwright v. Witt*.[31] That "clarification," however, is more aptly characterized as a redefinition.[32]

In what the dissent dubbed a "brazenly revisionist reading" of prior precedent,[33] Justice Rehnquist's majority opinion did away with the existing standard by recasting *Adams* as a retrenchment from (rather than a restatement of) *Witherspoon*'s rule.[34] In the Court's view—although *Adams* liberally quoted the prior decision throughout—the "standard applied in *Adams*" somehow lowered the bar set in *Witherspoon*.[35] Such a reading would be bad enough, but the Court did not stop there. Without much discussion, the *Witt* Court dispensed with *Witherspoon*'s requirement that a juror's inability to comply with the law needed to be made unmistakably clear.[36] It did so on the theory that there would be cases where, despite a prospective juror's answers during voir dire, the prosecutor or the trial judge may be left with a

30. *Id.* at 45.

31. Wainwright v. Witt, 469 U.S. 412, 424 (1985).

32. One commentator has suggested that *Witt* effectively overruled *Witherspoon*. *See The Supreme Court, 1984 Term, Leading Cases*, 99 HARV. L. REV. 120, 127–28 (1985). And though they did not go as far, others have noted that *Witt*'s formulation of the standard substantially weakened *Witherspoon*. *See* F. Thomas Schornhorst, *Preliminary Screening of Prosecutorial Access to Death Qualified Juries: A Missing Constitutional Link,* 62 IND. L. J. 295, 296 n.7 (1987) (suggesting that *Witt*'s formulation "expands the range of prosecutorial challenges beyond that which had been thought permissible under [*Witherspoon*]"); *see also* Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution,* 85 MICH. L. REV. 1741, 1785–86 (1987) (arguing that *"Witt*. . .posit[ed] a substantive standard that invited state trial judges to exclude more jurors than before" and that it "effectively dismantle[d] *Witherspoon*"); William S. Geimer, *Death at Any Cost: A Critique of the Supreme Court's Recent Retreat from its Death Penalty Standards,*12 FLA. ST. U. L. REV. 737, 775 n.184 (arguing that, in *Witt,* the Court "effectively abandoned serious review of trial court exclusion of jurors with reservations about the death penalty"); John C. Belt, Note, Morgan v. Illinois*: The Right to Balance Capital Sentencing Juries as to Their Views on the Death Sentence is Finally Granted to Defendants,* 24 N.M. L. REV. 145, 155 (1994) ("[T]he Supreme Court significantly reduced the standard of proof required in excluding capital sentencing jurors."); Valerie T. Rosenson, Note, Wainwright v. Witt*: The Court Casts a False Light Backward,* 66 B.U. L. REV. 311, 328–29 (1986) ("The *Witt* Court's dismissal of the unmistakable clarity standard results in an increased ability to exclude venire members who have feelings against the death penalty.").

33. *Witt*, 469 U.S. at 450 (Brennan, J., dissenting).

34. *Id.* (quoting the majority opinions concession that "gone too is the extremely high burden of proof").

35. *Id.* at 420–21.

36. *Id.* at 424–25.

"definite impression" that the juror would be unable to impartially apply the law.[37]

This, I believe, was the biggest affront to *Witherspoon*. The teeth of its "extremely high burden of proof" was that a juror would be removed only after unequivocally stating they could not (or would not) consider the facts of the case before voting to impose a sentence less than death.[38] Under *Witherspoon*, mere reluctance or hesitation was not enough. *Witt*, however, "establishe[d] an entirely new standard"; [39] after that decision, a juror no longer had to make it unmistakably clear that they could not obey the law.[40] Instead, no longer did a juror need to make their inability to fairly evaluate the law "unmistakably clear"; instead, a potential juror could be struck for cause if the prosecutor or the trial judge believed that the juror's view on the death penalty would prevent the juror's performance of their duties.[41]

That said, however bad the *Witt* decision was for capital defendants, the Court said nothing of *Witherspoon*'s admonition to prosecutors and judges that "a [person] who opposes the death penalty, no less than one who favors it, can make the discretionary judgement entrusted to him by the State and can thus obey the oath he takes as a juror."[42] In such a case, the *Witherspoon* Court explained, the government lacked authority to exclude the prospective juror.[43]

That carveout, however, was soon paved over. In the most recent case on the proper standard for belief-based exclusion, the Court applied a watered-down version of *Witt*'s already-diluted standard.[44] In *Uttecht v. Brown,* a potential juror made clear that he felt the death penalty was improper at times but (repeatedly) stated that he could and would objectively apply the law to the facts presented.[45] Justice Kennedy's majority opinion started on the right track by recognizing that a potential juror cannot be excused for cause so long as they can still follow the law.[46] The opinion, however, quickly went off the rails. And when the smoke cleared, the Court concluded that the Constitution allowed a juror to be struck despite his assurances that they would fairly consider imposing a

37. *Id.* at 426.
38. Wainwright v. Witt, 469 U.S. 412, 450 (1985) (Brennan, J., dissenting).
39. Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).
40. *Id.* at 421.
41. *Id.* at 423.
42. Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).
43. *Id.*
44. Cover, *supra* note 8, at 120 ("In more recent cases, most notably in *Uttecht v. Brown*, the Court has failed to apply even *Witt*'s articulation stringently.").
45. Uttecht v. Brown, 551 U.S. 1, 15 (2007).
46. *Id.* at 9.

sentence of death.[47] In the majority's view, that assurance was overcome by the trial judge's inferences that the juror was substantially impaired: "Courts reviewing claims of *Witherspoon-Witt* error . . . owe deference to the trial court, which is in a superior position to determine the demeanor and qualifications of a potential juror."[48] In other words, so long as the trial judge conducted voir dire before excluding a potential juror, courts were not to "second-guess that determination" on appeal.[49]

Another strong dissent followed. As four Justices pointed out, the majority upheld the exclusion of a potential juror who was "clearly willing to impose the death penalty, but consider[ed] the severity of the sentence."[50] Appreciating the practical effects of such a holding, the dissent aptly recognized that it was hard to imagine a juror safe from challenge "unless [they] delivered perfectly unequivocal answers . . . [that they] would be able to vote for the death sentence under any imaginable circumstance."[51]

In the end, if *Witt* lowered the bar set by *Witherspoon*, *Uttecht* all but removed it. Belief-based for-cause strikes (and generic peremptory strikes)[52] allow capital prosecutors to empanel a jury that is disproportionately punitive and prosecution-friendly.[53] But with support for capital punishment waning, as only about one-third of Americans continue to prefer the death penalty as a sentence for murder,[54] it is hard to imagine that such a group would accurately represent the rest of the community.[55] And, representative or not, death-qualified juries

47. *Id* at 18.
48. *Id.* at 22.
49. *Id.* at 21.
50. *Id.* at 43 (Stevens, J., dissenting).
51. *Id.*
52. Even when prosecutors are unable to excuse a juror for cause, they have another tool at their disposal: the always-reliable peremptory strike. *See* Cover, *supra* note 8, at 121 ("Through the exercise of peremptory strikes, the state is able to exclude even more death-averse jurors than permitted under *Witt*."). Like strikes for cause, peremptory strikes allow prosecutors to remove jurors. But this time, prosecutors get a limited number of "freebies" that allow them to remove jurors for (almost) any articulable reason.
53. Cover, *supra* note 8, at 121("The combination of *Witherspoon* and peremptory strikes leads to capital juries that may be stripped of all opponents of capital punishment."); *see also* Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 Mich. L. Rev. 1, 28 (1982) (concluding, in an early study of the use of peremptory challenges against death-averse jurors, that "the prosecution used peremptory challenges against . . . 77% of the scrupled jurors"); Mike Allen et al., *Impact of Juror Attitudes About the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis,* 22 L. Hum. Behav., 715, 725 (1998) (indicating that "death-qualified *voir dire* practices produce jurors more likely to render guilty verdicts," and thus more likely to impose death).
54. Jeffrey M. Jones*, Americans Now Support Life in Prison Over Death Penalty,* Gallup (Nov. 25, 2019), available at: https://tinyurl.com/384amean (finding that only 36% of Americans support the death penalty over life in prison).
55. James Luginbuhl & Kathi Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials,* 12 L. &. Hum. Behav. 263, 267 (1988);

amplify the voice of the "distinct and dwindling" group of Americans that continue to support capital punishment.[56]

III. The Abolitionist's Plea

As the name suggests, the central goal of a capital abolitionist is the total eradication of death sentences in America. In pursuit of those ends, abolitionists have attacked such sentences through a series of arguments that go beyond this essay.[57] But rather than simply restate those claims, I, instead, focus on how the effects of death qualification have trickled into the Court's Eighth Amendment jurisprudence, standing squarely between abolitionists and their goal.[58]

The Eighth Amendment's cruel-and-unusual analysis turns on the "evolving standards of decency that mark the progress of a maturing society."[59] Given their evolving nature, those standards have proven elusive. When attempting to pin them down, the Court looks for "objective indicia."[60] And while it has looked to several different indicators in the past,[61] two "twin pillars"[62] have emerged—with the "more direct source" being data concerning the actions of sentencing juries.[63]

Robert Young, *Guilty Until Proven Innocent: Conviction Orientation, Racial Attitudes, and Support for Capital Punishment, 25* Deviant Behav. 154–55 (2004) (excludable juries are less likely to accept the cost of convicting the innocent).

56. *See* Cover, *supra* note 8, at 128.

57. For example, since *Witherspoon*, various Sixth Amendment challenges to death qualification have developed. Those challenges include arguments that death-qualification yields juries that are conviction-prone and thus do not represent a fair cross-section of the community. *See supra* note 53 and accompanying text.

58. *See* Cover, *supra* note 8, at 123.

59. Trop v. Dulles, 356 U.S. 86, 101 (1958).

60. Gregg v. Georgia, 428 U.S. 153, 173 (1976) (referencing *Trop*, 356 U.S. at 101).

61. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 575–78 (looking to international and foreign law); Hall v. Florida, 572 U.S. 701, 709–14 (2014) (looking to the viewpoints of professional organizations); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (1974) (looking to public opinion polls). These sources, however, are not widely accepted as bona fide indicators of society's changing mores. Take Rehnquist's dissent in *Atkins*, which states:

> In my view, these two sources—the work product of legislatures and sentencing jury determinations—ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values firmly supported by our precedents. More importantly, however, they can be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.

Atkins, 536 U.S. at 324 (Rehnquist, C.J., dissenting).

62. *See* Cover, *supra* note 8, at 115.

63. Furman v. Georgia, 408 U.S. 238, 439–40 (1972) (plurality decision) (Powell, J., dissenting).

Recognizing that American citizens are increasingly turning their backs on the death penalty today,[64] it does not take long to see the problem. The Supreme Court allows state prosecutors to cherry-pick capital jurors who are more likely to vote for death, then ignores that manipulation and heavily relies on those skewed results to justify the death penalty's continued constitutionality. The linchpin of the modern death penalty analysis is, therefore, based on the legal fiction that capital-verdict statistics accurately reflect what our society views as cruel and unusual.[65] Frankly, this jurisprudence flouts reality.[66]

But to be fair, the Court has not completely overlooked this issue. In fact, the *Witherspoon* majority recognized that its decision would impact those evolving standards. The Court noted that capital juries have the unmatched responsibility to "express the conscience of the community on the ultimate question of life or death."[67] Indeed, the Court acknowledged that if the link between capital punishment and contemporary community values was broken, capital verdicts would

64. *See* Jeffrey Jones, *Death Penalty Support Holding at Five-Decade Low,* GALLUP NEWS (Nov. 18, 2021), https://tinyurl.com/msnvme43 (showing that support for the death penalty is steadily declining); *see also* Jones, *supra* note 54 (showing that Americans prefer life imprisonment over the death penalty).

65. Others have boiled this idea down even further. For example, Ben Cohen and Robert Smith quipped that:

> Measuring the community's sentiment concerning a specific punishment by gathering a venire, removing from the venire all people opposed to a punishment, and then taking the temperature of the remaining citizens concerning the propriety of that punishment, would be like assessing the impact of global warming by taking the temperature in a room with its air-conditioning on.

G. Ben Cohen & Robert J. Smith, *The Death of Death Qualification*, 59 CASE W. RES. L. REV. 1, 99 n.54 (2008), https://tinyurl.com/8bdcmf. Likewise, Professor Cover aptly stated that:

> [T]he Court's conclusions that the death penalty is not "cruel and unusual punishment" have been buoyed by an inflated and inaccurate estimation of popular support for the death penalty.

Cover, *supra* note 8, at 129.

66. Ohio Justice and Policy Center Director, Kevin Werner, highlighted that inconsistency during his testimony before the Ohio House of Representative's Criminal Justice Committee (in admittedly Ohioan terms):

> [Touting death-qualified jury verdicts as evidence of general societal support] is akin to taking a poll of Ohio State students and ask[ing] how many of them favor the Buckeyes beating Michigan State this weekend then boasting that the results were that the students favor OSU.
>
> The argument that says capital juries favor the death penalty loses its luster when we consider 1.) those jurors are supposed to favor the death penalty because that's the way the system was designed and 2.) those jurors are not representative of the general population—they're just the people predisposed to vote in favor of the death penalty.

See Abolish the Death Penalty; Revise Juror Challenge Numbers: Hearing on H.B. 183 Before the H. Comm. On Crim. Just., 134th Gen. Assembly (Ohio 2021) (proponent testimony of Ohio Justice and Policy Director, Kevin Werner).

67. Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).

"hardly reflect" the evolving standards of decency.[68] The majority ended by making clear that if "[c]ulled of all who harbor doubt about the wisdom of capital punishment[,] . . . a jury can speak only for a distinct and dwindling minority."[69]

Four years after *Witherspoon*, the Court decided *Furman v. Georgia*.[70] There, a plurality agreed that, when viewed against society's standards of decency, all forms of capital punishment were cruel and unusual.[71] In reaching that conclusion, various Justices harkened back to *Witherspoon*'s emphasis on the importance of capital-jury verdicts and pointed to the infrequency that such sentences were being imposed.[72] Even Justice Powell's dissent cited *Witherspoon* and recognized that any attempt to discern where society's standards of decency lie "must take careful account of the jury's response to the question of capital punishment."[73]

The problem is that, more recently, *Witherspoon*'s aspirational language has been twisted.[74] While the *Witherspoon* Court did not foresee how its defendant-minded holding would be bastardized down the line, the modern Court has had the benefit of time. And though, while on the Court, Justice Breyer has placed death qualification on his laundry list of issues that legitimize our capital punishment regime,[75]

68. *Id*. at 519 n.15.

69. *Id.* at 520.

70. *See generally* Furman v. Georgia, 408 U.S. 238 (1972) (plurality opinion).

71. *Id.* at 239–40.

72. *Id.* at 299 (Brennan, J., concurring) ("Juries, expressing the conscience of the community on the ultimate question of life or death, have been able to bring themselves to vote for death in a mere 100 or so cases among the thousands tried each year where the punishment is available.") (cleaned up); *id.* at 291 ("The contemporary rarity of the infliction of this punishment is thus the end result of a long-continued decline."); *id.* at 309 (Stewart, J., concurring) ("[I]t is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare."); *id.* at 313 (White, J., concurring) ("[T]he penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice."); *id.* at 362–63 (Marshall, J., concurring) (recognizing that the fact that "convicted murderers are rarely executed" is "critical to an informed judgment on the morality of the death penalty"). *But see id.* at 387 (Burger, C.J., dissenting) ([R]egardless of its characterization, the rate of imposition does not impel the conclusion that capital punishment is now regarded as intolerably cruel or uncivilized.").

73. *Id.* at 439–41 (Powell, J., dissenting).

74. *See id.* at 440–41. Admittedly, after citing *Witherspoon*, Justice Powell's dissent in *Furman* turned this inquiry on its head and ultimately suggested that the statistics regarding capital-jury verdicts pointed toward widespread acceptance of the death penalty. However, there is no need to throw the baby out with the bathwater. What is important here is the agreement on the importance of capital-jury statistics.

75. Glossip v. Gross, 576 U.S. 863, 913–14 (2015) (Breyer, J., dissenting) (citing Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 Ariz. S.L.J. 769, 772–93, 807 (2006) (summarizing research and concluding that "[f]or over fifty years, empirical investigation has demonstrated that death qualification skews juries toward guilt and death); Note, *Mandatory Voir Dire Questions in Capital Cases: A Potential Solution to the Biases of Death Qualification*, 10 Roger Williams Univ. L. Rev. 211, 214–23 (2004) (similar); *Glossip*, 576 U.S. at

other members of the Court have failed to ask whether the gauge on our "evolving standards of decency" remains accurate.[76]

At best, the Justices have overlooked this problem. At worst, they have ignored it. Either way, the hyper-focus on death qualification's impact on individual trials seen in post-*Witherspoon* cases, like *Witt* and *Uttecht*, has forgotten how individual verdicts contribute to the broader landscape.

That is where abolitionists take issue.[77] To them, the total abolition of the death penalty would likely have to play out in two steps. Step One: remove all mechanisms skewing the objective indicia of our evolving standards. Step Two: get the Supreme Court to recognize that those now accurate standards point away from the imposition of capital sentences. Of course, death qualification currently stands in the way. Thus, an abolitionist has no choice but to take aim at that process. They have.[78] And, as explained below, they may be joined by an unlikely ally.

IV. The Originalist's Dilemma

Somewhat surprisingly,[79] originalists could join abolitionists on the road to do away with death qualification. But if the abolitionist's path to

913 ("Other factors may also play a role. One is the practice of death-qualification; no one can serve on a capital jury who is not willing to impose the death penalty.").

76. Cover, *supra* note 8, at 123 ("[T]he Court has never accounted for the practice of death qualification in [the] broader, aggregate use of capital-jury verdicts.").

77. To be fair, the Court has not completely muffed the evolving standards analysis. The Court has looked to the evolving standards to make narrow carveouts from the death penalty's constitutionality. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002) (looking to society's evolving standards and holding that executing the mentally disabled was cruel and unusual); Roper v. Simmons, 543 U.S. 551 (2005) (looking to society's evolving standards and holding that executing juvenile offenders was cruel and unusual); Coker v. Georgia, 433 U.S. 584 (1977) (looking to society's evolving standards and holding that execution for rape was cruel and unusual). However, what abolitionists seek is not a piecemeal erosion but rather—well, a total abolition of capital punishment. The Court has only entertained that idea once before, and that hiatus on executions was brief. *See* Furman v. Georgia, 408 U.S. 238 (1972) (plurality opinion) (holding that, in its current form, the death penalty constituted a cruel and unusual punishment), *overruled by*, Gregg v. Georgia, 428 U.S. 153 (1976).

78. In addition to the numerous articles cited elsewhere in this essay that challenge the death-qualification process, there are a few more worth noting. *See* Katherine E. Berger, *Death Qualification of Juries as a Violation of the Social Contract*, 12 Wash. U. Juris. Rev. 115 (2019); Kenneth Miller & David Niven, *Mixed Messages: The Supreme Court's Conflicting Decisions on Juries in Death Penalty Cases*, 5 Am. U. Crim. L. Brief 69 (2009); Michael W. Peters, *Constitutional Law: Does "Death Qualification" Spell Death for the Capital Defendant's Constitutional Right to an Impartial Jury?*, 26 Washburn L.J. 382 (1987); Ronald C. Dillehay & Maria R. Sandys, *Life Under* Wainwright v. Witt*: Juror Dispositions and Death Qualification,* 20 L. & Hum. Behav. 147, 147–48 (1996).

79. While many originalists maintain the interpretive method has no ideological or political bent, some scholars have identified it as an identity politic designed to preserve the power of the original ruling class: property-holding white men. *See* Kufere Laing, *Interpreting the People's Constitution: Pauli Murray's Intersectionality as a Method of Constitutional Interpretation*, 65 How. L.J. 533, 551–53 (2022); *see also* Jamal Greene, *Selling Originalism*, 97 Geo. L.J. 657, 662 (2009). And because the interests of that once-ruling class rarely align with the interests of those most often

that point was a straightforward walk through the Eighth Amendment, the originalist's is a less linear journey through the Sixth. Still, both arrive at the same destination.

As their name suggests, originalists believe that our contemporary understanding of the Constitution should be tethered to the document's Framing-era construction.[80] It follows then that an avowed originalist would agree with a push to refasten our understanding of the Sixth Amendment to that of the founding generation. And, because that historical understanding points away from death qualification, honest[81] originalists should join in the pursuit of that practice's abolition.[82] There is no better time to do so than right now.

A. OT21: An Originalist Revolution

If anything, the last two years at the Court have been filled with cases where the Justices have chosen to jettison precedent for constitutional interpretation that is more consistent with what the majority views as the original understanding of the document. Take the last week of the Court's 2021 Term. Within four days, the Court issued three decisions that highlight this phenomenon.

Start with Justice Gorsuch's majority opinion in *Kennedy v. Bremerton School District*.[83] There, the Court addressed a First Amendment challenge brought by a high school football coach who was fired after leading the team in prayer at the center of the field.[84] Ruling that the prayer did not offend the Establishment Clause, the opinion formally laid to rest the test announced in *Lemon v. Kurtzman*.[85] "In place of *Lemon*," Justice Gorsuch explained, "the Establishment Clause must be interpreted by reference to historical practices and understandings."[86] Courts were to draw the line between the permissible and the impermissible

subjected to the death penalty, one may fairly assumed that, when left to their own devices, an originalist would not typically pursue capital abolition.

80. You don't have to take my word for it. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 856–57 (1989), available at: https://tinyurl.com/rvz8e9y5; *see also* Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 1 (2d ed. Yale Univ. Press 1986) (1962).

81. This essay assumes good faith and works on the presumption that, when faced with the logical ends of their framework, originalists will—for lack of a better term—"keep the same energy." But there are no promises. *See* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. Cin. L. Rev. 7 (2006), available at: https://tinyurl.com/3u6hd6nd.

82. Cohen & Smith, *supra* note 65, at 119–22.

83. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022).

84. *Id.* at 512–14.

85. *Id.* at 534–35.

86. *Id.* at 535.

in accordance "with history and faithfully reflec[t] the understanding of the Founding Fathers."[87] Beyond other references to the Constitution's "terms and traditions," the majority did not say much else on the issue.[88] But although Justice Gorsuch's opinion did not provide a clear look into how the Court intends to operationalize the "history and tradition test,"[89] it left no doubt that the Court will do so. After *Kennedy*, original meaning and history represented the rule—"rather than some exception"—within the Court's Establishment Clause jurisprudence.[90]

Justice Alito's majority opinion in *Dobbs v. Jackson Women's Health* likewise looked to the societal traditions at the time of the Fourteenth Amendment's passage to conclude abortion is not a fundamental right protected by the Constitution.[91] In concluding the right to reproductive autonomy "ha[d] no basis in the Constitution's text or our Nation's history," the majority canvassed the regulatory practices surrounding abortion before, during, and after the ratification of the Fourteenth Amendment.[92] The Court saw it important to note that "[u]ntil the latter part of the 20th century," the right to abortion "was entirely unknown in American law."[93] "At common law," Justice Alito went on, "abortion . . . was regarded as unlawful and could have very serious consequences," and by the time the amendment was adopted, "three-quarters of the States had made abortion a crime."[94] So, while *Dobbs* itself did not inject the history-and-tradition inquiry into the Fourteenth Amendment's due process analysis,[95] it represents yet another data point on how the Court intends to treat precedential decisions that, in a majority's view, contravene history.

And in perhaps the most striking example of the Court's newfound commitment to Framing-era understandings, Justice Thomas's majority opinion in *New York Rifle & Pistol Association v. Bruen* held that rather than survive means-ends scrutiny, firearm regulations were to be upheld only if they were "consistent with the Nation's historical tradition."[96]

87. *Id.* at 535–36.
88. *Id.* at 540 n.6.
89. *Id.* at 573.
90. *Id.* at 536.
91. Dobbs v. Jackson Women's Health Org., 597 U.S. 215–17 (2022).
92. *Id.* at 235–63, 300.
93. *Id.* at 231.
94. *Id.* at 241. To be sure, there is disagreement about the relevant history of the right to reproductive autonomy. *See, e.g.*, Aaron Tang, *Lessons from Lawrence: How "History" Gave Us Dobbs–and How History Can Help Overrule It*, 133 YALE L.J. FORUM 65, 76–90 (2023) (cataloguing errors in the "dubious" historical record relied on in *Dobbs*).
95. It, instead, applied the test announced in Washington v. Glucksberg, 521 U.S. 702, 721 (1997), which requires a right be "deeply rooted in our nation's history and tradition" before it is protected under the Fourteenth Amendment. *See id.* at 231 (applying *Glucksberg* test).
96. N.Y. Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022).

"History," the opinion said, "guide[s] our consideration of modern regulations."[97] The majority, thus, examined "historical precedent," and "[a]t the end of [its] long journey through the Anglo-American history," the Court concluded the challenged regulation violated the Second Amendment because there was no "tradition [of such regulation] in the historical materials."[98]

Together, these decisions appear to mark a shift in the Court's approach to constitutional interpretation. Each cements the role of ratification-era practices and understandings in the Court's methodological approach to constitutional questions and the Court's keen interest in interpreting the Constitution in a manner consistent with those historical traditions. As discussed below, doing away with death qualification would serve as a (welcomed) extension of that trend.

B. The Historical Traditions of Juries

There has been a long-held understanding, stretching back to the country's English roots, that the jury's primary obligation was to vote in line with their beliefs and community values, not to blindly follow the law. The Court recognized that fact in *Jones v. United States*,[99] where it traced the idea back to the originalist's holy grail: Blackstone.[100] In that opinion, Justice Souter explained the jury's position as the "grand bulwark" that guards all our civil liberties,[101] including the freedom from cruel and unusual punishment. And in that role, juries have always been "authorized *and required* to vote on their conscience."[102] Indeed, at the founding, it was "the jurors themselves [that] ruled on the constitutionality of the law in question" through their choice to enforce individual criminal statutes.[103]

Still, those that support death-qualification attempt to counter with an almost irreverent reading of the impartial jury requirement. But that

97. *Id.* at 28.
98. *Id.* at 27, 70.
99. Jones v. United States, 526 U.S. 227 (1999).
100. Rothegery v. Gillepsie Cnty., 554 U.S. 191, 219 (2008) (Thomas, J., dissenting) ("There's no better place to begin than with Blackstone whose work constituted the preeminent authority on English law for the founding generation.") (internal quotations omitted).
101. *Jones,* 526 U.S. at 246 (citing Ahkil Amar, The Bill of Rights (1999) ("[T]he Federal Farmer had declared that if judges tried to subvert the laws, and change the forms of government, jurors would check them, by deciding against their opinions and determinations.") (cleaned up)); Blakely v. Washington, 542 U.S. 296, 306 (2004) ("Just as suffrage ensures the people's control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.").
102. Cohen & Smith, *supra* note 65, at 116.
103. *Id.*

reading contradicts the jury's historic role as a check.[104] Sure enough, the Framers envisioned "impartial juries."[105] But as legal historians have pointed out, the Framers were concerned with partiality caused by prior involvement in the case, relationships to the parties, or some other personal interests in the verdict.[106]

In supporting their position, however, death-qualification proponents focus on a "partiality" of a different type. Unlike the Framers, they are concerned with a prosecutor's ability to bring charges and seek sentences without significant pushback.[107] Really, those who support death qualification are propelled by the fear of jury nullification—not fairness.

Viewed in this light, the flaw in that argument becomes clear: The Framers rejected concerns about nullification and, in fact, accepted it as the jury's prerogative. At the founding, juries were *compelled* to do exactly what death-qualification proponents fear,[108] and that sort of nullification has traditionally been viewed as a feature—not a flaw—of our constitutional design.[109] Indeed, Alexander Hamilton believed that

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104. As the Court explained in *Jones*:

> The potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences. This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as "pious perjury" on the jurors' part.

526 U.S. at 245 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, at 238–39 (1769)).

105. *See* U.S. CONST., amend VI.

106. Cohen & Smith, *supra* note 65, at 116 n.118 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, at *363).

107. Adams v. Texas, 448 U.S. 38, 55 (1980) (Rehnquist, J., dissenting) ("[S]ociety, as much as the defendant, has a right to an impartial jury."); *see also* Holland v. Illinois, 493 U.S. 474, 483 (1990) ("Although the constitutional guarantee runs only to the individual, and not to the State, the goal it expresses is jury impartiality with respect to both contestants.").

108. Cohen & Smith, *supra* note 65, at 113 ("Juries enabled the people to review the actions of the executive in enforcing the law, the judiciary in applying the law, and the legislature in establishing it.").

109. For this, we need look no further than the Federalist Papers:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.

See THE FEDERALIST No. 83, at 498 (Alexander Hamilton); *see also* Jones v. United States, 526 U.S. 227, 245 (1999). (citing Blackstone and recognizing that the jury's exercise of power took the form of "acquittals in the face of guilt"); *see also* Furman v. Georgia, 408 U.S. 238, 314 (1972) (White, J., concurring) ("[A] jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime. Legislative policy is thus necessarily defined not by what is legislatively authorized, but by what juries and judges do in exercising the discretion so regularly conferred upon them.").

when a juror's conviction about a law differed from the sentencing statute, the juror is bound "by the superior obligation of conscience to follow their convictions."[110] John Adams joined Hamilton in this view, believing that "no man can be condemned of life . . . without the concurrence of the voice of the people"—no matter what a criminal statute provided.[111] In the eyes of the Framers, without those obligations, the jury could not maintain its place as the palladium of liberty. For that reason, the Court has recognized that the jury's power needs to be protected from attacks undertaken through "secret machinations" that slowly erode the barrier between the government and a criminal defendant.[112]

Death qualification, it can be said, represents one such machination. As one scholar has put it: "Nothing within the English law, or the American common law, suggested that jurors could be excused because following the law required them to 'decide a cause upon oath against his own judgment.'"[113] Death qualification reduces the jury's ability to perform in its role as a governmental check by requiring jurors to do just that. Such a requirement is out of line with the history of the jury-trial right, which has never tolerated making a juror's agreement with a particular punishment a qualification for service.[114] The Framing-era would have viewed attempting to implement such a requirement as "tyranny."[115]

A faithful originalist could not fight the fact that our modern death-qualification scheme ignores the Framers' intentions.[116] And because they could not tolerate that dissonance, a true originalist must disavow the practice.

V. Death Qualification as the Target of an Abolitionist-Originalist Alliance

Though usually discussed in the context of race, Derick Bell's theory of "Interest Convergence" is a helpful framework for evaluating why the often-ignored grievances of abolitionists and criminal defendants may no longer fall on deaf ears. Outside the race context,[117] Bell's

110. People v. Croswell, 3 Johns Cas. 337, 346 (N.Y. 1804) (Alexander Hamilton).
111. 2 The Works of John Adams 253 (Charles Francis Adams ed., 1850).
112. *Jones*, 526 U.S. at 246 (citing 4 William Blackstone, Commentaries on the Laws of England 1769).
113. Cohen & Smith, *supra* note 65, at 119.
114. *Id.* at 117.
115. *Id.*
116. *Id.* at 121.
117. This Essay does not overlook the fact that racial undertones pervade our criminal legal system—especially in the capital context. However, because the essay is meant to be narrow and because race is thoroughly discussed in the other pieces that fill this volume, I choose to discuss

theory can be boiled down to the idea that the interest of a politically unpowerful group will be accommodated only when they converge with the interests of those who wield the power.[118] And though abolitionists have lodged critiques against death qualification for decades, standing alone, the grievances of that politically powerless group tend to go unnoticed. But as explained above, abolitionists could be joined by the originalists whose already great political influence is only increasing as the federal judiciary places more and more emphasis on historical traditions.[119]

So, by trading on the credit of originalists, abolitionists can make the possibility of eliminating death qualification a reality. Indeed, over the last two decades, the Court has reimagined its Sixth Amendment jurisprudence, standing ready and willing to refasten the Sixth Amendment case law to its Framing-era underpinnings. For example:

- In 1999, the *Jones* Court looked to "the Framers' understanding" to hold that defendants have a right to have the jury find every element of the charged offense;[120]
- In 2000, the *Apprendi* Court looked to the country's "historical foundation" to hold that defendants have a right to have the jury make every factual determination needed to support a sentence;[121]
- In 2002, the *Ring* Court relied on the traditional principles announced in *Jones* and *Apprendi* to hold that defendants have a right to have the jury find all aggravating factors needed to authorize a death sentence;[122]

Bell's theory in terms of power as opposed to race. That said, for one more eye-opening discussion of race and the death penalty, *see* Ngozi Ndulue, *Enduring Injustice: The Persistence of Racial Discrimination is the U.S. Death Penalty*, Death Penalty Info. Ctr. (2020), available at: https://tinyurl.com/zawcm93c.

118. *See generally,* Derrick Bell, Brown v. Board of Education *and the Interest Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980) (coining the term "interest convergence").

119. At this juncture, the words of Audra Lorde bear repeating: "The master's tools will never dismantle the master's house." Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *in* Sister Outsider: Essays and Speeches 110, 112 (2007). With that in mind, a fair retort to this essay's proposal would be that originalism (the "master's tool" here) cannot be used to take down the house that is America's capital punishment regime. In response, however, I echo the words of Ruth Wilson Gilmore who reminds us to pay attention to the possessive 's' in "master's." Like Gilmore, I believe that—because tools are just that—the ends they serve depend entirely on whose hands they are in. *See* Ruth Wilson Gilmore*, Public Enemies and Private Intellectuals: Apartheid: USA*, *in* Race & Class 35, 69–78 (1993), available at: http://tinyurl.com/khksn6e8. Thus, although it is easy to sneer at originalism and reject its utility out of hand, I challenge readers to engage with the proposal in earnest and to judge it on its merits.

120. Jones v. United States, 526 U.S. 227 (1999).

121. Apprendi v. New Jersey, 530 U.S. 466 (2000).

122. Ring v. Arizona, 536 U.S. 584 (2002).

- In 2004, the *Blakely* Court looked to "the Framers' paradigm for criminal justice" to hold that the Sixth Amendment forbade a judge from enhancing a criminal sentence based on facts not found by a jury;[123]
- In 2016, the *Hurst* Court also looked to the earlier cases that sought out the Sixth Amendment's original understanding to hold that juries—not judges—must decide whether to impose the death penalty;[124] and
- In 2020, the *Ramos* Court looked to what the right "meant at the time of the Sixth Amendment's adoption" to hold that jury verdicts in criminal cases must be unanimous.[125]

More telling than those holdings, however, is the composition of the majorities in those cases.[126] In each of those majorities, you will find Justices Thomas and Scalia—two originalists and patently conservative members of the Court. And in recent years, you will also find Justices Breyer, Ginsburg, and Sotomayor—three members of the Court's more liberal wing who have questioned the death penalty's continued existence. [127] And because today's Court contains more originalist members who may be willing to side with the liberals in the name of ideological integrity, the Court might invite the opportunity to extend its string of Sixth Amendment cases.

Admittedly, that would be a win for originalism. That victory, however, would be only a technical one. The real winners would be

123. Blakely v. Washington, 542 U.S. 296 (2004).

124. Hurst v. Florida, 136 S. Ct. 616 (2016).

125. Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

126. ***Jones:*** Souter, Stevens, Scalia, Thomas, and Ginsburg. ***Apprendi:*** Stevens, Souter, Ginsburg, Scalia, and Thomas. ***Ring:*** Ginsburg, Scalia, Thomas, Stevens, Kennedy, and Souter. ***Blakely:*** Scalia, Stevens, Souter, Thomas, and Ginsburg. ***Hurst:*** Sotomayor, Roberts, Scalia, Kennedy, Thomas, Ginsburg, and Kagan. Notably, Justice Breyer did not join any of those majorities. However, he concurred with each of them, writing separately only to maintain his belief that all forms of capital punishment were constitutionally questionable.

127. **Justice Breyer's** *Glossip* dissent makes clear that he strongly questions the continued constitutionality of the death penalty. He has also shared his thoughts during various interviews and in his books he has written. *See Individual Justices and the Death Penalty*, Death Penalty Info. Ctr., https://tinyurl.com/2p8desby (last accessed Mar. 3, 2024).
When she was on the Court, **Justice Ginsburg** joined Breyer's dissent questioning the death penalty's permissibility. Ginsburg has also been quoted saying that "If [she] was queen, there would be no death penalty." *Id.* (discussing Ginsburg's comments at a 2017 talk at Stanford University). **Justice Sotomayor** has not been so explicit, but she continues to write scathing dissents in cases where a majority of the Court greenlights an execution. And while she did not join Justice Breyer's *Glossip* dissent, she did write a separate dissent that (impliedly) called for the end of capital punishment, *see* Glossip v. Gross, 576 U.S. 863, 949–78 (2015) (Sotomayor, J., dissenting); *id.* at 880–81 (Alito, J, majority opinion) (suggesting that the "clear" logical conclusion of Justice Sotomayor's *Glossip* dissent was that the death penalty was unconstitutional).

capital defendants, who would enjoy the immediate Sixth Amendment benefits, and abolitionists, who would be one step closer to their long-term Eighth Amendment goal of showing that the American death penalty no longer comports with society's evolving standards.

VI. Conclusion

In the end, the Court's death-qualification jurisprudence allows for a growing portion of our society to be excluded from the life-and-death decisions entrusted to capital juries. Abolitionists are persuaded that death qualification is an elaborate scheme to empanel capital juries biased toward imposing death sentences. And like Justice Stevens, they believe that "[t]he prosecutorial concern that death verdicts would rarely be returned by twelve randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive."[128] But although those critiques have been ignored in the past, all is not lost. Abolitionists may enlist the help of an unlikely ally. And if successful, they would be one step closer to their goal of ending the American capital punishment regime.

* * *

Sure enough, this strategy would force abolitionists to set aside any methodological objections and ride the originalism train to an agreeable destination. But contrary to proverbial wisdom, sometimes the destination is, in fact, more important than the journey. And, as explained, the road to ending death qualification may be a perfect example of this counterintuitive reality.[*]

128. Baze v. Rees, 553 U.S. 35, 84 (2008) (Stevens, J., concurring in judgment).

* I end with a note: Until and unless the Supreme Court shifts its death-qualification jurisprudence, nothing in this essay should be taken to even suggest I would be unable to fairly consider the facts adduced at trial when deciding whether to impose a death sentence. #EmpanelMe

ESSAY

The American Death Penalty: Tracking the Absurdities

By Michael Meltsner*

Wiley

It's an honor to appear at an event celebrating the life and work of Wiley Branton. He was the kind of civil rights lawyer who couldn't stand doing just one thing well. His career included a fabulous record as a litigator. He was an effective government official who advanced the right to vote in the South at a time when exercising it was full of danger as well as serving as the administrator of anti-poverty programs and as a law school dean. As a former law school dean myself, I can tell you it's harder than it looks. His voice was full-throated Arkansan, but he thrived wherever his work took him. In truth, when I think of him, I don't immediately recount these many achievements. As a young lawyer at the NAACP Legal Defense Fund ("LDF") in the sixties, it was his ever-present smile that captivated me when he visited our office, and talking with him always seemed to end with him conveying a sense of a larger perspective. Indeed, if you were lucky enough to be in a room with Wiley and Thurgood Marshall chatting, you knew these men would find a way to enjoy life despite the burdens they carried and the risks they took.

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Prelude

I once observed that, much like the way Michelangelo imagined the statue that would be revealed when he finally cut into a block of marble, the problem of applying capital sentencing standards to a jury—the question of who should live and who should die—was proposed long before 1973 when the Supreme Court reinstituted the death penalty with standards of a sort to be presented to a jury.[1] But rather than going back to 18th-century death penalty critics, Cesare Beccaria and Benjamin Rush, my thoughts begin with Columbia Law School ("CLS") professor Herbert Wechsler. When I moved from LDF to CLS's faculty in 1970, he was probably America's most prominent law teacher. Wechsler had been a Supreme Court clerk, a Nuremberg prosecutor, and the co-author of the two casebooks that changed how criminal law and federal practice were understood and taught. He was an influential advisor to New York State's governor and the force behind the epic *New York Times v. Sullivan* case.[2] Most significantly, for my purposes, he was the reporter and prime mover of the American Law Institute's ("ALI") Model Penal Code ("MPC") that had been years in the making and was finally approved in 1962.

Wechsler graciously agreed to an extensive interview for my book about our LDF capital punishment campaign, *Cruel and Unusual: The Supreme Court and Capital Punishment*.[3] We met in his law school office, a space that must have been impregnated by the smoke of ten thousand cigarettes. His voice was gravelly. He had a habit of not looking directly at you and delivering answers to questions with mini-lectures. He spoke in paragraphs, but he could also be brusque. You might properly think the phrase "[h]e does not suffer fools gladly" was invented with him in mind. His story boiled down to this: Wechsler had wanted ALI to support full abolition of the Code but thought it was a long shot.[4] He hoped comments from Justice Robert Jackson could change that, but the Justice had died before a key ALI meeting.[5] He then proposed an alternative set of death penalty sentencing provisions for the Code in

1. *See generally* Gregg v. Georgia, 428 U.S. 153 (1976). Troy Gregg was convicted of murdering two men who picked him up while hitch hiking. In a 7-to-2 decision, the Court held that the death penalty in extreme criminal cases did not violate the Eighth and Fourteenth Amendments under all circumstances.

2. New York Times v. Sullivan, 376 U.S. 254 (1964).

3. Michael Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment (2d ed. 2011).

4. *Id.* at 21, 23.

5. *Id.* at 22–23.

light of the many jurisdictions that would continue to keep the death penalty.[6] Because Wechsler believed this formulation had narrowed the availability of capital punishment by requiring aggravating and mitigating circumstances that would go into death sentencing, he was disappointed that no jurisdiction had agreed to his approach.

What he did not say straight out was that he feared an abolition controversy at ALI might cast a shadow on the general reforms that were at the core of the MPC. Even more importantly, his views toward abolition were hopelessly tangled. To summarize what was a complex matter, Wechsler had opposed abolition or argued for caution in many previous settings when he thought the elimination of the sanction flew in the face of what would be extreme public disapproval. He had written, along with his colleague Jerome Michael, in their classic 1940 text *Criminal Law and its Administration*, that a legitimate rationale for execution and harsh punishment was the public's desire for revenge.[7] Wechsler believed that lenient treatment of offenders might lead to lynching or indifference about prosecution. And he told me that, as late as 1959, he had written that doing away with capital punishment might invite the greater evil of private violence. If this position seems inconsistent with his later abolitionist stance, it is perhaps well to remember that Wechsler was a great believer in the view that the public had to become interested in what went on in the criminal process and that stimulating that interest required that its voice be heard. On the other hand, Wechsler had come to believe the continued impact of the death penalty on the rest of the criminal justice system and other MPC sentencing reforms was, and would be, extremely negative. If he could bring the ALI membership to support abolition, he would regard it as a great victory.

Looking back at these events, my sense of the absurd is overwhelming. As seen below, I am led to balance an interest in doctrine and constitutional interpretation with a sense of the absurdity demonstrated by oft-appearing instances justifying reams of irony, ridicule, satire, and sarcasm. In this instance, a brilliant but ambivalent scholar seeks to overthrow the death penalty. Still, when that proves unlikely he provides a means of keeping it—the weighing of aggravating and mitigating factors—that he thinks more benign than the prevailing

6. *Id.* at 21.

7. 1 Jerome Michael & Herbert Wechsler, Criminal Law and its Administration 16 (1st ed. 1940).

standardless pre-1960s mode.[8] No one likes Wechsler's formulation at first except our cohort of death penalty lawyers at LDF because we believe it can be used effectively as a tactic to attack the then-current standardless capital punishment sentencing system and be useful in seeking the stays necessary to create a moratorium on executions. But the ALI formulation came back to bite us in 1976.

At first, the United States government took the position before the Supreme Court that the MPC alternative was just precatory (really only general education for juries), and worse, in deciding *McGautha v. California* in 1971, seven justices of the Supreme Court agreed that even if the MPC was intended to constrain discretion, it didn't do so, and actually couldn't do so.[9] That task is beyond human capacity. Of course, in a blink of constitutional time, the Court improbably concluded that the standardless system it approved a year earlier was now unconstitutional in *Furman v. Georgia*, under the fig leaf of a different clause of the Constitution.[10] There was another shift in 1976, in *Gregg v. Georgia*,[11] when the legal world suddenly embraced Wechsler's "impossible" formulation, or at least part of it. MPC-like thinking carried the day, and the Court agreed over the objections of the anti-capital punishment lawyers who now find the MPC incapable of narrowing arbitrary fostering discretion.[12] If war is to be understood as politics by other means, such doctrinal gymnastics by all parties suggests that judicial decisions and law-making in some areas (here, capital punishment) are also politics by other means.

For some reason, that only a psychoanalyst could unravel, this series of events reminds me of the old Abbot and Costello comedy routine called "Who's on First?"[13]

> Costello: That's what I want to find out. I want you to tell me the names of the fellows on the St. Louis team.
>
> Abbott: I'm telling you. Who's on first, what's on second, I Don't Know is on third
>
> Costello: You know the fellows' names?

8. Model Penal Code § 210.6 (Am. L. Inst. Official Draft and Explanatory Notes 1962).
9. McGautha v. California, 402 U.S. 183, 206–207 (1971).
10. Furman v. Georgia, 408 U.S. 238 (1972).
11. Gregg v. Georgia, 428 U.S. 153 (1976); *see also* Peggy Cooper Davis, *Georgia on My Mind*, 43 Amicus J. 6 (2023).
12. Evan Mandery, *It's been 40 Years Since the Supreme Court Tried to Fix the Death Penalty—Here's How it Failed,* (Mar. 30, 2016, 10:00 PM), www.The Marshall Project.org/2016/3/30/it.
13. Abbott and Costello, *Who's on First*, Baseball Almanac, www.Baseball-Almanac.com/humor4.shtml (last visited Mar. 4, 2024).

Abbott: Yes.

Costello: Well, then who's playing first?

Abbott: Yes.

Costello: I mean the fellow's name on first base.

Abbott: Who.

Costello: The fellow playin' first base.

Abbott: Who.

Costello: The guy on first base.

Abbott: Who is on first.

To recap: By 1976, Wechsler, the scholar who wanted total abolition of capital punishment, had his tactical formulation triumphant in bolstering a penalty he wanted to eliminate. The Supreme Court embraced what it had previously derided.[14] The switch ultimately came about because the Justices totally misread seventies public opinion, which now overwhelmingly favors retention of the death penalty. As for the LDF lawyers and their clients, they happily chose a tactic to stop executions, that had stopped executions, and seemingly moved the country closer to abolition. After all, over 600 lives were ultimately saved by *Furman v. Georgia*.[15] But almost fifty years after *Gregg*,[16] the capital punishment abolitionists are still stuck with the tactic that is now a governing principle, even though it is derided by the left and right for not fulfilling its intended purpose and likewise rejected by current Justices as a pathway to abolition.[17] This governing principle still stands as a legal means of regulating potential executions.

On the other hand, given the number of states that have recently abandoned the death penalty, both in law and in fact, as well as the behavior of prosecutors and jurors in failing to seek or implement capital punishment and the persistence of racial discrimination, if the Supreme Court still honored the *Trop v. Dulles* formulation that the Eight Amendment's Cruel and Unusual Punishment Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," the death penalty would be removed from our array of sentencing alternatives.[18] Although the number of death sentences and executions has decreased in twenty-first-century

14. Mandery, *supra* note 12.
15. Furman v. Georgia, 408 U.S. 238, 417 (1976) (Powell, J., dissenting).
16. Gregg v. Georgia, 428 U.S. 153 (1976).
17. Mandery, *supra* note 12.
18. Trop v. Dulles, 356 U.S. 386, 100–101 (1958).

America amid declining public support, the United States remains among the leading executioners worldwide, alongside many dictatorial regimes.[19] Given the present composition of the Supreme Court and its stance, the death penalty will remain without a significant shift in public opinion. Thus, while abolition-minded lawyers must work within the system we have, commentary and criticism focused solely on death penalty litigation and doctrine isn't going to sway ideologues. Since the restoration of the death penalty in 1976, the harsher judicial approach to abolition has led to a focus narrowly on administrative, procedural, and utilitarian objections to executions. Interestingly, in this same period, European authorities increasingly recognize the death penalty as a human rights violation.[20]

Suggested Approaches

Advocates and scholars have pointed to various strategies to advance abolition in the face of the Supreme Court's hostility. In *Little Furmans Everywhere: State Court Intervention and the Decline of the American Death Penalty*, leading capital punishment scholars Carol S. Steiker and Jordan M. Steiker "explore some of the myriad scenarios in which state court intervention . . . has interacted with political reform or repeal efforts to accelerate the recent massive decline in the use of the death penalty across the United States."[21] While each of the state cases they describe is "unique," the Steikers believe they reflect "dynamics between judicial and political action [that] illuminate the importance of state court intervention in the story of the American death penalty's precipitous decline, which has tended to foreground other institutional actors and to neglect the complex interactions among branches of government."[22] They argue that state court rulings, while often technical and less known by the general public, have been "a pervasive and powerful force in the two-decade-long diminution of the practice of capital punishment across the United States.[23]

Anthony Amsterdam has described a similar focus away from typical federal court litigation ending with the Supreme Court review.

19. *Key facts*, Penal Reform Int'l, https://www.penalreform.org/issues/death-penalty/key-facts/ (last visited Mar. 4, 2024).

20. Mugambi Jouet, *A Lost Chapter in Death Penalty History:* Furman v. Georgia, *Albert Camus, and the Normative Challenge to Capital Punishment*, 49 Amer. J. Crim. L. 119 (2022).

21. Carol S. Steiker & Jordan M. Steiker, *Little Furmans Everywhere: State Court Intervention and the Decline of the American Death Penalty*, 107 Cornell L. Rev. 1621, 1623 (2022).

22. *Id.* at 1623.

23. *Id.* at 1624.

In a recent article, *The Ghost of Furman Past and the Spector of Furman Future*, he sets out the optimal strategy for death–penalty defense lawyers "to pursue[] in the immediate and mid-range future," to both (1) protect individual clients and (2) advance the long-range cause of abolition.[24] The strategy is evoked because the present composition of the Supreme Court "cannot sensibly" be the forum "for litigation aimed at ending the death penalty" despite the "rarity" of death sentences "relative to the opportunity for imposing them."[25] Post-conviction litigation in federal habeas corpus courts, a place where capital case convictions and sentences were subject to careful, often painstaking review, have been extremely narrowed since the passage of the Antiterrorism and Effective Death Penalty Act ("AEDPA") signed by President Clinton in 1996.[26]

Amsterdam's two-step strategy emphasizes devoting resources to pretrial and trial defense work, similar to the suggestion implicit in the Steikers' report of state supreme court approaches. The strategy also aims to present cogent arguments for abolition in the state courts. While no state court has yet to rule capital punishment cruel and unusual, the recent decline in states permitting the death penalty, prosecutors seeking the death penalty, jurors selecting it over life sentences (often barring parole) offers, and fertile ground for initially persuading taking death off the table. Amsterdam adds that defeating a death sentence at trial, as well as suggesting a plethora of grounds for abolition to state courts, especially state courts in jurisdictions where executions have not taken place in many years despite the presence of men on death row, also "opens up a new line of equal protection attack, featuring a reconfigured class-of-one analysis, as well as a due-process claim of arbitrariness and unfairness."[27] This latter suggestion, of course, harks back to language used in Potter Stewart's important opinion in *Furman*.[28]

It is significant to note, as the Steiker's point out, that "[s]ometimes judicial reform or restriction of capital punishment short of wholesale abolition can have the effect—and may well be intended to have the effect—of stabilizing the practice against disrepute or legal challenge."[29] But they conclude that "the overwhelming weight of state

24. Anthony G. Amsterdam, *The Ghosts of Furman Past and the Specter of Furman Future*, 43 Amicus J. 10 (2023).
25. *Id.* at 10–12.
26. Pub L. 104–132, 110 Stat. 1214 (1996).
27. Amsterdam, *supra* note 24, at 13.
28. Furman v. Georgia, 408 U.S. 238, 309–310 (1976).
29. Steiker & Steiker, *supra* note 21, at 1683–84.

judicial intervention over the past two decades has served to diminish the practice of capital punishment in the United States rather than to reinforce it."[30] Nevertheless, while I believe the actions taken in state trial and appellate courts and the strategies urged upon advocates to adopt are both necessary and appropriate, their continued acceptance would profit from and perhaps be energized by what I recommend here: efforts to unleash a larger cultural approach aimed at the general public in a fashion that can bolster the already growing disenchantment with the death penalty.

The Uses of Absurdity and Its Friends: Irony, Satire, Ridicule and Sarcasm

While no one should advocate less vigorous defense of murder cases, it is time to address the public directly by exposing the dysfunction that characterizes every aspect of the capital punishment system. The absurdities of the American way of execution are numerous. To cite an egregious example, 2022 was widely dubbed "the year of the botched execution" because one-third of the executions were definitively botched—and they were all attempted by the supposedly humane method of lethal injection.[31] Poorly trained executioners couldn't set IV lines, States didn't follow their execution protocols, and inmates gasped for breath as they died drawn-out, torturous deaths. A recent op-ed in the *New York Times* by Columbia professor Bernard Harcourt tracked the horrendous record of grisly execution chamber events in Alabama in recent years.[32] The cruelty displayed hasn't deterred the state from using a drug that has never been utilized or tested in future executions.[33] But Alabama is hardly the only place where execution protocols have led to unnecessarily painful deaths. In her powerful new book, *Secrets of the Killing State, the Untold Story of Lethal Injection*, professor Corinna Lain puts to rest any claims that States are capable of administering executions humanely.[34] The few States that still execute

30. *Id.* at 1686.

31. *See generally* Corinna Lain, Secrets of the Killing State, the Untold Story of Lethal Injection (forthcoming 2024).

32. Bernard Harcourt, *Alabama Has a Horrible New Way of Killing People on Death Row*, N.Y. Times (Sept. 23, 2023), https://www.nytimes.com/2023/09/18/opinion/alabama-executions-botched.html.

33. Nicholas Bogel-Burroughs and Abbie VanSickle, *Alabama Carries Out First U.S. Execution by Nitrogen*, N.Y. Times (Jan. 25, 2024), https://www.nytimes.com/2024/01/25/us/alabama-nitrogen-execution-kenneth-smith.html#:~:text=The%20state%20executed%20Kenneth%20Smith,Supreme%20Court%20declined%20to%20intervene.

34. Lain, *supra* note 31.

frequently seem unwilling to confront the systemic lapses in their approach meaningfully.[35] Multiple decisions from our High Court abet them.[36] According to a study by Bloomberg News, since 2013, there have been more than 270 emergency requests to stay executions.[37] The Justices blocked executions only eleven times.[38] However, of twenty-one emergency requests to vacate a stay of execution, eighteen were granted, showing that "the court is much more likely to let executions proceed than to put them on hold."[39] In fact, putting an execution on hold while litigation continues has become a rarity since 2020, when former President Donald Trump made his third appointment to cement a 6-3 conservative majority on the Court. Richard Glossip's was one of the few cases on hold, and he had something highly unusual for a capital case: backing from Oklahoma's attorney general.[40]

Amsterdam and the Steikers' approach, if fully realized, will no doubt result in converting some death penalty sentences to life, but it is unlikely to change the attitude of the majority of Justices. The approach I suggest is equally unlikely to result in a change at the Court; nevertheless, it should be added to the activist playbook. The 1972 *Furman* decision was neutralized, if not overruled after thirty-five states enacted reframed death penalty statutes.[41] The Court has a checkered history of following public opinion, but over time, it is undeniable that its decisions often reflect shifts in the public's attitudes. I believe it is time for a vigorous approach to change the culture surrounding the death penalty. Such a shift in approach is ripe given the contrast between the public's actions in death cases and the Supreme Court's disposition. It is also of indeterminate effect. It should be done because the facts support it, and the public should be informed, not because it can be proven effective. I refer to telling the story through the intense and frequent attention to what I call absurdities—irony and satire, sarcasm and ridicule. Each form is different in particulars, but all tend to undermine conventional understandings and beliefs. Their use to

35. *Id.*

36. *See* Baze v. Rees, 553 U.S. 35 (2008); Bucklew v. Precythe, 139 S. Ct. 1112 (2019).

37. Lydia Wheeler, Kimberly Strawbridge Robinson, and Nicole Sadek, *Death Row Inmates Find Fewer Paths to Supreme Court Reprieves*, Bloomberg (Sept. 26, 2023, 5:01 AM), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/X6C8LQ8S000000?bna_news_filter=us-law-week#jcite.

38. *Id.*

39. *Id.*

40. *Oklahoma Attorney General Moves to Vacate the Murder Conviction of Richard Glossip*, Death Penalty Info. Ctr. (Apr. 23, 2023), https://deathpenaltyinfo.org/news/oklahoma-attorney-general-moves-to-vacate-the-murder-conviction-of-richard-glossip.

41. Mandery *supra* note 12.

point out deficiencies by masters of the form is common throughout history—Aristophanes, Petronius, Chaucer, Swift, Twain, HL Mencken, Orwell, Andy Borowitz, Jon Stewart, Stephen Colbert, to mention just a few who have used absurdities to educate and to hold up a mirror to the follies of the powerful and the socially conventional.

Capital punishment has not escaped the wrath of those who convey absurdities. The French philosopher Voltaire, for example, whose satire *Candide* takes down persistent optimism, wrote about capital punishment.[42] He said that "[i]t is forbidden to kill; therefore, all murderers are punished unless they kill in large numbers and to the sound of trumpets."[43] In 1840, William Makepeace Thackery wrote extensively about the actual implementation of the death penalty in "Going to See a Man Hanged."[44] Here is an excerpt:

> J. S—, the famous wit, now dead, had, I recollect, a good story upon the subject of executing, and of the terror which the punishment inspires. After Thistlewood and his companions were hanged, their heads were taken off, according to the sentence, and the executioner, as he severed each, held it up to the crowd, in the proper orthodox way, saying, "Here is the head of a traitor!" At the sight of the first ghastly head the people were struck with terror, and a general expression of disgust and fear broke from them. The second head was looked at also with much interest, but the excitement regarding the third head diminished. When the executioner had come to the last of the heads, he lifted it up, but, by some clumsiness, allowed it to drop. At this the crowd yelled out, "Ah, Butter-fingers!" the excitement had passed entirely away. The punishment had grown to be a joke—Butter-fingers was the word—a pretty commentary, indeed, upon the august nature of public executions, and the awful majesty of the law.[45]

The greatest work of American literature dealing with the death penalty is surely Herman Melville's *Billy Budd, Sailor*.[46] The novella illustrates, inter alia, how moral issues governing crime and punishment mask nuance and fairness.[47] There the young, speech-impaired, Billy can't defend himself from a charge of murder when he is challenged by Captain Vere's "speak! defend yourself."[48] All he can do is evoke

42. Callins v. Collin, 510 U.S. 1141, 1145 (1994).
43. Voltaire, Candide (1759).
44. William Makepeace Thackeray, *Going to See a Man Hanged*, WorldPress (Aug. 23, 2017), https//redlipsand bibliomaniacs.worldpress.com.
45. *Id.*
46. Herman Melville, Billy Budd (Jim Manis 2012).
47. *Id*.
48. *Id.* at 380.

such "strange dumb gesturing and gurgling" that makes him seem apoplectic.[49] He is innocence personified, absurdly destroyed by the impersonal forces of a cruel world. His seaboard trial, as professor Richardt Weisberg[50] has controversially argued, contains "no fewer than eight procedural errors," the first of which is Vere's convening of a "drumhead court" that, according to the 1749 Articles of War, bestowed "court-martial commissions exclusively to fleet or squadron commanders." Thus, Billy's case should have been referred to the squadron command.[51] Vere assumed multiple roles in the trial. He was a witness, a prosecutor, both jury and judge—all the more egregious because he was the vessel's captain, with all its incidental powers.[52] Further, Billy had no defense counsel and there was no one present at his trial to argue reasonable doubt.

For illustrative purposes, here are some current examples, but they are merely the few absurdities that jump out at me. Readers who share my premises will have other examples that should be added to the mix and deployed, many of which may be more powerful than mine. If there is any executed American whose name the public remembers, it is likely to be Gary Gilmore,[53] who in 1977 became the first person executed in the U.S. in ten years, the first after the victory for abolition in *Furman v. Georgia*.[54] During the time Gilmore was on death row, he attempted suicide.[55] He made clear that he wanted to die. Yet the state of Utah intervened to make sure he received the emergency medical treatment that saved his life so a state-assembled firing squad could execute him.

A similar example resides in the American rule governing how to treat a person who is diagnosed as psychotic. Here, the law seems to be that the symptoms of the illness can be addressed, and if we are successful in moderating them, well, then we can go on to an execution. In *Harry Potter and the Deathly Hallows*, JK Rowling has a character named Snape who asks his victims, "Would you like me to [kill you] now. . . or would you like a few moments to compose an epitaph?"[56] Our death row population has time to compose an epitaph and a novel

49. *Id.*
50. Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd with an Application to Justice Rehnquist*, 57 NYU L. Rev. 1, 10 (1982).
51. *Id.* at 22–23, 27–28.
52. *Id.* at 19.
53. Gilmore v. Utah, 429 U.S. 1012 (1976).
54. Furman v. Georgia, 408 U.S. 238, 417 (1976).
55. John H. Bloom, *Killing the Willing: "Volunteers, Suicide and Competency*, 103 Mich. L. Rev. 939, 940 n. 40 (2005).
56. JK Rowling, Harry Potter and the Deathly Hallows 683 (2007).

the length of Tolstoy's *War and Peace*.[57] The latest median wait for execution in the United States continues to change but ordinarily, the number has been between fifteen and twenty years.[58] In the past, the primary argument made to support the death penalty was a supposed deterrent effect. The delays inherent in the American system and the small number of people actually executed have contributed to the total abandonment of this argument. They also make a mockery of the notion that execution will provide a sense of closure to family members of the victim. Some wonder if the delays are enough of a weak link to eventually bring down capital punishment.

Anyone who has followed the capital punishment story from 1963 to today is aware that the Supreme Court has consistently avoided the obvious evidence of race-based sentences of death. Even in the famous 1963 Three Justice dissent to a denial of a petition for certiorari in *Rudolph v. Alabama,*[59] the record of Southern states overwhelmingly executing black men was not a factor.[60]

Before *Rudolph*, at LDF, we were planning a capital punishment campaign because some 90 percent of the men executed for rape were Black.[61] My colleagues Frank Heffron and Leroy Clark and I initially had the numbskulll idea that this statistic would be important. Tony Amsterdam soon brought into our team the leading criminologist in America, Marvin Wolfgang of the University of Pennsylvania, who facilitated our education in the arcane world of criminal justice-related statistics. He and Tony designed the research approach and crafted the ninety-some-page questionnaire that allowed us to show in an Arkansas case that there was no characteristic of crimes Black people were convicted of that made their offenses more severe than those committed by white people who were spared death sentences.[62] In short, the resulting disparity could not be explained due to factors other than race. In subsequent years, the formidable Baldus study's powerful evidence of race-based capital sentencing in Georgia was rejected by the Supreme Court in *McCleskey v. Kemp*;[63] Justice Powell's controlling

57. *Id.*

58. *Time on Death Row*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row (last visited May 7, 2024).

59. Rudolph v. Alabama, 375 U.S. 889 (1963). Rudolph is a capital rape case that alerted the legal world to the interest in abolition of several of the Justices.

60. *Id.*

61. Michael Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment 75 (1973).

62. Maxwell v. Bishop, 398 U.S. 262 (1970) *reversed on other grounds*, 398 F.2d 138 (8th Cir. 1968).

63. McCleskey v. Kemp, 481 U.S. 279 (1987); *aff'g* McCleskey v. Zant, 580 F. Supp. 338 (1984).

opinion in the five to four decision rejected the discrimination claim in part because it might lead to continuing litigation over other disparities in the criminal justice system[64], a claim thoroughly ridiculed by Justice Brennan's dissent as being based on providing too much justice.[65] Powell's biographer later reported that the *McCleskey* decision was the one the Justice most regretted.[66] But a greater irony today is, of course, that a Court that decries affirmative action as race discrimination in college admissions[67] has never been able to bring itself to fully acknowledge the racial component in death cases that all can see. The *Furman* decision that ended the death penalty as a practical matter in 1972 was ultimately based on a finding of arbitrariness.[68] Still, most observers understand the term as a cover for racial discriminatory prosecution and sentencing that the Justices could not acknowledge, much less use, as a basis for a decision. When it comes to race and the criminal process, the Court is unwilling to say the emperor isn't wearing any clothes.

A nationally recognized expert, Michigan Law School professor Samuel Gross, noted another critical dysfunction that seems to fit the definition of a Catch-22 perfectly. The district court judge in McCleskey (1) first demanded that McCleskey's analysis must take into account all relevant factors, (2) then observed that only the method of multiple regression analysis was capable of doing so, and yet (3) held that since multivariate analysis does not, by definition, offer proof of an individual state actor's state of mind on the issue of intent to discriminate *in a particular case*, statistical analysis provided no evidence of value to McCleskey's claims of discriminatory treatment.[69]

Federal judges and Supreme Court justices must, of course, be confirmed by the United States Senate. Here is an excerpt from the 1970 Senate confirmation hearings of Justice Harry Blackmun:

> I grew up in a State Minnesota, which has not had the death penalty since 1911. In my entire lifetime within my memory it has not been an issue. And when I came on the court [the Eighth Circuit] there were immediately three or four instances where we were asked to stay executions scheduled for the next day. In none of those cases did we enter a stay order. In each of them as I recall the eighth amendment

64. *Id.* at 298.
65. *Id.* at 339.
66. John C. Jeffries Jr., Justice Louis F. Powell Jr.: A Biography 451 (1st ed. 2001).
67. Students for Fair Admissions Inc. v. President and Fellows of Harvard College 600 U.S. 181 (2023).
68. Furman v. Georgia, 408 U.S. 238, 251 (1976).
69. Samuel R Gross, *David Baldus and the Legacy of* McCleskey v. Kemp, 97 Iowa L. Rev. 1905, 1912–13 (2012). *See also* McCleskey v. Zant, 580 F. Supp. 338 (N. D. Ga. 1984).

> issue was raised. And I stated in connection with the observation which the press has latched onto, I think I can quote it verbatim. I also stated that ordinarily the imposition of the death penalty is a matter for the discretion of the legislature. I firmly believe this. One, of course, can imagine if a Legislature were to impose the death penalty on a pedestrian for crossing the street against a red light this might be something else again.
>
> Senator FONG. That would be very unreasonable?
>
> Judge BLACKMUN. Sir?
>
> Senator FONG. That would be very unreasonable?
>
> Judge BLACKMUN. I would think so.[70]

This is from the Justice who twenty-four years later wrote:

> "From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies" [71]

Blackmun let it be known privately before he was a Justice that he abhorred the death penalty; it took him years to move past jaywalking. We might say generously, better late than never that he acted on his beliefs. A less kindly viewer might point out that over a thousand men were executed during his years on the Supreme Court bench. I close my few and I hope suggestive examples of absurdities with perhaps the strangest item of all. In the run-up to the two California capital punishment referenda in 2016—one of which would replace the death penalty with life sentences—a survey of the 700-plus inmates on death row found that many actually opposed the potential abolition victory.[72]

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70. *Confirmation Hearing on the Nomination of Hon. Harry Blackmun, to Be an Associate Justice of the Supreme Court of the United States: Before the S. Comm. on the Judiciary*, 91st Cong. 59–60 (1970).

71. Callin v. Collins, 510 U.S. 1141,1145 (1994) (Blackman J. dissenting).

72. Paige St. John, *Death Row Inmates' Surprising Views on Death Penalty Vote: 'If You Are Going To Execute Me, Execute Me*,' L.A. Times (Sept. 7,2016,3:00 AM), https://www.latimes.com/local/lanow/la-me-death-row-death-penalty-20160901-snap-story.html#:~:text=He%20agrees%20with%20

Apparently, they believed they were in no real jeopardy of execution—many years later they are all still alive—and that life sentences would rob them of the attention they received from being under sentence of death as well as the assistance of pro bono counsel, necessary to win greater changes in their sentences and prison conditions.

For someone like me, who argued his first capital case[73] at the age of twenty-six in the 1960s when supporters of the death penalty frequently cited its supposed "terror effect" on would-be criminals and also claimed many potential killers stayed their hand due to visions of the electric chair and gas chamber, the willingness of so many convicted of capital murder to quickly brush aside the likelihood of actual execution was surprising. The ultimate truth of their behavior was to confirm that many Americans want the death penalty in theory but not practice. Ultimately, this establishes the force of the constitutional point made first in the 1968 LDF brief in *Boykin v. Alabama*,[74] which seems even more persuasive today. The assertion, as recently reiterated by Anthony Amsterdam, is that "the question is not will contemporary standards of decency allow the existence of such a general law on the books [but] rather will contemporary standards of decency allow the general application of the law's penalty in fact."[75] Daniel Medwed and I recently found the disparity between, as Amsterdam put it, "what the public conscience will allow the law to *say* and what it will allow the law to *do*" amounted to a recrudescence of human sacrifice—a widespread ancient practice of rare, ritualized and arbitrary killing, aimed at victims from the most vulnerable class, to advance a range of societal goals—appease the gods, ensure good weather—by the most powerful.[76] Given the numbers, we concluded Americans have merely substituted a gurney for a stone altar.[77]

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other%20condemned,death%20penalty%20but%20speed%20appeals.&text=%E2%80%9CIf%20you%20are%20going%20to,go%2C%20let%20me%20go.%E2%80%9D.

73. Coleman v. Alabama, 377 U.S. 129 (1964); *See also* Coleman v. Alabama, 389 U.S. 22 (1967).

74. Boykin v. Alabama, 395 U.S. 238 (1969).

75. Brief for NAACP Legal Defense Fund, Inc. at 38, Boykin v. Alabama, 395 U.S. 238 (1969) (No. 642), 1968 WL 112750.

76. Medwed & M. Meltsner, *Does a Fair Way to Decide Who Gets the Death Penalty Actually Exist?*, Slate (Feb. 2, 2022), https://slate.com/news-and-politics/2022/02/the-death-penalty-is-arbitrary-and-capricious.html. *See also* Amsterdam, *supra* note 24, at 12.

77. Amsterdam, *supra* note 24, at 12.