

ENSURING BLACK LIVES MATTER WHEN THE PENALTY IS DEATH

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“[I]t is not so much that the death penalty has a race problem as it is that the race problems of America manifest themselves through the implementation of the death penalty.”¹

INTRODUCTION

*Trayvon Martin.*² *Michael Brown.*³ *Breonna Taylor.*⁴ *George Floyd.*⁵ These are several of the names that come to mind when we think about the Black Lives Matter (BLM) movement. They are the faces of institutional oppression of Black men and women in their daily interactions with law enforcement. Thus far, the BLM movement has focused on police brutality against Black communities—the vagaries of violence perpetrated on minority communities by those whose duty is to protect them.⁶ But there is another place where Black Lives *should* Matter, but don’t—the death penalty.

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¹ 55 Harv. C.R.-C.L. L.Rev 585, 589 (2020).

² Karen Grigsby Bates, *A Look Back at Trayvon Martin’s Death, and the Movement it Inspired*, NPR (July 31, 2018), <https://www.npr.org/sections/codeswitch/2018/07/31/631897758/a-look-back-at-trayvon-martins-death-and-the-movement-it-inspired>.

³ *Timeline of events in shooting of Michael Brown in Ferguson*, AP NEWS (Aug. 8, 2019), <https://apnews.com/article/9aa32033692547699a3b61da8fd1fc62>.

⁴ Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor’s Death*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html>.

⁵ Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis, & Robin Stein, *How George Floyd was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.

⁶ Larry Buchanan, Quoctrung Bui, & Jugal K. Patel, *Black Lives Matter May be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

The law of Black lives not mattering was established in the 1987 landmark case *McCleskey v. Kemp*.⁷ In *McCleskey*, the Supreme Court famously acknowledged a study proving that race influences capital sentencing but then held that the results of that study did not mean that capital punishment violated the Eighth Amendment.⁸ To establish a violation of the Eighth Amendment, the Court held a capital defendant must show *intentional* race discrimination in his or her case.⁹ As Justice Blackmun observed in dissent, the same disparate impact evidence that individuals could use to save their jobs could not be used to save their lives.¹⁰ Today, *McCleskey* has come to stand for the Court's refusal to address the racially disparate imposition of death across the nation.

In a separate and seemingly unrelated corner of death penalty doctrine, another type of disparate impact has likewise gone unaddressed: geographic arbitrariness. Although the Supreme Court in *Furman v. Georgia* held that the arbitrary and capricious imposition of the death penalty violates the Eighth Amendment,¹¹ and has not repudiated that principle since announcing it in 1972, the fact of the matter is that the death penalty is a punishment pursued and applied only in certain counties. In fact, as of 2013, only two percent of all counties in the United States are responsible for more than half of the nation's death row population and for more than half of the nation's executions since 1976.¹²

Considered separately, neither of these problems are particularly new. Scholars have written about racial discrimination in the death penalty for decades.¹³ More recently, scholars have

⁷ *McCleskey v. Kemp*, 481 U.S. 279, 287–88 (1987).

⁸ *Id.*

⁹ *Id.* at 297.

¹⁰ *See id.* at 362.

¹¹ *Furman v. Georgia*, 408 U.S. 238, 239–240 (1972).

¹² Richard C. Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*, DEATH PENALTY INFO. CTR. (Oct. 2013), <https://files.deathpenaltyinfo.org/legacy/documents/TwoPercentReport.pdf>.

¹³ *See, e.g.,* Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 96 (Charles J. Ogletree, Jr. & Austin

also written about geographic arbitrariness in capital punishment.¹⁴ Few scholars, however, have recognized the connection between the two. To the extent that they have, they have simply equated the death penalty with the imposition of death sentences in former confederate states.¹⁵ Yet to be explored in the literature is the connection between race and geography *today*. This connection moves beyond the death penalty as Southern exceptionalism connecting the past with the present and showing that the overlap between racism and geography is not just a coincidence.¹⁶

This article aims to fill this gap in the literature, examining racism in the context of geographic arbitrariness both as a historical condition and as a distinct feature of the death penalty today. After exploring the problem, I consider two possible responses. One I refer to as “McCleskey Plus” because it does what the Supreme Court failed to do in 1987. Here I argue for the implementation of racial justice acts that recognize race discrimination in the imposition of death without requiring a showing of purposeful discrimination. The second possible response takes the BLM movement to the next level, moving past demands to “defund the police” to a compelling, clear message: “defund the death penalty.”

Sarat, eds., N.Y.U. Press 2006) (discussing racial issues in the US death penalty system); Stephen B. Bright, *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 211 (Charles J. Ogletree, Jr. & Austin Sarat, eds., N.Y.U. Press 2006) (discussing racial issues in the US death penalty system).

¹⁴ See, e.g., Robert J. Smith, *The Geography of the Death Penalty and its Ramifications*, 92 B.U. L. REV. 227-230 (2011) (discussing geographic arbitrariness in the US death penalty).

¹⁵ See, e.g., Charles J. Ogletree, Jr., *Black Man’s Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 1, 18–19 (2002) (“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. This similarity appears to be more than mere coincidence or correlation—and indeed, a cursory evaluation of some of the factors that explain the high incidence of lynching shows that many of those factors are present in the impulse to impose capital punishment today.”).

¹⁶ Southern exceptionalism is a subset of American exceptionalism, which claims that the United States as a whole is not exceptional when it comes to the death penalty. Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 Or. L. Rev. 97, 122 (2002). Rather, the Southern United States is exceptional in its increased imposition of death. *Id.* Noted death penalty scholar Carol Steiker opines that southern exceptionalism exists due to the extensive history of racial tension in the South, the South’s embrace of Protestant fundamentalism, the South’s distinctive sub-culture of violence, and the South’s resistance to the Civil Rights Movement. *Id.* at 122–25.

The discussion proceeds as follows. Part I of this Article introduces the problem more fully, beginning with the foundational condition of the death penalty’s constitutionality as established in *Furman v. Georgia*—that it not be imposed in an arbitrary and capricious manner.¹⁷ This discussion on *Furman* is followed by what at first glance appears to be two separate violations of this rule: the death penalty’s application along the lines of geography and race. Part II provides a deep dive into the connection between geographic and racial arbitrariness today by examining the top death sentencing and executing counties in the United States through the lens of their extensive histories of racial tension and prosecutorial misconduct. Part III explores what it means for the death penalty to exist in a society that demands criminal justice reform and equal treatment for Black men and women. In the end, it suggests two plausible solutions to resolving the tangled relationship between race and geography in the death penalty’s application. The states that still embrace capital punishment, and the federal government for that matter, can (1) recognize through the enactment of racial justice acts that the death penalty should only be imposed in the absence of racial and geographic arbitrariness, or (2) embrace the BLM movement’s “Defund the Police” mantra and apply it to where Black lives are actually on the table—“Defund the Death Penalty.”

I. THE ARBITRARY NATURE OF THE US DEATH PENALTY

*“The arbitrary imposition of punishment is the antithesis of the rule of law.”*¹⁸

A central tenet of the death penalty, both morally and constitutionally, is that it is reserved solely for the “worst-of-the-worst” criminals.¹⁹ As the Supreme Court explained in *Kennedy v. Louisiana* in 2008, “capital punishment must ‘be limited to those offenders who commit a “narrow

¹⁷ *Furman*, 408 U.S. at 239–240.

¹⁸ *Glossip v. Gross*, 576 U.S. 863, 915 (2015) (Breyer, J., dissenting).

¹⁹ See Robert Blecker, *Among Killers, Searching for the Worst of the Worst*, WASH. POST (Dec. 3, 2000), <https://www.washingtonpost.com/archive/opinions/2000/12/03/among-killers-searching-for-the-worst-of-the-worst/d48af4b8-dbb2-44d6-9b16-e2966eda7015/>.

category of the most serious crimes” and whose extreme culpability makes them “the most deserving of execution.”²⁰ This is the constitutional condition, and the moral one for that matter, on the state’s power to take the lives of its own citizens: that this awesome power is reserved for only the worst of the worst.

However, the reality is that death row facilities across the United States are filled with inmates who were sentenced to death based on such arbitrary factors as their race, the race of their victims, and the jurisdiction in which they were sentenced.²¹ Throughout the United States, the death penalty effectively functions as a lottery system.²² It is a system in which typically the only people who receive death sentences are those who murder multiple people, torture their victims in murderous overkills, or are Black.²³ The ensuing discussion sets the groundwork for the deep dive that follows, explaining *Furman v. Georgia*’s holding and examining what would appear to be two separate violations of that holding—the imposition of the death penalty on the basis of the arbitrary and capricious factors of geography and race.

A. *Why Arbitrariness Matters: Furman v. Georgia*

In the 1960s, the sweeping social and political transformation that took the country by storm also transformed the death penalty. Across the country in the 1960s, executions became the

²⁰ *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (quoting *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Georgia*, 536 U.S. 304, 319 (2002))).

²¹ See *Policy Issues: Arbitrariness*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/arbitrariness> (last visited Nov. 23, 2020).

²² See, e.g., Bradley A. MacLean & H.E. Miller, Jr., *Tennessee’s Death Penalty Lottery*, 13 TENN. J.L. & POL’Y 85, 101 (2018) (“The thesis of this article is that Tennessee’s capital punishment system operates as a capricious lottery.”).

²³ See, e.g., Josh White & Robert Barnes, *Supreme Court rejects D.C. area sniper’s appeal*, WASH. POST (Nov. 10, 2009), <https://www.washingtonpost.com/wp-dyn/content/article/2009/11/09/AR2009110903055.html> (discussing Supreme Court’s rejection of appeal by DC sniper John Allen Muhammad for the murder of ten people); Tracy Wilson, *Death Penalty Ordered in Torture Case*, L.A. TIMES (Aug. 25, 1998), <https://www.latimes.com/archives/la-xpm-1998-aug-25-me-16367-story.html> (announcing death sentence for man who kidnapped, tortured, and burned victim alive); *Commonwealth v. Boxley*, 596 Pa. 620, 623 (Pa. 2008) (sentencing a Black man to death for the murder of one person).

exception, not the rule.²⁴ As legal historian Corinna Lain explains, “In 1962, there were only 47 executions, and the numbers plummeted from there—1963 had 21 executions, 1964 had 15, 1965 had 7, 1966 had one, 1967 had two, and from 1968 until the death penalty was reinstated in 1976, there were *none* .”(emphasis added).²⁵

In the 1960s, death sentences also became increasingly rare. As Lain explains, the years 1935 to 1942 produced an average of 142 death sentences per year, but by the 1960s, that number fell to 106 “despite a significant rise in population and capital crimes.”²⁶ Throughout the 1960s, when prosecutors asked juries to impose the death penalty, they only did so approximately 10 to 20 percent of the time.²⁷

Taken together, these developments produced a death penalty that was rarely applied in practice, and when it was applied, prosecutors did so in an arbitrary and capricious manner. Southern states accounted for nearly two-thirds of all executions in the country during this time, and a 1967 National Crime Commission report recommended the abolishment of capital punishment if it could not be administered in a non-discriminatory fashion.²⁸ The NAACP decided

²⁴ See Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 19–26 (2007). Immediately prior to World War II, the United States averaged 142 death sentences per year. *Id.* at 21. “[B]y the 1960s, that number had dropped to 106 despite a significant rise in population and capital crimes committed during that interval.” *Id.* This significant drop in average death sentences was likely due to a range of different factors. *Id.* In the 1960s the criminal procedure revolution instituted sweeping reforms across the United States by providing defendants more avenues for relief from violations of their constitutional rights. *Id.* In addition, states began to fall in line with declining support for the death penalty. *Id.* at 22–23. In 1957, Alaska and Hawaii abolished the death penalty, closely followed by abolition of varying degrees by Oregon (1964), West Virginia (1965), Iowa (1965), New York (1965), Vermont (1965), and New Mexico (1969). *Id.* The international community experienced a similar abolition movement, as 70 countries abolished the death penalty by 1968, including all of Western Europe. *Id.* at 26. Recognizing the decline in support for the death penalty, the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP) joined forces to launch a nationwide litigation campaign against the US death penalty. *Id.* at 20. The joint campaign played a large role in establishing a litigation-induced moratorium on the death penalty as the Supreme Court reviewed countless constitutional challenges of the death penalty. *Id.*

²⁵ *Id.* at 19.

²⁶ *Id.* at 21.

²⁷ *Id.*

²⁸ See *id.* at 22; see also PRESIDENT’S COMM’N ON L. ENF’T AND THE ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, 143 (U.S. Gov’t Printing Office 1967).

to mount a legal challenge to the death penalty in the 1960s, and that challenge came to the fore in 1972, when the Court decided the landmark case *Furman v. Georgia*.²⁹

In *Furman*, the Supreme Court held that, in the instant cases, the death penalty violated the Eighth Amendment because it was applied in an arbitrary and capricious manner.³⁰ The Court's holding was not so clear at the time because it did not issue a majority, or even a plurality opinion.³¹ It issued a one-paragraph per curiam opinion followed by nine separate opinions—five concurrences and four dissents.³² No Justice in the majority joined another Justice's concurring opinion, but the one common thread in each of the concurring opinions was that the death penalty was arbitrary and capricious and thus unconstitutional.³³

The five Justices comprising *Furman*'s majority each shared their own perspectives on the death penalty's arbitrary and capricious application. Justice William Douglas wrote that the selective application of the death penalty feeds “prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.”³⁴ Justice Potter Stewart added that in examining the history of the imposition of death in the United States, “if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.”³⁵ Emphasizing the fact that the death penalty is not used for the “worst of the worst” individuals, Justice Byron White summarized his position in a judicial conference when he said that “[t]he nut of the case is that only a small proportion are put to death,

²⁹ *Furman v. Georgia*, 408 U.S. 298, 239-40 (1972) (holding imposition and carrying out of death penalty in these cases constitutes cruel and unusual punishment in violation of Eighth and Fourteenth Amendments).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *See Id.*

³⁴ *Id.* at 255 (Douglas, J., concurring).

³⁵ *Furman*, 408 U.S. at 310 (Potter, J., concurring).

and I can't believe that they are picked out on the basis of killing those who should be killed. I can't believe that it is meted out fairly.”³⁶ Finally, the formidable duo of Justice William Brennan and Justice Thurgood Marshall expressed their views on the arbitrariness and inequality in the United States’ imposition of death. Justice Brennan wrote, “[n]o one has yet suggested a rational basis that could differentiate . . . the few who die from the many who go to prison.”³⁷ And Justice Marshall added that it “is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups, who are least able to voice their complaints against capital punishment.”³⁸

Furman, however, was short-lived. Four years later, in the wake of a legislative backlash that resulted in revamped state death penalty statutes across the nation, the same Supreme Court that struck down the death penalty brought it back to life in *Gregg v. Georgia*.³⁹ In *Gregg*, the Supreme Court did not repudiate *Furman*’s holding—the arbitrary and capricious imposition of the death penalty was still unconstitutional—but rather, the Court held that the newly passed death penalty statutes satisfied the rule of *Furman*.⁴⁰ According to the Supreme Court in *Gregg*, the problem of arbitrariness in the death penalty was solved.

Looking back, this re-birth of the death penalty in 1976 represented a critical juncture for the criminal justice system, a chance to finally make right on centuries of racial and geographic arbitrariness in the imposition of death in the United States. Yet as we will see, despite the promise of *Furman* and the pronouncement in *Gregg*, parity has remained notably absent from the halls of

³⁶ THE SUPREME COURT IN CONFERENCE (1940-1985) 617 (Del Dickson ed., 2001).

³⁷ *Furman*, 408 U.S. at 294 (Brennan, J., concurring).

³⁸ *Id.* at 365–66 (Marshall, J., concurring).

³⁹ *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

⁴⁰ *Id.* at 206–07.

death row.⁴¹ The US death machine picked up right where it left off in 1972. As abolitionist Henry Schwarzschild observed after the Supreme Court decided *Furman* in the late 1970s:

We have always picked quite arbitrarily a tiny handful of people among those convicted of murder to be executed, not those who have committed the most heinous, the most revolting, the most destructive murders, but always the poor, the [B]lack, the friendless, the life's losers, those without competent, private attorneys, the illiterate, those despised or ignored by the community for reasons having nothing to do with their crime The penalty of death is imposed almost entirely upon members of what the distinguished social psychologist Kenneth B. Clark has referred to as "the lower status elements of American society."⁴²

The more times change, the more they stay the same. And so here we are, over four decades later, still talking about geographic and racial arbitrariness in the death penalty. A closer look at both of these problems comes next.

B. *Geographic Arbitrariness*

If asked which states hand down the most death sentences, most Americans would likely mention the Southern states that make up the so-called "Bible belt."⁴³ These states are also known as the "death belt."⁴⁴ From the Civil War to the Civil Rights Movement, the South has been associated with staunch opposition to egalitarianism, especially concerning the equal treatment of Black men and women in the criminal justice system.⁴⁵ The phrase "Jim Crow Justice" says it all.⁴⁶

⁴¹ See *Furman*, 408 U.S. at 239; *Gregg*, 428 U.S. at 207.

⁴² Lain, *supra* note 24, at 29 (quoting Henry Schwarzschild, In Opposition to Death Penalty Legislation, in THE DEATH PENALTY IN AMERICA, at 364, 366-67).

⁴³ See Mark Abadi and Shayanne Gal, *The US is split into more than a dozen 'belts' defined by industry, weather, and even health*, BUS. INSIDER (May 7, 2018, 5:47 a.m.), <https://www.businessinsider.com.au/regions-america-bible-belt-rust-belt-2018-4>.

⁴⁴ Smith, *supra* note 14, at 230. The "death belt" typically includes Alabama, Florida, Georgia, Louisiana, Mississippi, Virginia, North Carolina, South Carolina, and Texas. *Id.* at 230 n. 6. The nickname refers to "the southern states that together account for over 90% of all executions carried out since 1976." *Id.* "Professor Ogletree explained that the Death Belt states 'overlap . . . with the southern states that had the highest incidence of extra-legal violence and killings during the Jim Crow era.'" *Id.*

⁴⁵ William J. Stuntz, *Unequal Justice*, 121 HARVARD L. REV. 1969, 1970 (2008).

⁴⁶ Jim Crow laws established a "codified system of racial apartheid [that] restricted the economic and civil rights of African Americans and affected almost every aspect of daily life, mandating segregation of schools, parks, libraries, cemeteries, restrooms, transportation, restaurants and other private and public institutions." *Jim Crow Laws*, EQUAL JUST. INITIATIVE (May 1, 2014), <https://eji.org/news/history-racial-injustice-jim-crow-laws/>.

Thus, most Americans would be surprised to learn the reality of death sentencing in the United States. From 2004 to 2009, Alabama, Arizona, California, Florida, Texas, Oklahoma, Missouri, and Pennsylvania accounted for more than two of every three death sentences nationwide.⁴⁷ Not all of these are Southern states. Most notably, they include California in the West, Oklahoma and Missouri in the Midwest, and Pennsylvania in the Northeast. Moreover, while these states lead the nation in death sentencing, their proclivity toward imposing death sentences is not embraced by every jurisdiction within their borders.⁴⁸

In fact, only a handful of counties are responsible for a majority of the death sentences in these “frequent flyer” death penalty states.⁴⁹ In his research on the geography of the death penalty, Robert Smith found that a “significant majority of counties within the busiest death-sentencing states did not sentence anyone to death from 2004 to 2009.”⁵⁰ In California, for example, only three counties—Los Angeles, Riverside, and Orange—accounted for over half of the state’s death sentences from 2004 to 2009.⁵¹ However, this phenomenon of death sentencing concentrated at the county level is not unique to California.

In the modern era of the death penalty, which began with *Gregg v. Georgia* in 1976, fifteen counties across the United States have been responsible for 30 percent of the nation’s executions, even though they comprise fewer than one percent of the counties in the country.⁵² Indeed, only two percent of US counties are responsible for over half of the nation’s executions since 1976.⁵³ In Texas, the so-called “capital of capital punishment,”⁵⁴ only a small minority of counties fuel the

⁴⁷ Smith, *supra* note 14, at 230–31.

⁴⁸ *Id.* at 231.

⁴⁹ *See id.*

⁵⁰ *Id.*

⁵¹ *Id.* In fact, “in California, 64% of counties did not sentence anyone to death, and 90% returned no more than one death sentence.” *Id.* And only six counties sentenced more than one defendant to death per year. *Id.*

⁵² Dieter, *supra* note 12, at 7.

⁵³ *Id.* at 1.

⁵⁴ *See id.* at 5.

state's death penalty system while the rest of the counties have not conducted an execution since 1976.⁵⁵ Harris, Dallas, Tarrant, and Bexar Counties—all situated in and around Houston, Dallas, and San Antonio, respectively—are home to more than half of all executions in Texas.⁵⁶ These county-level statistics show that, as death penalty scholar Richard Dieter says, “[d]eath sentences depend more on the location of the county line than on the severity of the crime.”⁵⁷

Why have a handful of jurisdictions become “killer counties”? The answer is a select group of the nation's deadliest prosecutors.⁵⁸ A few examples illustrate the point.

Dale Cox, a prosecutor in Caddo Parrish, Louisiana, is personally responsible for half of the state's death sentences since 2010.⁵⁹ Cox publicly declared that “we need to kill more people,” and during closing arguments in a recent capital trial, he said to the defendant, “[i]t would be better if you were never born. You shall have a millstone cast around your neck, and you will be thrown into the sea.”⁶⁰

Travel just over 1,200 miles west to Maricopa County, Arizona, and you meet prosecutor Jeannette Gallagher, who, along with two of her colleagues, is responsible for 20 out of 59 capital cases reviewed by the Arizona Supreme Court between 2007 and 2013.⁶¹ Gallagher's record illustrates her gross ignorance of mitigating circumstances, including cases in which she obtained death sentences for defendants with mental illnesses, low IQs, and drug addictions.⁶²

⁵⁵ *Id.*

⁵⁶ *Id.* at 7.

⁵⁷ *Id.* at 3.

⁵⁸ Robert J. Smith, *America's Deadliest Prosecutors*, SLATE (May 14, 2015, 3:54 AM), <https://slate.com/news-and-politics/2015/05/americas-deadliest-prosecutors-death-penalty-sentences-in-louisiana-florida-oklahoma.html>.

⁵⁹ *Id.*

⁶⁰ Rachel Aviv, *Revenge Killing: Race and the death penalty in a Louisiana parish*, NEW YORKER (June 29, 2015), <https://www.newyorker.com/magazine/2015/07/06/revenge-killing>.

⁶¹ Smith, *supra* note 58.

⁶² *Id.* “[T]he Eighth Amendment prevents the state from defeating or limiting a defendant's plea in mitigation. No state can condemn a defendant unless he has had the chance to present to the jury any and all evidence he wishes to present in mitigation, which includes anything ‘he proffers as a basis for a sentence less than death.’” Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think*, 98 COLUM. L.

As further examples, Bernie de La Rionda in Duval County, Florida, obtained ten death sentences during his time as a prosecutor,⁶³ and his county is home to approximately one quarter of Florida’s death sentences despite comprising only five percent of the state’s population.⁶⁴ Bob Macy, the former Oklahoma County District Attorney (“DA”), sent fifty-four people to death row.⁶⁵ Lynne Abraham, the former Philadelphia DA, obtained forty-five death sentences during her tenure.⁶⁶ And Joe Freeman Britt, the former DA in Robeson County, North Carolina, earned the title of “America’s deadliest prosecutor” for his forty-two death sentences.⁶⁷

Armed with unfettered prosecutorial discretion and the support of their voting bases, these killer prosecutors have almost single handedly kept the US death penalty alive.⁶⁸ Together, just the examples mentioned above account for over 150 death sentences.⁶⁹ The power and influence of these prosecutors becomes even more clear by the drop in death sentences upon their retirement or electoral defeat.⁷⁰ Oklahoma County DA Bob Macy retired in 2001 and from 2010 to 2015, the county only had one death sentence.⁷¹ Since Philadelphia DA Lynne Abraham retired in 2010, the county obtained only three death sentences.⁷² Joe Freeman Britt, the former Robeson County, North Carolina DA obtained forty-two death sentences during his tenure in the 1990s.⁷³ From 2005 to 2015, the county only imposed two death sentences.⁷⁴

REV. 1538, 1546 (1998). For example, South Carolina law prompts jurors to consider as mitigating circumstances whether “the murder was committed while the defendant was under the influence of mental or emotional disturbance” and “[t]he age or mentality of the defendant at the time of the crime.” *Id.* at 1547 n. 41.

⁶³ Smith, *supra* note 58.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Rhonda Brownstein, *Are There Limits to Prosecutorial Discretion?*, S. POVERTY L. CTR. (Jan. 1, 2003), <https://www.splcenter.org/fighting-hate/intelligence-report/2003/are-there-limits-prosecutorial-discretion>.

⁶⁹ See Smith, *supra* note 58.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

This geographic disparity in the US death penalty system has grown more pronounced in recent years.⁷⁵ In California, for example, a study conducted by the American Civil Liberties Union (ACLU) revealed that from 2000 to 2007, 10 counties comprised 83 percent of the state's death sentences.⁷⁶ But just one year later, only five of those accounted for 90 percent of all death sentences in California.⁷⁷ Statistics from across the nation illustrate similar patterns. In Ohio, approximately one-quarter of the state's death row population comes from Hamilton County even though it is the home to only nine percent of the state's murders.⁷⁸ In an examination of the sixty death sentences imposed in Florida until 2013, the Death Penalty Information Center found that over 28 percent of them came from one of the state's twenty jurisdictions.⁷⁹ And in Missouri, where 95 percent of all intentional murder cases are never presented to juries as capital cases, prosecutors in St. Louis sought death sentences in 7 percent of intentional homicides while prosecutors in Kansas City only did so in 0.5 percent of all intentional homicides.⁸⁰

In short, the death sentencing narrative in the United States is largely controlled by a handful of county prosecutors with a thirst for capital litigation.⁸¹ As death sentencing declines in the United States, the influence of this select group of prosecutors over the entire capital punishment system has become more pronounced and more dangerous.⁸² And the largely unfettered power held by the nation's deadliest prosecutors has further shaped the top five death

⁷⁵ Dieter, *supra* note 12, at 13.

⁷⁶ NATASHA MINSKER, ANA ZAMORA & NICOLE SILVERSTEIN, DEATH IN DECLINE '09: LOS ANGELES HOLDS CALIFORNIA BACK AS NATION SHIFTS TO PERMANENT IMPRISONMENT 2 (Miriam Gerace, ed., 2010), https://www.aclunc.org/docs/criminal_justice/death_penalty/death_in_decline_09.pdf.

⁷⁷ *Id.*

⁷⁸ Dieter, *supra* note 12, at 13.

⁷⁹ *Id.* at 14.

⁸⁰ *Id.*

⁸¹ Dieter, *supra* note 12.

⁸² Dieter, *supra* note 12, at 13.

sentencing counties from 2015 to 2019: Riverside County, California; Los Angeles County, California; Maricopa County, Arizona; Clark County, Nevada; and Cuyahoga County, Ohio.⁸³

As a brief aside, it is worth noting the financial cost of this geographical arbitrariness; it is not just the injustice of arbitrary death sentencing that is a problem, but also what it does to these counties monetarily. Litigating a capital case is expensive.⁸⁴ As former Boulder County, Colorado DA Stan Garnett, explained, “[p]rosecuting a death penalty case through a verdict in the trial court can cost the prosecution well over \$1 million dollars my total operating budget for this office is \$4.6 million and with that budget we prosecute over 1,900 felonies per year.”⁸⁵ The handful of counties that fuel the death penalty across the country accumulate millions of dollars in litigation-related costs that are shouldered by the entire state.⁸⁶ US taxpayers bear those costs. They are the ones who suffer the loss of tax revenue that could otherwise be put to another use in their state.⁸⁷

Stepping back to view the financial big picture, there were 8,300 death sentences from 1973 through 2011.⁸⁸ With the cost of each case at about \$3 million, taxpayers paid almost \$25 billion in death penalty-related expenses during that time.⁸⁹ That is \$25 billion in taxes paid that brought zero benefit to the residents of 85 percent of the US counties that have not sentenced an inmate to death since the 1970s.⁹⁰ When one compares the total cost of death sentencing during that time with the number of executions actually conducted, each capital case costs not \$3 million, but rather approximately \$20 million.⁹¹ Had one of the nation’s deadliest prosecutors agreed to a

⁸³ DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2019: YEAR END REPORT 10 (2019), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report#execution-and-sentencing-trends>.

⁸⁴ Dieter, *supra* note 12, at 15.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Dieter, *supra* note 12, at 15.

⁹¹ *See id.*

punishment of life without parole for just one of those inmates, the state could have paid 250 police officers or teachers a salary of \$75,000 for one year.⁹²

This is the reality of a geographically arbitrary death penalty, a death penalty where a handful of counties in California, Arizona, Nevada, Ohio, Texas, and Oklahoma fuel the death penalty in the United States.⁹³ But, geographic arbitrariness is not the only type of capriciousness that drives the death penalty in the United States. Another is race.

C. *Racial Arbitrariness*

The death penalty in the United States has a long and disturbing relationship with race. Racial tension in the United States is largely rooted in the nation's abhorrently long history with slavery.⁹⁴ This interaction between race and the death penalty manifests itself in several ways, two of which are most glaring.⁹⁵ First, before the Civil War, state laws literally mandated differing applications of the death penalty based on the defendant's race.⁹⁶ These laws, so-called "Black codes," instilled structural racism into the very fabric of the law.⁹⁷ In 19th century Kentucky, for example, Black people were hanged for attempted murder, rape, attempted rape, arson, and slave revolt, while White people were only hanged for murder.⁹⁸ As another example, this one dating to 1856, Virginia had "sixty-six capital crimes for slaves . . . against only one (murder) for

⁹² *Id.*

⁹³ DEATH PENALTY INFO. CTR., *supra* note 83.

⁹⁴ See Liz Mineo, *Why America Can't Escape Its Racist Roots*, HARV. GAZETTE (June 4, 2020), <https://news.harvard.edu/gazette/story/2020/06/orlando-patterson-explains-why-america-cant-escape-its-racist-roots/>.

⁹⁵ Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 96, 97 (Charles J. Ogletree, Jr. & Austin Sarat, eds., 2006).

⁹⁶ *Id.* at 98.

⁹⁷ *Id.*.

⁹⁸ *Id.* at 99.

[W]hites.”⁹⁹ Thus, prior to the Civil War, due process was essentially non-existent for slaves in the Southern United States.¹⁰⁰

Even after slavery ended, Black codes continued to exist. In fact, they proliferated even further into the fabric of society. Black codes were, in the absence of slavery, used throughout the criminal justice system to maintain racial control.¹⁰¹ While race-based sentencing became unconstitutional after the Civil War, states quickly regained control of Black populations across the country through the creation of all-White juries.¹⁰² Prosecutors utilized all-White juries to sentence Black defendants to death more frequently than White defendants.¹⁰³ The anti-Black sentiment of the 20th century can be summed up by the bigoted remarks of former Arkansas Governor George W. Hays:

One of the South’s most serious problems is the negro question. The legal system is exactly the same for both [W]hite and [B]lack, although the latter race is still quite primitive, and in general culture and advancement in a childish state of progress. If the death penalty were to be removed from our statute-books, the tendency to commit deeds of violence would be heightened owing to this negro problem. The greater number of the race do not maintain the same ideals as the [W]hites.¹⁰⁴

Let that sink in for a moment.

Second, throughout much of history, executions served to reinforce the nation’s White-established racial hierarchy.¹⁰⁵ The public nature of state executions and the racist “sermons” given

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 98. “As early as 1692, Virginia began using local justices of the peace rather than juries and legally trained judges to try slaves for capital crimes. South Carolina adopted a similarly streamlined procedure in 1740. These systems remained in place as long as slavery existed.” *Id.*

¹⁰¹ See Banner, *supra* note 95, at 97-98.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 101.

¹⁰⁵ *Id.* at 97.

to onlookers served to further degrade Black people in the United States.¹⁰⁶ Generally, execution procedures and techniques across the nation “included a variety of rituals intended to broadcast a message of [W]hite dominance.”¹⁰⁷ Indeed, one such execution technique—lynching—survived the Civil War and became a symbol of racism and White supremacy through the 20th century.¹⁰⁸

As death penalty scholar and litigator Stephen Bright explained, “[t]he death penalty is a direct descendant of lynching and other forms of racial violence and racial oppression in America.”¹⁰⁹ We know that disparate punishments based on race were commonplace during slavery, but the point here is that such inequality remained prevalent through the 19th and 20th centuries.¹¹⁰ Following the Civil War and the abolition of slavery, at least 4,743 people were killed by lynch mobs, over 90 percent of which occurred in the Southern United States.¹¹¹ And approximately three-fourths of those killed by lynch mobs were Black.¹¹² In short, lynching, the shadow death penalty, ensured the subsistence of systemic racism even after the abolition of Black codes.

As described above, in the early 1920s, the increasing likelihood of Congressional enactment of anti-lynching statutes led southern states to invest in more subtle methods of racial

¹⁰⁶ Banner, *supra* note 95, at 101–102. Before the execution of Rose Butler, a New York City slave who allegedly burned her owner’s house down, Baptist minister John Sandford said,

The wings of the Constitution of America are extended to defend and foster the property, the liberties. And the lives of all citizens, without exception . . . In this inestimable privilege, our fellow citizens of *color* enjoy a mutual share with us; and this unquestionably should dictate to them a correspondent spirit of gratitude and the practice of every social virtue. It is therefore deeply to be regretted that persons of color should either envy or attempt to destroy the safety and comfort of which we are justly entitled.

Id. (emphasis in original quote).

¹⁰⁷ *Id.* at 97.

¹⁰⁸ *Id.* at 106.

¹⁰⁹ Stephen B. Bright, *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 211, 214 (Charles J. Ogletree, Jr. & Austin Sarat, eds., 2006).

¹¹⁰ *Id.* at 215.

¹¹¹ *Id.*

¹¹² *Id.*

control, namely the formation of all-White juries through the peremptory strike system.¹¹³ And so began the next chapter of systemic racism in the US death penalty. This racism is so ingrained in the day-to-day caseload of courts across the United States that, as Stephen Bright points out, “[u]ntil recently, African-Americans facing the death penalty in Georgia appeared before a [W]hite judge sitting in front of the Confederate battle flag. Georgia adopted its state flag in 1956 to symbolize its defiance of the Supreme Court’s decision in *Brown v. Board of Education*.”¹¹⁴

That brings us to 1987, when the Supreme Court granted certiorari in *McCleskey v. Kemp*.¹¹⁵ In *McCleskey*, a Georgia State Court sentenced Warren McCleskey, a Black man, to death for murdering a White police officer.¹¹⁶ McCleskey challenged the conviction, arguing that the racially discriminatory application of Georgia’s capital sentencing scheme violated the Eighth Amendment.¹¹⁷ In support of this claim, McCleskey’s lawyers submitted a statistical study conducted by Professors David Baldus, Charles Pulaski, and George Woodworth, which became known as the “Baldus study.”¹¹⁸

The Baldus study consisted of two in-depth examinations of racial discrimination in over 2,000 murder cases in Georgia throughout the 1970s.¹¹⁹ To ensure the study’s credibility,

¹¹³ *Id.* “During jury selection, potential jurors are excused ‘for cause’ when the judge finds that they cannot decide the case impartially. Independently, each side may exercise some limited number of peremptory strikes to excuse additional jurors without offering a reason.” (could not find quote on referenced page) The U.S. Supreme Court has limited this procedure and held that peremptory challenges may not be made on the basis of race or gender. *Batson v. Kentucky*, 476 U.S. 79, 100 (1986) (race); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 146 (1994) (gender).

¹¹⁴ Bright, *supra* note 109, at 219.

¹¹⁵ *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3866 (U.S. July 7, 1986) (No. 84-6811).

¹¹⁶ *McCleskey*, *supra* note 7 at 283, 85. Interestingly, *McCleskey* originated from Georgia state courts, just like the Supreme Court’s decisions holding the death penalty unconstitutional in 1972 and then reestablishing the death penalty in 1976. *McCleskey*, 481 U.S. at 283; *Furman*, 408 U.S. at 239-40; *Gregg*, 428 U.S. at 207.

¹¹⁷ *McCleskey*, 481 U.S. at 286.

¹¹⁸ *Id.* The Baldus study is actually two sophisticated statistical studies that examine over 2,000 murder cases that occurred in Georgia during the 1970’s. The raw numbers collected by Professor Baldus indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing Blacks received the death penalty in only 1% of the cases. The raw numbers also indicate a reverse racial disparity according to the race of the defendant: 4% of the Black defendants received the death penalty, as opposed to 7% of the white defendants.

¹¹⁹ *Id.*

Baldus and his colleagues strictly scrutinized the data through an analysis of over 230 variables that could have explained the disparity in Georgia’s death penalty system on non-racial grounds.¹²⁰ In examining these factors, Professor Baldus and his colleagues concluded that “the jury *more likely than not* would have spared McCleskey’s life had his victim been [B]lack.”¹²¹ Specifically, the study found that “defendants charged with killing White victims were 4.3 times as likely to receive a death sentence as defendants charged with killing [B]lacks.”¹²² The Baldus study also concluded that “the death penalty was assessed in 22% of the cases involving [B]lack defendants and White victims; 8% of the cases involving White defendants and White victims; 1% of the cases involving [B]lack defendants and [B]lack victims; and 3% of the cases involving White defendants and [B]lack victims.”¹²³ The key takeaway from the Baldus Study was that Black defendants who killed White victims were the most likely demographic to receive a death sentence in Georgia in the 1970s.¹²⁴

In a 5-4 opinion authored by Justice Powell, the Supreme Court denied McCleskey’s claim.¹²⁵ For the sake of argument, the Court assumed the validity of the Baldus study, but found it nevertheless insufficient to prove an Eighth Amendment claim.¹²⁶ According to the Supreme Court in *McCleskey*, a capital defendant challenging his or her death sentence on racial grounds would need to show intentional discrimination in the imposition of death.¹²⁷ “[W]e hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in

¹²⁰ *Id.* at 287.

¹²¹ *Id.* at 325 (Brennan, J., dissenting).

¹²² *Id.* at 287.

¹²³ *McCleskey*, *supra* note 7, at 286.

¹²⁴ *Id.* at 287.

¹²⁵ *Id.* at 319–20.

¹²⁶ *Id.* at 312–13.

¹²⁷ *Id.* at 297.

McCleskey's case acted with discriminatory purpose," the Court concluded.¹²⁸ And that was the end of that.

In refusing to address racial discrimination in the imposition of death in *McCleskey*, the Supreme Court lost an opportunity to make amends for centuries of racial discrimination in the application of the death penalty.¹²⁹ As Stephen Bright notes:

McCleskey v. Kemp is a manifestation of indifference on the part of the Court to secure justice for racial minorities in cases in which there is a long history of discrimination, and there is every indication that racial prejudice influences the vast discretion exercised in making the highly charged, emotional decision about who is to die.¹³⁰

The legacy of the Court's decision in *McCleskey* would be felt by capital defendants for decades to come. In a 2007 speech, Anthony Amsterdam, who argued *Furman* and was a member of McCleskey's defense team, stated, "*McCleskey* is the *Dred Scott* decision of our time."¹³¹

Because it was the basis for the claim in *McCleskey*, the Baldus study is perhaps the most famous examination of race in the US death penalty system. Yet, it is not the only study to prove that race plays an important role in the imposition of the death penalty. A 1990 study conducted by the U.S. General Accounting Office, now the U.S. Government Accountability Office, examined 28 such studies across the United States, finding that in "82 percent of the studies, race of the victim was found to influence the likelihood of being charged with capital murder or

¹²⁸ *Id.* On September 26, 1991, Georgia executed Warren McCleskey. Peter Applebome, *Georgia Inmate is Executed After 'Chaotic' Legal Move*, N.Y. Times, Sept. 26, 1991, at A18, <https://timesmachine.nytimes.com/timesmachine/1991/09/26/047191.html?pageNumber=18>.

This is but one example of judicial homicide, the term that appears on the death certificates of all inmates executed in the United States. H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 310 (David Crystal ed., 1st ed. Oxford Univ. Press 2010).

¹²⁹ *Case: Landmark: McCleskey V. Kemp*, NAACP LEGAL DEF. & EDUC. FUND (Apr. 27, 1987), <https://www.naacpldf.org/case-issue/landmark-mccleskey-v-kemp>.

¹³⁰ Bright, *supra* note 109, at 240.

¹³¹ Adam Liptak, *New Look at Death Sentences and Race*, N.Y. TIMES (Apr. 29, 2008), <https://www.nytimes.com/2008/04/29/us/29bar.html>; *HISTORY: The Death Penalty Through the Life of Anthony Amsterdam*, Death Penalty Info. Ctr. (Sept. 13, 2007), <https://deathpenaltyinfo.org/news/history-the-death-penalty-through-the-life-of-anthony-amsterdam>.

receiving the death penalty, i.e., those who murdered [W]hites were found to be more likely to be sentenced to death than those who murdered Blacks.”¹³² Moreover, the GAO study found that the effect of race in the imposition of death was “remarkably consistent across data sets, states, data collection methods, and analytic techniques.”¹³³ In practice, race matters in the application of the death penalty in the United States. It just doesn’t matter under the law.

II. THE NEXUS BETWEEN GEOGRAPHIC AND RACIAL ARBITRARINESS

*“When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.”*¹³⁴

Thus far, the discussion has considered arbitrariness in terms of geography and race separately. Here, the discussion considers them together, breaking new ground by bridging the gap between past and present. In the pages that follow, I first provide a deep dive into the top five death sentencing counties in the United States from 2015 to 2019, showing how prosecutorial discretion has created these killer counties, how these counties are marked by deep histories of racial tension and discrimination, and how prosecutorial discretion all too often results in an abuse of that discretion—prosecutorial misconduct in the single-minded obsession to obtain a sentence of death. I then provide a parallel analysis for the top five counties for executions in the United States. As we are about to see, the connection between racial and geographic arbitrariness reveals a dark shadow of racism that began centuries ago and, when combined with overzealous prosecutors, has worked to perpetuate the arbitrary and systemically racist imposition of death. The journey of

¹³² U.S. GEN. ACCT. OFF., GAO/GDD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990), <https://www.gao.gov/products/GGD-90-57>. As of April 2020, there are 2,603 inmates on death row across the United States, 41.38 percent of whom are Black. Dieter, *supra* note 12 5. Aside from race-of-defendant and race-of-victim disparities, race also influences the death penalty through the creation of all-white juries and by the historically overwhelming majority of white elected prosecutors. McClesky, *supra* note 7, at 39, 37 (all-white juries) (white prosecutors).

¹³³ U.S. GEN. ACCT. OFF., *supra* note 132.

¹³⁴ *Furman v. Georgia*, 408 U.S. 238, 293 (1972) (Brennan, J., concurring).

thousands of Black men and women into the US death penalty system runs along a well-trodden path scarred by racial and geographic arbitrariness. The case studies below show unequivocally what I mean.

A. *Death Sentencing*

The decision to charge a capital crime—to seek the death penalty—falls squarely within the realm of a prosecutor’s discretion. What then, might we find when we look at the top five death sentencing counties in the United States? An examination of the top death sentencing counties since 1976 would provide a complete, historical picture of the most active death-sentencing counties in the modern era, but we are now forty-five years into the modern era, and much has changed over those years.¹³⁵ To obtain a contemporary snapshot of the leading counties for death sentencing, I took a smaller, more recent slice of time for which data was available: 2015 to 2019.¹³⁶ This window has the added benefit of coinciding with the BLM movement.¹³⁷ Here are the top five death sentencing counties during this time frame in total death sentences:

¹³⁵ For example, the Commonwealth of Virginia, once staunchly in favor of the death penalty, has only two inmates on death row and is on track to abolish capital punishment altogether. Samantha O’Connell, *Virginia, Second Most Prolific Death Penalty State, Moves Toward Abolition*, AMER. BAR ASS’N PROJECT BLOG (Feb. 5, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/va-moves-toward-abolition/.

See Frank R. Baumgartner et al., *Learning to kill: Why a small handful of counties generates the bulk of US death sentences*, PLOS ONE, at 1, 3 (Oct. 27, 2020), <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0240401&type=printable>. The top 10 death sentencing counties since 1976 are Los Angeles, California (311); Harris County, Texas (299); Philadelphia, Pennsylvania (187); Maricopa County, Arizona (179); Cook County, Illinois (157); Miami-Dade County, Florida (118); Clark County, Nevada (118); Oklahoma County, Oklahoma (116); Riverside County, California (110); and Duval County, Florida (110). *Id.*

¹³⁶ The Death Penalty in 2019: Year End Report, DPIC (Dec. 17, 2019), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report>. 12. Using this data set eliminates irrelevant data points for jurisdictions that have abolished the death penalty, such as Illinois, and other counties that are no longer active in capital litigation.

¹³⁷ The BLM movement informally began shortly after the killing of Michael Brown in St. Louis, Missouri in 2014. Wesley Lowery, *Black Lives Matter: birth of a movement*, GUARDIAN (Jan. 17, 2017), <https://www.theguardian.com/us-news/2017/jan/17/black-lives-matter-birth-of-a-movement>. This article examines death sentences handed down in the four years following Brown’s killing and the proliferation of the BLM movement across the United States.

County	State	Death Sentences (2015-2019)
Riverside	California	18
Los Angeles	California	10
Maricopa	Arizona	9
Cuyahoga	Ohio	9
Clark	Nevada	7

Figure 2: The top five death sentencing counties in the United States from 2015 to 2019.¹³⁸

At face value, these counties have little in common and range from dense urban metropolises, to more sprawling suburban jurisdictions. But when one looks beneath the surface, each of these counties has an extensive history scarred by slavery and the centuries-long, systemic oppression of Black and Brown communities. Each county has a deeply-entrenched pattern of systemic racism that has seeped into the criminal justice system and has been facilitated by widespread prosecutorial misconduct in their pursuit of the death penalty. The same combination of racism and official misconduct that gave rise to the BLM movement is responsible for the gross inequality in death sentencing across the United States.

¹³⁸ DPIC, *supra* note 137.

1. California

Riverside County, California led the nation in death sentencing from 2015 to 2019, closely followed by nearby Los Angeles County, California.¹³⁹ The City of Los Angeles and the surrounding counties have an extensive history of racial tension, and the entire state of California had unfortunate forays with racism through the internment of Japanese-Americans in the wake of the attack on Pearl Harbor in 1941¹⁴⁰ and a period during which the Ku Klux Klan gained influence over local politics in the 1920s and 1930s.¹⁴¹ Dr. C. Rob Shorette II recently discussed California's history of racism:

People often think that because California doesn't have the same history with slavery as the South does, racism is something that happens over there on that side of the country. But "California has a rich history of discrimination," [Lawrence Ross, the author of "Blackballed: The Black & White Politics of Race on America's Campuses"] says, and that is evidenced by Ku Klux Klan rallies, the mass deportation of Latinos, restrictive clauses in housing, segregated beaches, Japanese internment camp assembly centers, racially segregated schools, and so much more.¹⁴²

California isn't the South, but it would be a mistake to assume that it doesn't have the racial discrimination and racial tension for which the South is famous.

Two well-known instances of racial oppression in California's history are particularly alarming. In 1965, a White California Highway Patrol Officer pulled over two Black men on suspicion of driving under the influence in Los Angeles's Watts neighborhood.¹⁴³ The traffic stop evolved into a heated exchange between the driver, a passenger, and the police, and within hours

¹³⁹ Dieter, *supra* note 12, at 11.

¹⁴⁰ *Japanese Internment Camps*, HISTORY.COM (Oct. 29, 2009), <https://www.history.com/topics/world-war-ii/japanese-american-relocation>.

¹⁴¹ Blazedale, *The Los Angeles Mayor Who Was Also A KKK Leader*, LA TACO (July 8, 2020), <https://www.lataco.com/la-mayor-kkk/>; *Orange County Civil Rights: A History of an Enduring Struggle for Equality*, OC HUMAN RELATIONS, (last visited Nov. 25, 2020).

¹⁴² C. Rob Shorette II, *The Ignored History of Racism in California: College Edition*, HUFFPOST (Mar. 1, 2016), https://www.huffpost.com/entry/the-ignored-history-of-ra_b_9349900.

¹⁴³ *Watts Rebellion*, HISTORY.COM (Sept. 28, 2017), <https://www.history.com/topics/1960s/watts-riots>.

the neighborhood erupted into deadly clashes between the Black community, the police, and the White community.¹⁴⁴ The racial tension in Watts resulted in over 30 deaths, 1,000 injuries, and 4,000 arrests. By the time it was over, it involved 34,000 people and 1,000 buildings, causing \$40 million in damages.¹⁴⁵

Twenty-six years later, the racial divide grew wider between the White, Black, and Korean communities in the region.¹⁴⁶ In 1992, the acquittal of the Los Angeles Police Department officers responsible for the brutal beating of Rodney King resulted in violent demonstrations across the region.¹⁴⁷ Over the ensuing two days, California deployed the National Guard, fifty people were killed, more than 2,300 were injured, and thousands were arrested.¹⁴⁸ Los Angeles's 1992 race demonstrations became known as "one of the most devastating civil disruptions in American history."¹⁴⁹ But these racial issues did not end in the 1990s.¹⁵⁰

In addition to issues with race, the Los Angeles and Riverside County DAs' Offices have a recent history of misconduct. A 2016 study conducted by Harvard University's Fair Punishment Project found that prosecutorial misconduct was alleged in 84 percent of the Riverside County death penalty cases reviewed.¹⁵¹ In addition, Riverside County is not a stranger to *Batson* claims for improper peremptory strikes of jurors based on their race.¹⁵² The numbers tell the tale: while

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Jeff Wallenfeldt, *Los Angeles Riots of 1992*, BRITANNICA, <https://www.britannica.com/event/Los-Angeles-Riots-of-1992> (last visited Nov. 24, 2020).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ In July 2020, the Riverside, California City Council declared racism a public health crisis in the city. *Riverside declares racism a public health crisis*, ABC7 (July 2, 2020), <https://abc7.com/racism-in-america-racist-public-health-crisis-riverside/6291539/>.

¹⁵¹ FAIR PUNISHMENT PROJECT, *TOO BROKEN TO FIX: PART I: AN IN-DEPTH LOOK AT AMERICA'S OUTLIER DEATH PENALTY COUNTIES* 32 (Aug. 2016). However, the California Supreme Court, which has a reversal rate of approximately 10% of death penalty cases it reviews, found an inappropriate comment by prosecutors in only one case and failed to find misconduct in any of the cases. *Id.*

¹⁵² *Id.* at 35.

only seven percent of the county is Black, 76 percent of its defendants sentenced to death between 2010 and 2015 were Black.¹⁵³

The picture in Los Angeles is similar. Between 2010 and 2015, Los Angeles County sentenced 31 defendants to death.¹⁵⁴ Prosecutorial misconduct in the county can be traced back to the 1970s and 1980s, during which the DA's office frequently utilized testimony from jailhouse informants and practiced questionable trial tactics to obtain murder convictions.¹⁵⁵ During that time period, more than a dozen defendants were sentenced to death in Los Angeles County.¹⁵⁶ A 1990 grand jury in the county concluded that "egregious perjurers have been used as prosecution witnesses or law enforcement officials committed shocking malfeasance."¹⁵⁷ Furthermore, nine percent of Los Angeles County's population is Black,¹⁵⁸ but of the 31 defendants sentenced to death in the county from 2010 to 2015, 42 percent were Black and six percent were White.¹⁵⁹

2. *Arizona*

Maricopa County, Arizona, sits at third on the list of top death sentencing counties in the United States between 2015 and 2019.¹⁶⁰ Nestled along the southern border with Mexico, Arizona is a gateway to the United States for thousands of immigrants each year. Yet, illegal immigration is far from the state's most pressing issue. Racial disparity is rampant across the state, with an education system that neglects Black children, a poverty rate that skews toward Black families,

¹⁵³ *Id.*

¹⁵⁴ FAIR PUNISHMENT PROJECT, TOO BROKEN TO FIX: PART 2: AN IN-DEPTH LOOK AT AMERICA'S OUTLIER DEATH PENALTY COUNTIES 28 (Sept. 2016).

¹⁵⁵ *Id.* at 29.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Quick Facts – Los Angeles County, California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/losangelescountycalifornia,CA/PST045219> (last visited Nov. 27, 2020).

¹⁵⁹ FAIR PUNISHMENT PROJECT, *supra* note 154, at 32.

¹⁶⁰ DEATH PENALTY INFO. CTR., *supra* note 83, at 10.

and a criminal justice system that sentences Black men and women to higher terms of incarceration than equally situated White people.¹⁶¹

Delving back into the state's history, it is not hard to find instances of racial oppression against Black Arizonans.¹⁶² On November 27, 1942, in Phoenix, the heart of Maricopa County, a drunk, off-duty soldier from the all-Black 364th Negro Infantry Regiment had a heated exchange with a woman at a bar, which resulted in a physical altercation.¹⁶³ As a crowd formed outside the bar, military police officers from the Black 733rd Military Police Unit arrived on the scene, which erupted in chaos as clashes between members of the military and Phoenix Police officers intensified.¹⁶⁴ By the end of the night, 3 soldiers were killed, 12 people were injured, and over 200 soldiers were arrested, 15 of whom were sentenced to federal terms of incarceration for up to 50 years and one of whom was sentenced to death.¹⁶⁵

More recently, the jurisdiction has fallen victim to some of the most egregious instances of police and prosecutorial misconduct in the country, thanks to infamous former Maricopa County Sheriff Joe Arpaio and the Maricopa County DA's Office.¹⁶⁶ In 2011, the U.S. Department of

¹⁶¹ Jerod MacDonald-Evoy, *Data show Arizona's racial inequities in education, poverty, prisons*, AZ MIRROR (June 10, 2020, 8:51 a.m.),

<https://www.azmirror.com/2020/06/10/data-show-arizonas-racial-inequities-in-education-poverty-prisons/>;
FWD.US, ARIZONA'S IMPRISONMENT CRISIS: THE COST TO COMMUNITIES 10 (Nov. 2018),
<https://36shgf3jsufe2xojr925ehv6-wpengine.netdna-ssl.com/wp-content/uploads/2018/11/PART-2-The-cost-to-communities-1.pdf>.

¹⁶² Euell A. Nielsen, *The Phoenix Thanksgiving Day Riot (1942)*, BLACKPAST (Jan. 22, 2007),
<https://www.Blackpast.org/african-american-history/phoenixs-thanksgiving-day-riot-1942/>. See also Terry Greene Sterling, *Racism shaped Arizona, long before Sheriff Joe Arpaio. But it's also shaped a resistance*, AZ CENTRAL (July 18, 2021), <https://www.azcentral.com/story/opinion/op-ed/2021/07/18/phoenix-had-racism-dna-long-before-sheriff-joe-arpaio/7958436002/>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Ray Stern, *Sheriff Joe Arpaio's Office Commits Worst Racial Profiling in U.S. History, Concludes DOJ Investigation*, PHOENIX NEW TIMES (Dec. 15, 2011, 2:40 p.m.), <https://www.phoenixnewtimes.com/news/sheriff-joe-arpaio-s-office-commits-worst-racial-profiling-in-us-history-concludes-doj-investigation-6655328>; Anna Arceneaux & Jared Keenan, *We Are Fighting Maricopa County's Rampant Prosecutorial Misconduct*, ACLU (APR. 4, 2019, 3:00 p.m.), <https://www.aclu.org/blog/smart-justice/prosecutorial-reform/we-are-fighting-maricopa-countys-rampant-prosecutorial>.

Justice concluded an investigation into Arpaio’s Sheriff’s Department, finding “that he oversaw the worst pattern of racial profiling by a law enforcement agency in U.S. history.”¹⁶⁷

A study of the death penalty in Maricopa County from 2010 to 2015 found misconduct in 21 percent of the 28 capital trials resulting in a death sentence during that time.¹⁶⁸ And in 2012, the Arizona Supreme Court disbarred Maricopa County DA Andrew Thomas for actions that “outrageously exploited power, flagrantly fostered fear, and disgracefully misused the law.”¹⁶⁹ Although death sentencing decreased after Thomas’s disbarment, several other prosecutors have since taken over capital trial responsibilities, continuing the office’s reputation for misconduct in the courtroom.¹⁷⁰ From 2006 to 2015, Maricopa County prosecutors Juan Martinez, Jeannette Gallagher, and Vincent Imbordino accounted for one-third of all capital cases in the jurisdiction decided by the state supreme court on direct appeal.¹⁷¹ From 2010 to 2015, Maricopa County was the only jurisdiction in Arizona to sentence people of color to death, and it did so at a rate of 57 percent.¹⁷² Black men and women comprise only 6 percent of the county’s population.¹⁷³

3. *Ohio*

Cuyahoga County, Ohio, and its biggest city, Cleveland, experienced periods of intense racial tension throughout history. From July 18 to 26, 1966, a wave of racially-motivated unrest

¹⁶⁷ Stern, *supra* note 166.

¹⁶⁸ FAIR PUNISHMENT PROJECT, *supra* note 152, at 8.

¹⁶⁹ *Id.* at 9. DA Andrew Thomas created a “death penalty crisis” in Arizona after he decided to pursue capital punishment at unprecedented rates. Dieter, *supra* note 122, at 21. “At the height of his term . . . [Thomas] had 149 death penalty cases pending, far more than could be handled by the courts or the defense bar” and four times as many as Los Angeles or Harris Counties. *Id.* This unprecedented rate of death sentencing was due largely to the fact that Arizona had a catch-all aggravating factor which permitted capital charges in the instance of crimes that are “especially heinous, cruel, or depraved.” *Id.*

¹⁷⁰ FAIR PUNISHMENT PROJECT, *supra* note 151, at 9.

¹⁷¹ *Id.*

¹⁷² *Id.* at 11.

¹⁷³ *Quick Facts – Maricopa County, Arizona*, U.S. Census Bureau, <https://www.census.gov/quickfacts/maricopacountyarizona> (last visited Nov. 27, 2020).

overtook the county's Hough neighborhood.¹⁷⁴ During the summer of 1966, the county saw an increase in racial tension amid concerns of inequality in housing, disparate pricing by area merchants based on race, and widespread police harassment.¹⁷⁵ After the White owner of a local bar refused to give a Black customer a glass of water on July 18th, an angry crowd became violent and escalated into looting, arson, and demonstrations.¹⁷⁶ The period of unrest ended shortly after Mayor Ralph Locher requested assistance from the National Guard.¹⁷⁷ All told, the Hough demonstrations resulted in 30 injuries, almost 300 arrests, millions of dollars in property damage, and 4 deaths, all of whom were members of the city's Black community.¹⁷⁸ Racial tension continued in Cuyahoga County throughout the 1960s as it proliferated throughout the criminal justice system and beyond.¹⁷⁹

That pattern continues today. From 2015 to 2019, Cuyahoga County sentenced nine defendants to death.¹⁸⁰ But the recent discovery of incidents of prosecutorial misconduct in the county leave many of those sentences in question.¹⁸¹ In early 2015, for example, attorneys with the Ohio Innocence Project uncovered a trove of exculpatory evidence that was not uncovered in three murder trials.¹⁸² ~~OBJ~~¹⁸³~~OBJ~~¹⁸⁴ is misconduct, and countless other incidents, was Carmen Marino.~~OBJ~~~~OBJ~~ In announcing her decision to grant retrial for these three men, Judge Nancy Russo

¹⁷⁴ *Hough Riots*, CASE W. RSRV. UNIV. ENCYCLOPEDIA CLEVELAND HIST., <https://case.edu/ech/articles/h/hough-riots> (last visited Nov. 27, 2020).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *See, e.g., Glenville Shootout*, CASE W. RSRV. UNIV. ENCYCLOPEDIA CLEVELAND HIST., <https://case.edu/ech/articles/g/glenville-shootout> (last visited Nov. 27, 2020) (detailing armed clash between Cleveland Police and Black Nationalists of New Libya).

¹⁸⁰ DEATH PENALTY INFO. CTR., *supra* note 83.

¹⁸¹ Alec, *OH: The Long Shadow of Misconduct in Cuyahoga County*, OPEN FILE (Apr. 17, 2015), <https://www.prosecutorialaccountability.com/2015/04/17/oh-the-long-shadow-of-misconduct-in-cuyahoga-county/>.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

said, “Carmen Marino is infamous in Cuyahoga County for his vindictive, unprofessional, and outrageous misconduct in criminal cases” and she described him as¹⁸⁵

In 2020, public defenders came across newly discovered exculpatory evidence that may allow Cuyahoga County death-row inmate Melvin Bonnell to revisit his decades-old death sentence.¹⁸⁶ For years, the prosecutor’s office insisted that its evidence related to the Bonnell case consisted of four boxes of inconsequential documents.¹⁸⁷ In February 2020, the Cuyahoga County DA’s Office finally granted Bonnell’s defense team access to the four boxes of evidence.¹⁸⁸ In those boxes, they found a trove of undisclosed, potentially exculpatory evidence—bullets removed from the victim’s body and shell casings from the crime scene.¹⁸⁹ Bonnell’s defense team discovered this evidence, which was wrongfully withheld, two weeks after the Governor of Ohio reprieved Bonnell’s execution for a year due to the state’s inability to procure the necessary execution drugs.¹⁹⁰ Bonnell’s case is another unacceptable prosecutorial malfeasance in the US criminal justice system’s fixation with capital punishment.

¹⁸⁵ *Id.* After Carmen Marino’s retirement, the Cuyahoga County District Attorney’s Office established an award in his name for “integrity and professionalism in the name of justice.” *Prosecutorial misconduct, and what might be done about it*, INJUSTICE WATCH (Feb 3, 2017), <https://www.injusticewatch.org/news/2017/prosecutorial-misconduct-and-what-might-be-done-about-it/>. Upon discovery of Marino’s extensive misconduct, the office stripped his name from the award. *Id.*

¹⁸⁶ Eric Sandy, *Lawyers Discovered Long-Hidden Evidence at the Cuyahoga County Prosecutor's Office. Now, a Death Row Inmate May Get Another Shot at Justice*, CLEVELAND SCENE (Mar. 30, 2020), <https://www.clevescene.com/scene-and-heard/archives/2020/03/30/lawyers-discovered-long-hidden-evidence-at-the-cuyahoga-county-prosecutors-office-now-a-death-row-inmate-may-get-another-shot-at-justice>.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* This evidence withheld by the Cuyahoga County DAs Office is referred to as Brady material. *Brady v. Maryland*, 373 U.S. 83, 86 (1963). “Brady material is evidence discovered—but suppressed—by the prosecution that would have helped the defendant in some way, by proving his or her innocence, impeaching the credibility of a witness, or reducing his or her sentence.” *Brady Material*, CALIF. INNOCENCE PROJECT, <https://californiainnocenceproject.org/issues-we-face/brady-material/> (last visited Nov. 29, 2020).

4. Nevada

Clark County, Nevada is the home to extensive periods of racial oppression throughout its history. From 1967 to 1974, racial tension boiled over in Clark County, the epicenter of which was Rancho High School in North Las Vegas.¹⁹¹ A Rancho student at the time described the school as a “microcosm of the racial tensions that gripped a nation rocked by the civil rights movement, political assassinations, economic inequality[,] and the Vietnam War.”¹⁹² During this time, Nevada mandated school desegregation on paper, but many of the schools throughout the state were still racially segregated.¹⁹³ Rancho, however, was an exception, with extreme racial tension despite its unique, racially diverse student body.¹⁹⁴ As racial tension rose in the region, Rancho High School became “like a war zone.”¹⁹⁵ Demonstrations and incidents of violence by students resulted in North Las Vegas Police pepper-spraying a bus full of students, an emergency landing by a police helicopter after a student threw a rock at its rotor, and the death of a cancer-stricken student after exposure to pepper spray.¹⁹⁶

Fast-forward four decades and the systemic racism in Clark County is evident as one of the core drivers of its imposition of seven death sentences from 2015 to 2019.¹⁹⁷ In the five years preceding those death sentences, the Fair Punishment Project reviewed Clark County’s nine death sentences, which represented the entirety of Nevada’s death sentences during that period.¹⁹⁸

Furthermore, from 2006 to 2016, the Nevada Supreme Court found instances of prosecutorial

¹⁹¹ Trevon Milliard, *Documentary examines Rancho High School race riots during civil rights era*, LAS VEGAS REV. J. (Jan. 24, 2014, 9:08 p.m.), <https://www.reviewjournal.com/news/documentary-examines-rancho-high-school-race-riots-during-civil-rights-era/>.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ DEATH PENALTY INFO CTR., *supra* note 137.

¹⁹⁸ FAIR PUNISHMENT PROJECT, *supra* note 151, at 20.

misconduct in 47 percent of the Clark County capital trials that it reviewed on direct appeal.¹⁹⁹ This widespread misconduct in the Clark County DA's Office can be traced to the county's chief prosecutor, David Roger, who notably refused to plea bargain in capital cases, causing a significant backlog of capital trials in the jurisdiction.²⁰⁰ In 2013, an investigation into the Clark County DA's Office uncovered records of under-the-table payments of witness's bills and rent expenses in countless cases since 1989.²⁰¹ Defense counsel was unaware of these payments in every instance.²⁰²

In addition to an extensive record of discriminatory jury selection, 36 percent of the people sentenced to death in Clark County from 2010 to 2015 were Black, despite comprising less than 12 percent of the county's population.²⁰³ In 2016 and 2014, the Nevada Supreme Court overturned two convictions due to jury selection in a racially discriminatory manner.²⁰⁴ In oral arguments during the appeal of a capital case, a Nevada Supreme Court Justice said, "[t]his isn't the first time we've been in the rodeo on [discriminatory jury selection] with the Clark County District Attorney's Office."²⁰⁵ percent of all victims were White, although White people were percent of the total ²⁰⁶

In sum, the picture of the United States's top death sentencing counties is painted by a handful of "America's deadliest prosecutors."²⁰⁷ They have the largely unencumbered power to choose between life and death for hundreds of Black men and women in their jurisdictions, and

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 21.

²⁰¹ *Id.* at 21-22

²⁰² *Id.* at 22.

²⁰³ *Id.* at 24.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ FAIR PUNISHMENT PROJECT, *supra* note 151, at 24.

²⁰⁷ *See* Smith, *supra* note 58.

we now see the overlay between their abuse of this discretion to pursue death sentences and the county's longstanding race problems.²⁰⁸

At face value, executions appear to be a whole different ballgame. While the trial phase of capital litigation is largely controlled by county prosecutors, executions are at the behest of a range of different players—from appellate judges to correctional officials to state politicians to appellate defense teams. Although the influencers on the next phase of capital litigation differ from death sentencing, the dynamics remain the same. Race and geography are uniquely and closely interconnected to fuel the death penalty machine in a select group of literal killer counties. Let's take a look.

B. Executions

The preceding examination of America's "killer counties" demonstrated the unequivocal connection between geographically and racially arbitrary death sentencing in the U.S. death penalty system. But for those who are not yet convinced, the connection between racial and geographic arbitrariness becomes even clearer when we examine county-level execution trends across the United States. Here we see a parallel phenomenon; similar to death sentencing, the top executing counties in the United States are influenced by the intersection of their racist past and unchecked prosecutorial misconduct, both of which cast a long, dark shadow over the US death penalty system as a whole.

Two points merit mention before diving into executions. First, it is important to note that a jurisdiction's inclusion on the list of top executing counties is not possible without also being among the top death sentencing counties; where there are no death sentences, there can be no executions. As such, the role of prosecutors and the influence of their discretion is still front and

²⁰⁸ See Brownstein, *supra* note 68.

center in the analysis. Second, death sentences take a long time to mature into executions. The average wait on death row before an execution is now approximately twenty years and three months.²⁰⁹ For this reason, a more recent, limited time frame makes less sense when it comes to executions, and therefore, the analysis relaxes the earlier time constraints, examining the top executing counties in the United States since 1976. Here is the list:

²⁰⁹ *Time on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row> (last visited Feb. 20, 2021).

County	State	Executions
Harris	Texas	130
Dallas	Texas	62
Bexar	Texas	44
Tarrant	Texas	44
Oklahoma	Oklahoma	42

Figure 2: The top five executing counties in the United States since 1976.²¹⁰

1. Texas

Texas is commonly referred to as the “capital of capital punishment” for a reason: since 1976, the state has executed 573 inmates.²¹¹ There are three major reasons that Texas leads the nation in executions, and each is saturated with systemic racism. First, Texas elects its state appellate judges rather than appointing them, which exposes each judge to the tough-on-crime mentality that is popular in Texas politics.²¹² Second, there is no state-wide public defender system in Texas, exposing indigent defendants to the death penalty at disproportionately high rates.²¹³ And third, until the 1990s, Texas allowed jurors to only indirectly consider mitigating evidence in capital trials, resulting in hundreds of inmates on death row who may not be there if they were sentenced today.²¹⁴

²¹⁰ *Executions by County*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/executions-overview/executions-by-county> (last visited Nov. 27, 2020).

²¹¹ *Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976> (last visited Nov. 27, 2020).

²¹² Ned Walpin, *Why is Texas #1 in Executions?*, PBS: FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/texas.html#:~:text=The%20authors%20claim%20that%20the,executions%20both%20reflects%20the%20continuing> (last visited Nov. 27, 2020). Elected appellate judges also tend to be less competent than their appointed counterparts in other states. *Id.*

²¹³ *Id.* Texas has 19 state public defender’s offices on which 39 counties rely. Most counties have a roldex of private defense attorneys who volunteer their time to indigent clients. Neena Satija, *How judicial conflicts of interest are denying poor Texans their right to an effective lawyer*, (Aug. 19, 2019 12 AM Central), TEX. TRIB. <https://www.texastribune.org/2019/08/19/unchecked-power-texas-judges-indigent-defense/>

²¹⁴ Walpin, *supra* note 203. Mitigation typically includes evidence of a defendant’s mental illness; youth; or instances of child sexual, physical, and mental abuse, among various other factors. *Aggravating and Mitigating Factors*, JUSTIA, <https://www.justia.com/criminal/aggravating-mitigating-factors/> (last updated Apr. 2018). *See also* Jurek v. Texas, 428 U.S. 262, 276 (1976) (narrowing Texas’ definition of capital murder and requiring at least one statutory aggravating circumstance in first-degree murder case before death sentence may even be considered).

Texas's position at the pinnacle of executions in the United States is the result of a long history of racial oppression.²¹⁵ Without even accounting for slavery in Texas, the state's top executing counties have an extensive and unfortunate history of racial oppression.²¹⁶ Harris County, Texas, sits at the top of the list of counties with the highest number of executions since 1976.²¹⁷ In 1917, in the middle of World War I, Harris County was the site of violent clashes between a Black Army battalion sent to the region to provide security for the construction of two new military installations and local law enforcement.²¹⁸ And more recently, in 1967, demonstrations by Black students on Texas Southern University's campus over the murder of a Black 11-year-old and the location of massive garbage dumps in Black communities throughout Harris County led to violent encounters with the majority-White Houston Police Department.²¹⁹

²¹⁵ See W. Marvin Dulaney, *African Americans*, TEX. STATE HIST. ASS'N HANDBOOK TEX., <https://www.tshaonline.org/handbook/entries/african-americans> (last updated Sept. 29, 2020).

²¹⁶ See *Id.*

²¹⁷ DEATH PENALTY INFO. CTR., *supra* note 201.

²¹⁸ Robert V. Haynes, *Houston Riot of 1917*, TEX. STATE HIST. ASS'N HANDBOOK TEX., <https://www.tshaonline.org/handbook/entries/houston-riot-of-1917> (last updated Nov. 9, 2020). During World War I, the U.S. War Department decided to build two new military installations in Harris County to take advantage of the newly opened Houston Ship Channel. *Id.* To provide security for its construction sites, the U.S. Army ordered the Third Battalion of the Black Twenty-Fourth Infantry Regiment to the county. *Id.* During the Black Regiment's tour of duty in Harris County, "[t]hose individuals responsible for keeping order, especially the police, streetcar conductors, and public officials, viewed the presence of Black soldiers as a threat to racial harmony." *Id.* On August 23, 1917, police officers arrested one of the Black soldiers for interfering in the arrest of a Black woman. *Id.* The soldier was released, but upon hearing the news of his arrest, a group of Black soldiers marched on the police station to protest his arrest. *Id.* Amid the chaos, 19 people were killed and 11 were seriously wounded. *Id.* After the Army evacuated the Black Regiment from Harris County, a military court indicted 118 soldiers, found 110 of them guilty, executed 19 of them, and sentenced 63 of them to life in prison. *Id.*

²¹⁹ See Ayodale Braimah, *Houston (TSU) Riot (1967)*, BLACKPAST (Dec. 4, 2017), <https://www.Blackpast.org/african-american-history/houston-tsu-riot-1967/>. On May 15, 1967, students staged a peaceful demonstration outside one of the many Harris County dumps situated in Black neighborhoods, seeking to force the city to shut it down. *Id.* The demonstrations continued for two days, sparking support rallies at local churches where activists began to incite violence against the Houston Police. *Id.* Thinking the incitement came from Texas Southern University (TSU) students, the Houston Police shut down the school and barricaded Black students in their dorm buildings. *Id.* Tensions continued to rise and resulted in gunfire exchanged on both sides. *Id.* After a local reverend and community organizer was unable to deescalate the situation, police opened fire on a dorm building full of students, shooting nearly 5,000 rounds of ammunition into the structure before arresting 488 students. *Id.* These clashes later led to a nationwide anti-environmental racism movement. *Id.*

Commonly referred to as the “buckle” of the death belt, Harris County is the home to 130 executions since 1976 and recent, unprecedented instances of prosecutorial misconduct.²²⁰ Harris County’s position at the top of the list of executing counties is largely thanks to the 21-year tenure of former DA Johnny Holmes from 1979 to 2000.²²¹ Holmes’s time as the Harris County DA was marred by prosecutorial misconduct, which resulted in at least 200 death sentences during his tenure.²²² Unfortunately, Holmes’s influence and legacy for seeking the death penalty infected others within the office.²²³ Chuck Rosenthal, the DA from 2001 to 2008, oversaw forty capital trials and resigned from office when civil litigation revealed racist jokes and boasts about his capital litigation record sent via his government email account.²²⁴ More recently, two Harris County prosecutors, Kelly Siegler and Lyn McClellan, are responsible for 28 percent of the death penalty cases decided on direct appeal by the Texas Court of Criminal Appeals.²²⁵ In one of Harris County’s most egregious examples of misconduct, a Texas court found thirty-six instances of prosecutorial misconduct in a single murder trial in 2015.²²⁶

The influence of race on Harris County’s capital sentencing machine is daunting. From 2004 to 2016, every single inmate newly sentenced to death in the county was a person of color.²²⁷ And accounting for resentencing during that same period, 79 percent of the inmates

²²⁰ DEATH PENALTY INFO. CTR., *supra* note 201. *See also* FAIR PUNISHMENT PROJECT, *supra* note 144, at 47–48. However, death sentences in Harris County are almost non-existent today. *See id.* From 1998 to 2003 there were 53 death sentences, from 2004 to 2009 there were 16, and from 2010 to 2016 there were only 10. *Id.*

²²¹ FAIR PUNISHMENT PROJECT, AMERICA’S TOP FIVE DEADLIEST PROSECUTORS: HOW OVERZEALOUS PERSONALITIES DRIVE THE DEATH PENALTY 16 (June 2016).

²²² FAIR PUNISHMENT PROJECT, *supra* note 145, at 48.

²²³ *Id.*

²²⁴ *Id.* at 51.

²²⁵ *Id.* at 48.

²²⁶ Brian Rogers, *Judge cites prosecutorial misconduct in Temple case*, SAN ANTONIO EXPRESS-NEWS (July 8, 2015), <https://www.expressnews.com/%20news/local/article/Judge-cites-prosecutorial-misconduct-in-Temple-6374157.php%3b>.

²²⁷ FAIR PUNISHMENT PROJECT, *supra* note 145, at 51.

sentenced to death were people of color.²²⁸ In 1997, a Texas court sentenced Duane Buck to death after his own counsel introduced expert testimony that Mr. Buck was likely to commit criminal acts of violence in the future because he is Black.²²⁹ His death sentence was later reduced to life in prison after the Supreme Court granted a re-trial in 2016.²³⁰ In another case, a Texas court sentenced Juan Garcia to death, and he was later executed, after the prosecution’s expert witness testified that “‘race plays a role in that among dangerous people, minority people are overrepresented in this population,’ and ‘race’ cannot be ‘eliminated’ as a risk factor through incarceration.”²³¹

Dallas County, Texas, holds the second spot on the list of executing counties with sixty-two inmates put to death since the Supreme Court reinstated the death penalty in 1976.²³² Not surprisingly, Dallas County has its own unfortunate history marred by systemic racism. Like many other major southern cities in the early-to-mid-20th century, the Ku Klux Klan (KKK) reigned supreme in Dallas.²³³ In fact, during “the early 1920s, the city’s chapter of the Ku Klux Klan . . . included one out of every three eligible men” and “in no other city did the Klan find a readier reception than in Dallas.”²³⁴ But the KKK’s influence did not stop there.²³⁵ From 1922 to 1923, Dallas County elected members of the KKK to positions on the local judiciary and in City Hall.²³⁶

²²⁸ *Id.*

²²⁹ *Id.*; Alex Arriaga, *Texas death row inmate Duane Buck has sentence reduced to life after Supreme Court orders retrial*, TEX. TRIB. (Oct. 3, 2017), <https://www.texastribune.org/2017/10/03/high-profile-death-row-case-comes-end-guilty-plea/>.

²³⁰ Arriaga, *supra* note 220.

²³¹ FAIR PUNISHMENT PROJECT, *supra* note 145, at 51.

²³² DEATH PENALTY INFO. CTR., *supra* note 201.

²³³ Darwin Payne, *When Dallas Was the Most Racist City in America*, D MAG. (June 2017), <https://www.dmagazine.com/publications/d-magazine/2017/june/when-dallas-was-the-most-racist-city-in-america/>.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

The Dallas County chapter of the KKK also included two DAs and other high-ranking law enforcement officials.²³⁷

Similar to the other frequent capital litigating jurisdictions, Dallas County has its own track record of recent prosecutorial misconduct.²³⁸ Over the last decade, death penalty activity in the county has declined.²³⁹ However, from 2006 to 2015, three prosecutors in the Dallas County DA's Office were responsible for 62 percent of the capital cases decided on appeal.²⁴⁰ From 2010 to 2015, Dallas County prosecutors seeking the death penalty frequently ignored compelling mitigation evidence.²⁴¹ Two of these prosecutors have since left the DAs office and the third moved to an administrative role, leading to an almost immediate drop in capital litigation in the county.²⁴²

Racial Bias in the Dallas County Prosecutor's Office is even more alarming than its instances of misconduct in the courtroom.²⁴³ An office manual used in the 1960s instructed prosecutors not to "take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated."²⁴⁴ In 2003, the appeal of a Dallas County death sentence from 1986 reached the Supreme Court, where the Court overturned the defendant's conviction "finding that the Dallas County D.A.'s office eliminated 10 of 11 eligible Black jurors on the basis of race."²⁴⁵ Writing for the Court in that case, Justice Anthony Kennedy said this conduct "reveals that the culture of the [DA's] Office in the past was suffused with bias against African-Americans in jury selection."²⁴⁶

²³⁷ *Id.*

²³⁸ FAIR PUNISHMENT PROJECT, *supra* note 154, at 7.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *See Id.*

²⁴² *Id.* at 8.

²⁴³ *See Id.* at 9.

²⁴⁴ FAIR PUNISHMENT PROJECT, *supra* note 154 at 9.

²⁴⁵ *Id.*

²⁴⁶ *Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003).

Bexar County, Texas, comes in tied at third on the list of top executing counties, with 44 inmates put to death since 1976.²⁴⁷ Alarming, systemic racism is baked into the fibers of Bexar County’s foundation.²⁴⁸ In August 2020, the San Antonio City Council, one of the major governing bodies in Bexar County, declared racism a public health crisis.²⁴⁹ The Council’s resolution “symbolically commits the City to root out systemic racism throughout local government based on the racial disparities seen during the coronavirus pandemic.”²⁵⁰ This declaration is just the tip of the iceberg of racial tension and systemic racism in the county.²⁵¹ A recent segment on Texas Public Radio reported on the deep history of racism in San Antonio.²⁵² Host David Martin Davies said, “[h]orrible things happened here. We had slavery. We had Jim Crow. There was a whipping post in front of San Antonio’s old City Hall for slaves.”²⁵³ And the racism embroiled in daily life in Bexar County stretches far beyond the Jim Crow South of the 20th century.²⁵⁴ Carey Latimore, a Professor of History and African American Studies at Trinity University,²⁵⁵ elaborated on racism in Bexar County, especially as it relates to the segregated neighborhoods throughout San Antonio.²⁵⁶ Latimore said, “There is a reason that San Antonio is separate. There is a reason that it’s unequal, and it’s been federal policies, but it’s also been people’s own desires in San Antonio to keep and maintain, in a sense, a segregated or a somewhat segregated society here.”²⁵⁷

²⁴⁷ DEATH PENALTY INFO. CTR., *supra* note 210.

²⁴⁸ See Iris Dimmick, *Racism is officially a public health crisis in San Antonio*, SAN ANTONIO REP. (Aug. 20, 2020), <https://sanantonioreport.org/racism-is-officially-a-public-health-crisis-in-san-antonio/>.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ See The Source, *The Deep History of Racism in San Antonio*, TEX. PUB. RADIO (Sept. 3, 2020), <https://www.tpr.org/show/the-source/2020-09-07/the-deep-history-of-racism-in-san-antonio>.

²⁵² *Id.*

²⁵³ *Id.* at 14:53

²⁵⁴ *Id.* at 16:03.

²⁵⁵ *Id.* at 14:02.

²⁵⁶ *Id.* at 23:51.

²⁵⁷ *Id.*

Bexar County is the lone jurisdiction among the top executioners in the nation that is, according to the lack of reporting on the subject, not rife with an extensive history of prosecutorial misconduct. However, misconduct among the county's enforcers of the law is still not completely unheard-of.²⁵⁸ Recently, the State Bar of Texas disciplined former Bexar County DA, Nico LaHood, for professional misconduct committed during a murder trial in 2017, in which he threatened the opposing counsel.²⁵⁹ Earlier, in 2016, the Innocence Project released a report reviewing 660 instances of prosecutorial error or misconduct across five states between 2004 and 2008.²⁶⁰ The report highlighted five cases of misconduct involving the Bexar County DA's Office, two of which were found to have misconduct of a high degree such that it amounted to reversible error.²⁶¹

The final county in Texas among the top five executing jurisdictions in the nation is Tarrant County, comprised mostly of the metropolitan Fort Worth area, with 44 executions since 1976.²⁶² Along with its frequently executing sister counties, Tarrant County has its own contentious past riddled with racism.²⁶³ At the time of Tarrant County's founding in 1850, it was a small western community comprised of mostly White southerners.²⁶⁴ As such, "it combined the racial prejudices of the [Southern United States] with the greater tolerance and openness of the [Western

²⁵⁸ See, e.g., Bert, *TX: Texas Two-Step: Put Defendants on Death Row for Years, then Confront False Evidence Used Against Them*, OPEN FILE (Feb. 26, 2018), <https://www.prosecutorialaccountability.com/2018/02/26/tx-texas-two-step-put-defendants-on-death-row-for-years-then-confront-false-evidence-used-against-them/> (noting death sentenced based on unreliable informant testimony in Bexar County).

²⁵⁹ Brian Chasnoff, *State Bar Raps Ex-DA LaHood for 'Professional Misconduct'*, SAN ANTONIO EXPRESS-NEWS (Mar. 6, 2019), <https://www.expressnews.com/news/local/article/Former-DA-placed-on-probation-13667165.php#photo-17029899>.

²⁶⁰ Bruce Selcraig, *Bexar County gets mentioned in latest scrutiny of prosecutors*, SAN ANTONIO EXPRESS-NEWS (Apr. 6, 2016), <https://www.expressnews.com/news/local/article/Bexar-County-included-in-latest-scrutiny-of-7230434.php>.

²⁶¹ *Id.*

²⁶² DEATH PENALTY INFO. CTR., *supra* note 210.

²⁶³ See Richard Selcer, *Fort Worth, Texas, Where the West and the South Meet: A Brief History of the City's African-American Community, 1849-2012*, BLACKPAST (Aug. 1, 2012), <https://www.Blackpast.org/african-american-history/fort-worth-texas-where-west-and-south-meet-brief-history-citys-african-american-communi/>.

²⁶⁴ *See Id.*

communities at the time].”²⁶⁵ Despite the “progressive” nature of Tarrant County, the wave of racism in the Jim Crow South still quickly took hold of the community through the 19th and 20th centuries.²⁶⁶ In the early 1900s, for example, White people completely controlled the legal system in Tarrant County.²⁶⁷ “All the police, judges, prosecutors, and juries were [W]hite,” and “there were . . . no [B]lack lawyers to represent [B]lack defendants.”²⁶⁸ Were tensions to boil over and lead to unrest, the Black community was largely at the mercy of violent White mobs.²⁶⁹

One such instance of violence occurred in 1911, when Fort Worth’s Dixie Theater transitioned from serving only White patrons to Black patrons and hired a Black woman as a ticket seller.²⁷⁰ The same night of the theater’s grand opening, an angry mob of 1,000 White people marched through the streets of Tarrant County and destroyed the establishment.²⁷¹ As they marched downtown, the mob attacked Black worshippers on their way to an evening church service and robbed the Reverend M.L. Smith.²⁷² The Fort Worth Star-Telegram reported on the unrest, stating, “[t]he life of every negro in the business district was in danger.”²⁷³ Additionally, in the wake of the Supreme Court’s decision in *Brown v. Board of Education* in 1954, Mansfield, a town just inside Tarrant County’s outer limits, experienced intense, violent opposition to the desegregation of its schools.²⁷⁴ And more recently, in 2019, a research team from the National League of Cities, a non-governmental organization that assists city government officials with

²⁶⁵ *See Id.*

²⁶⁶ *Id.*

²⁶⁷ *See Id.*

²⁶⁸ *See Id.*

²⁶⁹ *See Selcer, supra note 260.*²⁶³

²⁷⁰ Bud Kennedy, *The 1911 headline read “TEXAS HAS RACE RIOT.” It was in Fort Worth.*, FORT WORTH STAR-TELEGRAM (Jan. 17, 2013), <https://www.star-telegram.com/article3833657.html>.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Jim Crow-Era Mansfield Overview*, CRISIS AT MANSFIELD, <https://omeka.library.unt.edu/s/the-crisis-at-mansfield/page/Jim-Crow-Mansfield-overview> (last visited Nov. 27, 2020); *see also* *Brown v. Bd. of Educ.*, 347 U.S. 483, 495–96 (1954).

improving quality of life across the nation,²⁷⁵ discovered significant racial inequality in Tarrant County’s legal system.²⁷⁶ Among its findings, the National League of Cities report found that Black people are disproportionately more likely to be assessed fines and fees, Black and Hispanic people are more likely to be arrested than Whites, White police officers use a disproportionate amount of force against Black people, and police search Black and Hispanic people at higher rates than White people.²⁷⁷

As a result of the racial inequality across Tarrant County, the Black population is especially vulnerable to prosecutorial misconduct, which is not uncommon in the local prosecutor’s office today.²⁷⁸ One former prosecutor in the Tarrant County DA’s Office was personally responsible for the reversal of two capital convictions due to misconduct.²⁷⁹ In one instance, the prosecutor withheld a psychologist’s notes from the defense team.²⁸⁰ The defendant received the death penalty and her co-conspirators were sentenced to life incarceration, but the withheld psychologist’s notes “could have convinced jurors that one of the co-defendants was most responsible for the crime.”²⁸¹

2. Oklahoma

Oklahoma City, Oklahoma, has executed the fifth highest total number of inmates in the United States since 1976.²⁸² Despite its position toward the end of the list of top death sentencing counties, Oklahoma City and its surrounding counties have perhaps the most alarming history of

²⁷⁵ *About NLC*, NAT’L LEAGUE CITIES, <https://www.nlc.org/about/> (last visited Nov. 27, 2020).

²⁷⁶ Luke Ranker, *Is Fort Worth dealing with racial inequality when it comes to arrests and the courts?*, FORT WORTH STAR-TELEGRAM (Apr. 2, 2019, 6:31 AM), <https://www.star-telegram.com/news/local/fort-worth/article228497854.html>.

²⁷⁷ *Id.*

²⁷⁸ See M. McDonald, *Texas Woman May be Spared Death Penalty Because of Prosecutorial Misconduct*, FORT WORTH STAR-TELEGRAM (June 2, 2011), <https://deathpenaltyinfo.org/news/texas-woman-may-be-spared-death-penalty-because-of-prosecutorial-misconduct>.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² DEATH PENALTY INFO. CTR., *supra* note 200.

racial tension.²⁸³ In the early 1920s, Tulsa, which sits approximately 100 miles northeast of Oklahoma County, was the home to a thriving Black community.²⁸⁴ The predominantly Black Greenwood neighborhood included a stretch of Black-owned businesses successful enough to earn it the nickname “Black Wall Street.”²⁸⁵ But on May 31, 1921, Black Wall Street came crashing back to the racial reality of life in the United States in the early 20th century, as a Black, male teenager sat in the local courthouse accused of attempting to rape a White, female teenager.²⁸⁶ As a mob of angry White men formed outside the courthouse, a group of military-veteran Greenwood residents arrived to protect the prisoner.²⁸⁷ Tensions quickly escalated, shots were fired, and so began the Tulsa Race Massacre.²⁸⁸ “Over the next two days, much of White Tulsa—convinced it was confronting a Black rebellion—converged on Greenwood in a hate-filled fury of historic proportions.”²⁸⁹ By the end of the two-day siege, 300 people, mostly Black, were killed, over forty square blocks were destroyed, and nearly every Greenwood resident was interned in makeshift detention centers.²⁹⁰ The findings of the Oklahoma Commission to Study the Riot of 1921 found:

The root causes of the Riot reside deep in the history of race relations in Oklahoma and Tulsa which included the enactment of Jim Crow laws, acts of racial violence (not the least of which was the 23 lynchings of African-Americans versus only one [W]hite from 1911) against African-Americans in Oklahoma, and other actions that had the effect of "putting African-Americans in Oklahoma in their place" and to prove to African-Americans that the forces supportive of segregation possessed the power to "push down, push out, and push under" African-Americans in Oklahoma . . .²⁹¹

²⁸³ Allen Pusey, *A Race Riot Erupts in Tulsa*, 100 A.B.A J. 72, 71 (2014).

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ Pusey, *supra* note 283.

²⁹⁰ *Id.*

²⁹¹ Charles J. Ogletree, Jr., *From Brown to Tulsa: Defining Our Own Future*, 47 HOWARD L. J. 499, 504 (2004).

Like the Texas counties discussed above, Oklahoma City has a deep and disturbing history of racial violence and oppression.

The deep-seated racism that marks Oklahoma's history is also evident in its recent enforcement of the rule of law.²⁹² Oklahoma County is the fifth highest executing county in the nation, with forty-one executions since the Supreme Court reinstated the death penalty in 1976.²⁹³ During a large portion of the modern death penalty era, Robert Macy led the Oklahoma County DA's Office.²⁹⁴ During Macy's tenure, from 1980 to 2001, his office sentenced fifty-four defendants to death.²⁹⁵ Twenty-three of Macy's capital convictions were a result of forensic testimony from disgraced law enforcement chemist Joyce Gilchrist.²⁹⁶ A 2001 Federal Bureau of Investigation (FBI) inquiry into Gilchrist's investigations concluded that she offered testimony "that went beyond the acceptable limits of science."²⁹⁷ Alarming, three death row inmates convicted during Macy's tenure were exonerated.²⁹⁸ And almost half of the inmates sentenced to death in trials featuring Gilchrist's testimony were executed before their case could be reviewed following the FBI's investigation.²⁹⁹ A former Oklahoma County Public Defender said, "Macy would pretty much do whatever it took to win,' including making inflammatory arguments and routinely withholding exculpatory evidence."³⁰⁰

In sum, every one of the top death sentencing counties and executing counties in the United States has an extensive history of racial discrimination and prosecutorial misconduct.

²⁹² *History of Misconduct Chronicled in Oklahoma County With 41 Executions*, DEATH PENALTY INFO. CTR. (Nov. 5, 2015), <https://deathpenaltyinfo.org/news/history-of-misconduct-chronicled-in-oklahoma-county-with-41-executions>.

²⁹³ FAIR PUNISHMENT PROJECT, *supra* note 201.

²⁹⁴ DEATH PENALTY INFO. CTR., *supra* note 83.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ FAIR PUNISHMENT PROJECT, *supra* note 154.

³⁰⁰ *Id.*

Consequently, the collision of these two problems has infested these jurisdictions' pursuit of the death penalty. Yet, as eye-opening as examining the death penalty through the prism of a county-by-county analysis may be, the fact remains that each capital case has an immeasurable effect on individual defendants and their families. For this reason, I pause to consider a case study that directly illustrates the intersection of racial and geographic arbitrariness and the impact on defendants and their families who are on the receiving end of this arbitrary treatment. This leads us to Shelby County, Tennessee, the home of Pervis Payne.³⁰¹

C. Pervis Payne: When Racial and Geographic Arbitrariness Collide

Pervis Payne is perhaps best known for *Payne v. Tennessee*, the case that ushered in the victim's rights movement through the US death penalty.³⁰² However, this case is also a stark illustration of the points discussed in this article thus far. Payne's case presents a perfect storm of systemic racism and unequal treatment in the US death penalty system.³⁰³ In 1987, Payne was a young, intellectually-disabled Black man with no criminal record.³⁰⁴ Over three decades later, he a convicted capital felon who has spent the majority of his life on Tennessee's death row for a crime that he insists he did not commit.³⁰⁵ In fact, newly-discovered evidence, tested for DNA, would appear to prove his innocence.³⁰⁶ In January 2021, a Tennessee judge dismissed a petition for post-conviction DNA analysis in Payne's case because the results were not favorable to him.³⁰⁷ Despite the petition's dismissal, Payne's legal team viewed the DNA analysis as a step in the right

³⁰¹ Daniele Selby, *8 Things You Need to Know About Pervis Payne Who Is Facing Execution*, INNOCENCE PROJECT (July 22, 2020), <https://innocenceproject.org/pervis-payne-wrongful-conviction-what-to-know-innocent-tennessee/>.

³⁰² See *Payne v. Tennessee*, 501 U.S. 808, 834(1991)(O'Connor, J., dissenting).

³⁰³ See Selby, *supra* note 301.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ Kirstin Garriss, *Judge Dismisses DNA Petition in Pervis Payne Case*, FOX 13 MEMPHIS (Jan. 25, 2021, 10:24 PM), <https://www.fox13memphis.com/news/local/judge-dismisses-dna-petition-pervis-payne-case/ZFE35B75ZZALDAR4A5PPC3OMMQ/>.

³⁰⁷ *Id.*

direction.³⁰⁸ Kelley Henry, a Supervisory Assistant Public Defender and member of the Payne legal team said, “[o]ur position is that it shows his DNA is found where he said it should have been found and it’s not found on the items of evidence that you would expect it to be found on if he was in fact the perpetrator.”³⁰⁹ Law enforcement found Payne’s DNA on a paper towel bundle and wash cloth that Payne alleges he used to help the victims, but his DNA is notably absent from the murder weapon.³¹⁰

In 1987, police officers arrested Payne for the murder of Charisse Christopher and her two-year-old daughter, Lacie, both of whom were White.³¹¹ According to Payne, a man raced by him as he walked up the stairs to the floor where Christopher and her daughter lived.³¹² Upon hearing moans from the apartment, Payne tried to help the victims, but panicked and fled when he heard sirens approaching the apartment building.³¹³ Police officers dispatched to the scene found Payne exiting Christopher’s apartment building covered in blood, and he responded that he was the complainant before fleeing the scene.³¹⁴ Police officers arrested Payne later that day when they found him hiding in his former girlfriend’s attic.³¹⁵

Despite Payne’s connection to the scene of the crime, the prosecution’s case was weak.³¹⁶ In its case-in-chief, the government painted a picture of Payne as “searching for sex after using drugs and looking at a Playboy magazine, and that he attacked Christopher after he made an

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Payne v. Tennessee*, 501 U.S. 808, 812 (1991).

³¹² *Id.* at 813.

³¹³ *Id.* at 813–814.

³¹⁴ *Id.*

³¹⁵ *Payne v. Tennessee*, 501 U.S. 808, 812 (1991).

³¹⁶ Selby, *supra* note83.

advance on her and she rejected him.”³¹⁷ However, law enforcement refused to test Payne for consumption of alcohol or illegal drugs, and the prosecution failed to follow-up on other legitimate suspects or forensically test any evidence from the crime scene.³¹⁸

In light of the above discussion, it may come as no surprise that the history of Shelby County, Tennessee, is “deeply rooted in . . . slavery” and racial oppression.³¹⁹ For example, in 1866, “long broiling tensions between the residents of southern Memphis, Tennessee erupted” into an intense period of civil unrest.³²⁰ When a White police officer attempted to arrest a Black military veteran, a group of approximately 50 Black people showed up to prevent the arrest.³²¹ The two sides exchanged gunfire and “the violence quickly spread to other [B]lacks living just south of Memphis who were attacked while their homes, schools, and churches were destroyed.”³²² Memphis police officers and firefighters refused to protect the Black community and even participated in the looting and violence.³²³ A description of the carnage states:

By the end of May 3, Memphis’s [B]lack community had been devastated. Forty-six [B]lacks had been killed. Two [W]hites died in the conflict, one as the result of an accident and another, a policeman, because of a self-inflicted gunshot. There were five rapes and 285 people were injured. Over one hundred houses and buildings burned down as a result of the demonstration and the neglect of the firemen. No arrests were made.³²⁴

³¹⁷ Daniele Selby, *From Emmett Till to Pervis Payne — Black Men in America Are Still Killed for Crimes They Didn’t Commit*, INNOCENCE PROJECT (July 25, 2020), <https://innocenceproject.org/emmett-till-birthday-pervis-payne-innocent-Black-men-slavery-racism/>.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ Mackenzie Lanum, *Memphis Riot, 1866*, BLACKPAST (Nov. 20, 2011), <https://www.blackpast.org/african-american-history/memphis-riot-1866/>.

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

Most notably, however, Shelby County is tied for 18th on a list of US counties with the most lynching victims from 1877 to 1950.³²⁵ During that time period, Shelby County was the site of 20 recorded lynchings, earning it the title of the most active lynching county in Tennessee.³²⁶ Even after this period of extrajudicial lynchings, Black Southerners, especially residents of Shelby County, “remained subject to the established legal system of racial apartheid known as Jim Crow.”³²⁷ Pervis Payne is one of those victims.

Payne’s case is also a perfect example of prosecutorial misconduct arising from systemic racism ingrained in the very fabric of Shelby County’s criminal justice system. Taking advantage of Shelby County’s history of racism, the prosecution in Payne’s case repeatedly referenced the victim’s White skin and portrayed Payne as a “drug-using, aggressive, hypersexual Black man.”³²⁸ Those who knew Payne and his family describe him as a “kind and respectful man, who liked to make his family laugh and help out at his father’s church.”³²⁹ But the rest of Shelby County thought otherwise.³³⁰ Payne’s sister, Rolanda Holman remembers the daily anonymous phone calls in which people used racial slurs and “would threaten to kill her and her family ‘like your brother did to that woman.’”³³¹

In 1991, the U.S. Supreme Court affirmed Payne’s death sentence.³³² On November 9, 2020, Tennessee Governor Bill Lee granted Payne a temporary execution reprieve

³²⁵ *Lynching in America: Confronting the Legacy of Racial Terror*, LYNCING IN AMERICA (EQUAL JUSTI. INST.) 2017), <https://lynchinginamerica.eji.org/report/>. From 1877 to 1950, Shelby County, Tennessee had 20 recorded lynching victims. *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ Selby, *supra* note 301.

³²⁹ Selby, *supra* note .

³³⁰ Daniele Selby, *Her Brother’s Been on Death Row for 33 Years. She Has Just One Birthday Wish.*, INNOCENCE PROJECT (Sept. 14, 2020), <https://innocenceproject.org/pervis-payne-sister-birthday-death-row-tennessee/>.

³³¹ *Id.*

³³² *Payne v. Tennessee*, 501 U.S. 808, 829–30 (1991).

from December 3, 2020 to April 2021.³³³ Payne’s sister said, “There are three things, to me, that the victim’s family and my family have in common, that is: we were both lied to, we were both manipulated, and we were both deceived by the legal system. And what we call a ‘justice system’ has created such injustice in our lives.”³³⁴

Having shown what happens when systemic racism and unbridled prosecutorial discretion meet in the context of the death penalty, it becomes clear that racial and geographic arbitrariness are no accident, and the connection between the two is more than just the prevalence of the death penalty in the Old South. We can now see the problem. The question then becomes what to do about it. What can we do to resolve this issue? The discussion now turns to two potential answers to the geographically and racially arbitrary imposition of the death penalty in the United States.

III. RESPONDING TO RACIAL AND GEOGRAPHIC ARBITRARINESS IN THE US DEATH PENALTY SYSTEM

“Every day in America the trek continues, a [B]lack march to death row.”³³⁵

It is said that the whole is greater than the sum of its parts, and that is certainly true of the arbitrary application of the death penalty in the United States. The problem with the death penalty is not just a race issue and it is not just a geography issue. It is a combination of both, and one cannot understand one problem without understanding the other. The US death penalty system must, at a bare minimum, undergo substantial reform.

Given the current composition of the Supreme Court, we know the courts are not the answer to this problem, but that does not mean there is nothing we can do to fight racial and geographic

³³³ Danielle Selby, *Pervis Payne Granted Temporary Reprieve of Execution*, INNOCENCE PROJECT (Nov. 7, 2020), [https://innocenceproject.org/pervis-payne-gov-lee-grants-execution-
reprieve/#:~:text=Pervis%20Payne%2C%20who%20has%20an,3.&text=Governor%20Bill%20Lee%20granted%20Pervis,execution%20until%20April%209%2C%202021](https://innocenceproject.org/pervis-payne-gov-lee-grants-execution-reprieve/#:~:text=Pervis%20Payne%2C%20who%20has%20an,3.&text=Governor%20Bill%20Lee%20granted%20Pervis,execution%20until%20April%209%2C%202021).

³³⁴ Selby, *supra* note 331.

³³⁵ MUMIA ABU-JAMAL, *LIVE FROM DEATH ROW 76* (HarperCollins 1995).

arbitrariness in the US death penalty system. Here, the discussion turns to two possible responses. The first response prompts states to adopt racial justice acts that would allow defendants to set aside their conviction and obtain a new trial upon a showing of systemic racial bias in the imposition of death sentences in their state. The other response takes the BLM movement's "Defund the Police" campaign one step further: "Defund the Death Penalty." I consider each response in turn.

A. "*McCleskey Plus*": *The Enactment of Racial Justice Acts*

The above discussion has shown the long shadow of racism that continues to cast its grim silhouette over the US death penalty system in the nation's highest death sentencing and executing states. In these states, a capital defendant is not likely to be able to meet *McCleskey*'s high standard of intentional discrimination, but a capital defendant *could* show the disproportionate impact of race in death sentencing, either through studies like the Baldus study, or frankly just by counting.

At the federal level, members of Congress have proposed several bills to eliminate racial bias in the criminal justice system.³³⁶ The most notable of these was a bill proposed by Michigan Representative John Conyers in 1988, which sought to prohibit "the imposition or the carrying out of the death penalty in a racially disproportionate pattern."³³⁷ None of the federal initiatives gained enough momentum to become laws.³³⁸

However, the enactment of racial justice acts ("RJAs") has seen success at the state level. In North Carolina, for example, the state legislature enacted the North Carolina Racial Justice Act of 2009, which provided an avenue through which death row inmates could "present statistical

³³⁶ See, e.g., Tanya Greene, *25 Years After McCleskey, Looking Forward to Legislative Fixes of Supreme Court Error*, AM. CIV. LIBERTIES UNION [\[online\]](#) (Racial Justice Act and Justice Integrity Act).

³³⁷ Racial Justice Act of 1988, H.R. 4442, 100th Cong. (1988).

³³⁸ Annika Neklason, *The 'Death Penalty's Dred Scott' Lives On*, ATLANTIC (June 14, 2019), <https://www.theatlantic.com/politics/archive/2019/06/legacy-mccleskey-v-kemp/591424/>.

evidence of systemic racial bias in the death penalty to challenge their sentence.”³³⁹ The state’s Racial Justice Act allowed defendants to present instances of racial bias through evidence of race-of-defendant disparities, evidence of race-of-victim disparities, or evidence of Batson violations through which race influenced the jury selection process through the use of improper peremptory strikes.³⁴⁰ Most importantly, unlike *McCleskey*, the North Carolina Racial Justice Act did not require proof that racial bias affected the defendant’s particular case.³⁴¹ And instances of racial bias in North Carolina’s pursuit of the death penalty were so prevalent that many believed seeking relief under the Racial Justice Act would effectively empty North Carolina’s death row.³⁴² This fact alone speaks volumes to the influence of race on North Carolina’s pursuit of the death penalty throughout history.

Unfortunately, soon after the reversal of North Carolina’s first death sentence, a coalition of state prosecutors began to lobby to repeal the Racial Justice Act.³⁴³ On June 19, 2013, Republican Governor Pat McCrory officially repealed it, which also negated any relief provided to defendants during the Act’s short existence.³⁴⁴

Fortunately, in June 2020, the North Carolina Supreme Court decided *State v. Ramseur*, which retroactively restored the full protections of the Racial Justice Act for all defendants who

³³⁹ Greene, *supra* note 337.

³⁴⁰ *In Landmark Decision, North Carolina Supreme Court Strikes Down Retroactive Application of Racial Justice Act Repeal*, AM. BAR ASS’N (July 24, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/summer/north-carolina-strikes-retro-application-of-rja-repeal/.

³⁴¹ *Id.*

³⁴² See Kristin Collins, *N.C. Supreme Court Decision Says Racial Justice Act is Key to Ending Death Penalty Racism*, CTR. DEATH PENALTY LITIG. (Aug. 14, 2020), <https://www.cdpl.org/n-c-supreme-court-decision-says-racial-justice-act-is-key-to-ending-death-penalty-racism/>.

³⁴³ Sarah Bufkin, *North Carolina General Assembly Votes To Repeal Landmark Racial Justice Law*, THINKPROGRESS (Nov. 29, 2011), <https://archive.thinkprogress.org/north-carolina-general-assembly-votes-to-repeal-landmark-racial-justice-law-df587ec82dcd/>.

³⁴⁴ Matt Smith, *'Racial Justice Act' repealed in North Carolina*, CNN (June 21, 2013), <https://www.cnn.com/2013/06/20/justice/north-carolina-death-penalty/index.html>.

filed claims before its repeal.³⁴⁵ In *Ramseur*, the court held that the “RJA Repeal and the provisions of the Amended RJA altering the evidentiary requirements for an RJA claim constitute impermissible ex post facto laws and cannot be constitutionally applied retroactively to defendant’s pending RJA claims.”³⁴⁶ Most recently, in September 2020, the North Carolina Supreme Court reduced the sentences of three Black death row inmates to life without parole.³⁴⁷

Legislation like this in North Carolina represents a significant step toward eliminating racial bias in the death penalty system, but four years of relief for only a handful of North Carolinians on death row is not enough. Take, for example, the case of Henry McCollum and Leon Brown, whom then North Carolina Governor Pat McCrory pardoned in 2014 after an investigation by the North Carolina Innocence Commission revealed their innocence after decades spent on the state’s death row.³⁴⁸ McCollum and Brown’s wrongful convictions are but one example where “McCleskey Plus” comes into play.

The above discussion shows that *McCleskey’s* legacy combined with geographic arbitrariness is, simply put, the “double whammy” of arbitrariness in the death penalty. What *McCleskey* failed to accomplish, geography may help cross the finish line. On its face, “McCleskey Plus” stands for eliminating the arbitrary application of the death penalty in the United States. But the reality is that it is so much more. It stands for one of the basic principles on which this country was founded—that all Americans are “created equal, that they are endowed by their creator with certain unalienable rights”³⁴⁹

³⁴⁵ *State v. Ramseur*, 374 N.C. 658, 683 (N.C. 2020).

³⁴⁶ *Id.*

³⁴⁷ Bryan Anderson, *3 North Carolina death row inmates will now serve life in prison*, AP (Sept. 25, 2020), <https://apnews.com/article/north-carolina-archive-courts-prisons-93caa01dfd5b47ca47741eda6443bf3f>.

³⁴⁸ *Henry McCollum and Leon Brown*, N.C. COAL. FOR ALTS. TO DEATH PENALTY, <https://nccadp.org/henry-mccollum-leon-brown/> (last visited January 26, 2022).

³⁴⁹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

So, what does “McCleskey Plus” look like in action? It looks like state racial justice acts that at the very least recognize that where a capital defendant can show arbitrariness in race and geography, and the connection between the two, he or she should be awarded a new trial. North Carolina laid out a perfectly viable blueprint for eliminating the arbitrary application of the death penalty in its own short-lived Racial Justice Act, which was itself a response to *McCleskey*.³⁵⁰ It focused only on race and was ultimately repealed.³⁵¹ Perhaps, however, states would be more willing to legislate such protections when capital defendants could show the disparate impact of race *and* geography through accounts like those provided above or studies showing the impact of race in their *county* of prosecution.

The enactment of such racial justice acts would almost certainly mean the end of the United States’ “killer counties.” On paper, such a result would not end capital punishment, but in reality, it would bring the US death penalty system to a screeching halt. It would put prosecutors on notice that people are watching, and watching even more carefully where a county has a history of racial oppression. “McCleskey Plus” would be a return to race—*plus geography*—as a legitimate basis for challenging a sentence of death. “McCleskey Plus” would almost certainly lead the death penalty further down the road toward abolition.

B. “Defund the Death Penalty”: A Case for Death Penalty Abolition Amid the Black Lives Matter Movement

One might respond to “McCleskey Plus” as a passive-aggressive way to end the death penalty, which is irretrievably intertwined with race and always has been.³⁵² So why not just get rid of it more directly? The BLM movement provides the inspiration: defund death.

³⁵⁰ See *North Carolina Racial Justice Act*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/north-carolina-racial-justice-act> (last visited Nov. 27, 2020).

³⁵¹ *Id.*

³⁵² See, e.g., *Policy Issues: Race*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/race> (last visited January 26, 2022).

Although the BLM movement has focused predominantly on ending police brutality nationwide, the movement’s values of equality, fairness, and due process for Black and Brown Americans also translates to the US death penalty system—a system built on centuries of geographic and racial arbitrariness working hand-in-hand to kill Black and Brown men and women. Throughout 2020, supporters of the BLM Movement called for the “defunding” of police departments across the country.³⁵³ If police departments cannot serve without racism, we should not support them. *Defund the police*. And along the same lines, if capital punishment cannot exist without racism, then it should not exist at all. *Defund the death penalty*.

The national BLM Movement calls “for a national defunding of police” and demands “investment in [Black] communities and the [allocation of] resources to ensure Black people not only survive, but thrive.”³⁵⁴ The Movement’s calls to “defund the police” are rooted in several issues, one of the most glaring of which is the disproportionate allocation of federal, state, and local budgets to law enforcement.³⁵⁵ Should the United States choose to take a step forward and “defund the death penalty,” the hundreds of millions of dollars typically used to facilitate pre-trial investigations, hire defense attorneys for indigent defendants, finance lengthy trials and appeals, and house inmates on death row could be re-allocated to address the underlying issues that fuel inequality across the country.³⁵⁶

“Defund the death penalty” may become a valuable tool for activists in their efforts to abolish the death penalty in the United States, and it could take several different forms. Absent an

³⁵³ #DefundThePolice, BLACK LIVES MATTER (May 30, 2020), <https://Blacklivesmatter.com/defundthepolice/>.

³⁵⁴ *Id.*

³⁵⁵ See, e.g., Jessica Learish, *Defund the police? Police budgets of major U.S. cities*, CBS News (Sept. 30, 2021), <https://www.cbsnews.com/pictures/defund-the-police-police-budgets-of-major-us-cities/3/>.

³⁵⁶ *Policy Issues – Costs*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/costs> (last visited Nov. 27, 2020).

absolute abolition of capital punishment, defunding the death penalty could involve truly saving it for the “worst-of-the-worst criminals.” Or perhaps, the federal, state, and local governments could withhold funding for capital punishment when jurisdictions exhibit certain “McCleskey Plus” factors in sentencing defendants to death. Such factors as disparate sentencing based on race, patterns of aggressive pursuit of death sentences by individual prosecutors, and high rates of death sentencing in jurisdictions with extensive histories of racial tension and systemic racism could all adequately persuade jurisdictions to slash funding. In the end, “defunding the death penalty” serves to end the centuries of inequality and prejudice on which capital punishment in the United States has been built. And in doing so, eliminating the nation’s deadliest, and most prejudiced, prosecutors would effectively abolish the death penalty as the costs continue to significantly outweigh the “benefits.”

So, the United States could attain equality in its death penalty system through the implementation of racial justice legislation, or the country could recognize that if we truly mean that Black lives must matter, then we need to abolish the death penalty altogether. Although drastic, legislative or judicial abolition of capital punishment would formally acknowledge the Court’s error in *McCleskey* and recognize that the entire death penalty system subsists on the backs of Black and Brown men and women incarcerated on death row. In the wake of the BLM Movement and racial injustices exposed across the country, it may now be time to “defund the death penalty.”

When we look at the disparities between predominantly White and Black communities in the United States, we see glaring differences in access to education, funding for children’s development programs, the existence of economic relief and employment training, access to healthcare, instances of crime and recidivism, and access to other basic social services. Defunding the death penalty and reinvesting that money in Black communities will help them thrive. Instead

of financing a death penalty that is essentially structured around perpetuating centuries-old racial hierarchies and killing Black and Brown people in the United States, we could finance the future by building strong, resilient Black communities. Eliminating economic, social, educational, and professional disparities will not only lift up young Black men and women across the country, but it will also serve to tear down the walls of the United States's criminal justice system that have so effectively divided the nation for almost 250 years.

IV. CONCLUSION

This project is intended to serve as a conversation starter. The goal is to shine a light on a connection between two problems that have been under-appreciated thus far, and to start thinking about what we might want to do about it. However, the primary objective is to shine a light *and* connect the dots. The hope is that this will allow us to have the conversations needed to make the changes that scream out to be made.

Understanding the relationship between the death penalty, race, and geography is well suited for the crossroads at which the United States sits today. Gretchen Engel, the Executive Director of the Center for Death Penalty Litigation summed it up perfectly when she said the United States is “a nation of laws, and when people have trials, they have to be fair trials, and part of a fair trial is that you don’t get a harsher punishment or a whiter jury because of the color of your skin.”³⁵⁷ The two possible responses discussed above stand for just that. If the death penalty cannot exist without racial and geographic arbitrariness, then it no longer has a place in our country’s criminal justice system. In light of the United States’s abhorrent history built on systemic

³⁵⁷ *North Carolina Supreme Court Strikes Down Racial Justice Act Repeal, Permits Race Challenges by 140 Death-Row Prisoners*, DEATH PENALTY INFO. CTR. (June 8, 2020), <https://deathpenaltyinfo.org/news/north-carolina-supreme-court-strikes-down-racial-justice-act-repeal-permits-race-challenges-by-130-death-row-prisoners>.

racism and the Supreme Court's admitted failure in *McCleskey*, there is no better time for change than in the midst of the BLM Movement. Black Lives *must* Matter. This is America.³⁵⁸

³⁵⁸ *Childish Gambino, This is America* (mcDJ & RCA 2018).