

A black and white photograph showing a man sitting in a chair, surrounded by several men in suits. The man in the chair is looking directly at the camera with a serious expression. He is wearing a light-colored shirt and suspenders. The men around him are adjusting straps or restraints on his arms and legs. The scene appears to be in a courtroom or a formal setting.

ENDURING INJUSTICE:

**THE PERSISTENCE OF RACIAL
DISCRIMINATION IN THE U.S.
DEATH PENALTY**

DEATH PENALTY INFORMATION CENTER



GROUP KILLS NEGRO; DISAPPOINTS CROWD

'Invited' Guests Wait Vainly
for Lynching as Neal Is Slain
in Florida Woods.

MAY 28, 2010, 8:45 P.M.

**Racism, shmacism. Get a rope
and let's go hang us one.**

Anonymous comment on news story about Andrew Ramseur's capital case,
www.statesville.com (Statesville Record & Landmark)

Copyright, 1934, by The Associated Press.
MARIANNA, Fla., Oct. 27.—
Claude Neal, the Negro accused of
attacking and killing the young
daughter of a white farmer, was
knifed and shot early today by a
mob and his body was dragged to
Courthouse Square and hanged to

ENDURING INJUSTICE

**THE PERSISTENCE OF RACIAL DISCRIMINATION
IN THE U.S. DEATH PENALTY**

A Report By The Death Penalty Information Center

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September 2020

TABLE OF CONTENTS

1 Introduction

2 Race and the Death Penalty Through U.S. History

3 Capital Punishment in the Colonial and Antebellum Period

5 Death in the Shadow of the Lynch Mob

7 Mass Violence and Community Terror

10 Anti-Lynching Campaigns

12 Capital Punishment as an Acceptable Alternative to Lynchings

14 Similarities Between Public Spectacle Lynchings and Public Executions

16 Race and Executions Between the Lynching Era and the Civil Rights Era

18 Beginning the Modern Era: Race Challenges at the U.S. Supreme Court

22 Beyond Black and White: Race, Ethnicity, Sovereignty and the History of the Death Penalty

23 The Death Penalty, Native American Sovereignty, and U.S. Territorial Conquest

25 Mob Violence Against Mexican Americans in the West

27 Race Still Matters: The Continuing Role of Race in the Modern Death Penalty

28 Modern Capital Punishment Trends: Declining Use but Continuing Disparities

33 Race Matters at Every Stage of a Capital Case

37 Arrest and Homicide Clearance Rates

37 Prosecutorial Charging

39 Jury Selection

39 Death Qualification

40 Peremptory Strikes

43 The Impact of Non-Diverse Juries

43 Defense Counsel

46 Sentencing and the Determination of “Deathworthiness”

48 Wrongful Convictions and Exonerations

51 The Aftermath of *McCleskey*: Are Race Challenges Doomed in the Modern Era?

53 The Death Penalty in the Era of the New Jim Crow and Black Lives Matter

54 Targeting Mass Incarceration

56 Black Lives Matter

61 Recognizing the Power of the Prosecutor

68 Conclusion

Until the killing of Black men,
Black mothers' sons, becomes
as important to the rest of the
country as the killing of a white
mother's son, **we who believe in
freedom cannot rest**

– Ella Baker



As this report was being written, tens of thousands were marching on streets across the world shouting “I cannot breathe!”; “No justice, no peace!”; “Black lives matter!”; and “Hands up, don’t shoot.” These are the cries of people exhausted and enraged by a global pandemic that has taken a deadly toll on people of color while videos capture African Americans being killed by law enforcement and former law enforcement officers. After the deaths of Ahmaud Arbery and Breonna Taylor, watching a police officer nonchalantly kneel on George Floyd’s neck for nine minutes proved too much to bear.

Readers may wonder why a report about the death penalty begins with a discussion of police violence. Yet, there are strong links between the indelible images of a knee pressed against George Floyd’s neck, the bodies of lynching victims surrounded by jubilant crowds, and the proud onlookers at the last public execution. Exploring these connections is essential to any full discussion of race and the death penalty in the United States.

In 1998, the Death Penalty Information Center released *The Death Penalty in Black and White*, a report about the effect of race on capital prosecutions and the race of decisionmakers in those cases. Since that time, DPIC has frequently highlighted the impact of race on individual cases and emerging research about racial bias in the administration of capital punishment.

This report seeks to provide an updated overview of the subject with particular attention to putting the American experience of race and the death penalty in context—both historical context and in relation to broader social movements. Over the past ten years, the public conversation about race and the criminal legal system has been increasingly informed by social justice movements galvanized in response to deaths at the hands of police, heightened awareness of the extent of mass criminalization of communities of color, a deeper understanding of racial-terror lynchings, and powerful examples of the potential to redress racial injustice. Against the backdrop of this evolving conversation, this report takes a new look at the historical role that race has played in the death penalty along with the continuing practices that perpetuate racial discrimination.



Race and the Death Penalty Through U.S. History



THE KU-KLUX ACTIVE.

"Terrorism in the South—Citizens Beaten and Shot at—A New Chapter," etc. [From *New York Tribune*.]

Capital Punishment in the Colonial and Antebellum Period

Capital punishment has been applied differently depending upon race throughout American history. In the seventeenth century, courts imposed death sentences most frequently in New England, where the majority of the victims and the people executed were white. Even so, on a per capita basis, Black people were disproportionately executed. The rate at which white people were executed decreased throughout that century, but the Black execution rate remained stable.¹ In the eighteenth century, the colonial population grew dramatically, and so did the South's slave labor economy. The South displaced New England as the region with the majority of executions, and Black people made up the majority of those executed.²

In the colonial and antebellum periods, most white people who were executed had committed murder, while the death penalty was carried out against Black people for a wide range of social infractions. This disparate treatment arose from both the goals of the use of capital punishment in the South and the laws put in place to further those goals.

During slavery, capital punishment served as a tool for controlling large Black populations and discouraging rebellion. The conception of Black people as personal property limited the use of the death penalty:

an enslaved person's execution would damage a white slaveholder's financial interests. As a result, most states allowed slaveholders to be compensated for the execution of an enslaved person.³

Southern states in the pre-Civil War period made distinctions between offenses based on race and slave status.⁴ Violence perpetrated by a white person against an enslaved person was seen less as an offense against a person than as a property crime against the person's owner. In Georgia, for example, the criminal code required a death sentence for any murder committed by a slave or free person of color. White people who committed murder could be sentenced to life in prison if the conviction was based on circumstantial evidence or if the jury recommended leniency. Rape of a white woman by a Black person carried a mandatory death sentence, but a white man faced a two- to twenty-year prison term for the rape of a white woman. The rape of a Black woman could be punished "by fine and imprisonment, at the discretion of the court."⁵

Different punishment for rape depending on the race of the victim was common in slave states. The death penalty for rape was applied overwhelmingly against Black defendants in cases involving charges of raping a white person. While the rape of a white



Library of Congress—1934

Angola State Farm: created as a slave plantation and transformed into a prison after the Civil War, currently houses Louisiana's death row

woman was a capital offense in almost all slave states, there is no record of a white man being executed under these statutes. In most slave states, the attempted rape of a white woman also was a capital offense for Black people, but not for white people.⁶ A slave owner had the legal right to compel sex with his slaves, and the rape of an enslaved Black woman or girl by one who was not her master was considered a less serious crime.

Race also affected how authorities carried out executions. In the colonies and early America, most people were executed by hanging, but Black people were vulnerable to more severe and gruesome punishments. Slave rebellions were seen as “petit treason” and punished in ways designed to send a strong deterrent message. In response to slave rebellions, murder, arson, or other crimes against white people, African Americans were burned at the stake, broken on wheels, gibbeted, decapitated, and dismembered.⁷



Associated Press—2011



[A slave] is a person and also property. As property, the rights of the owner are entitled to the protection of the law. As a person, he is bound to obey the law, and may, like any other person, be punished if he offends against it ...



– U.S. Supreme Court Chief Justice Roger Taney, in his role as Circuit Justice, rejecting defense counsel's argument that an enslaved woman could not be prosecuted for a federal crime

United States v. Amy,
24 F. Cas. 793, 809 (C.C.D. Va 1859) (No. 1,5).

Nearly a century of lynching and nearly five thousand mob murders within less than half a century have done an incalculable harm to American minds and particularly in those states where lynchings have been most frequent. Some of the effect can be seen in the frequency with which the phrase is heard often from the lips of normal, law abiding people even in the North and West—‘he ought to be strung up to a tree.’

— Walter White, *Rope and Faggot: A Biography of Judge Lynch* (1929)

The Civil War and Emancipation altered the legal status of African Americans in the South but not the desire of white southerners to ensure the continuation of a strict racial caste system. To ensure the continued subjugation of the large African-American population in the South, white southerners created Black Codes, convict-leasing systems, and eventually Jim Crow laws.⁸

Enacting laws that provided different punishment, treatment, and status based on race enabled white southerners to use the criminal legal system to legitimize and support white supremacist

principles. Although the North had fewer formal legal restrictions,⁹ most white northerners shared southerners’ belief in white supremacy, a belief that permeated formal and informal modes of social control throughout America.

After the Civil War, lynchings and other extrajudicial violence rose in prominence as a method of enforcing social control. Race significantly affected both the prevalence and the character of lynchings, especially after the Civil War. The Equal Justice Initiative has recently documented an explosion of post-Civil War racial violence and lynchings that

led to the deaths of at least 2,000 Black people between 1865 and 1876.¹⁰ Between the 1880s and the 1930s, lynchings were an almost daily occurrence. During this period, the vast majority of lynchings took place in the South.¹¹ After 1900, southern lynchings almost exclusively targeted

The Dogwood Tree

This is only the branch of the Dogwood tree;
An emblem of WHITE SUPREMACY.
A lesson once taught in the Pioneer's school.
That this is a land of WHITE MAN'S RULE.
The Red Man once in an early day,
Was told by the Whites to mend his way.
The negro, now, by external grace,
Must learn to stay in the negro's place.
In the Sunny South, the Land of the Free,
Let the WHITE SUPREME forever be.
Let this a warning to all negroes be,
Or they'll suffer the fate of the DOGWOOD TREE.

~Pub. by Harkeider Drug Co., Center, Tex.

| *Text accompanying a 1908 postcard of a lynching in Sabine County, Texas*

African Americans.¹² They also became more torturous and gruesome, serving both to terrorize the Black community and sometimes as an entertainment spectacle enjoyed by thousands of white celebrants.¹³

The Equal Justice Initiative has documented 4,425 of these “racial terror lynchings” in twenty states between the end of Reconstruction in 1877 and 1950.¹⁴ Twelve southern states accounted for the

vast majority of these killings — 4,084 lynchings.¹⁵ Nearly one quarter of all racial terror lynchings were based on claims of sexual assault and 30% were based on allegations of murder.¹⁶ Hundreds more African Americans were lynched for other crimes that were not punishable by death in the criminal legal system, and many were lynched for no crime at all. Many were lynched for minor transgressions of the racial caste system, including unintentionally bumping into a white woman.¹⁷

Popular culture has characterized lynching as the product of lawless mobs, but historians have documented lynching's close connections to the formal criminal legal system and the levers of power in the South.¹⁸ Racial terror lynchings were intended to send a public message to African-American communities: you live or die at the whim of the white community, stepping out of line puts you, your family, and your community at risk. Lynchings were also conducted to fuel a sense of white community outrage and to reinforce images of African Americans as subhuman deviants.¹⁹ At first blush, the history of lynching may not seem relevant to a discussion of the history of race and the death penalty. Yet, links between lynching, mob violence, and the legal capital punishment system were present throughout the lynching era.

There has never been a lynching in Phillips county (sic) and never will be as long as criminals receive proper and just punishment at the hands of the courts.

—Telegram sent to request the extradition of an African-American man for trial in the aftermath of the Elaine massacre, signed by the president of the Business Men's League, the president of the Helena Board of Trade, the Phillips County Sheriff, a county judge, and the mayor of Helena.²⁰

Racial violence against African Americans went beyond targeting individuals accused of crimes or violating social norms. During lynching's heyday, racial violence threatened entire Black communities when white mobs gathered to terrorize them. Members of the white mob almost never suffered consequences, but Black people were frequently prosecuted and sometimes sentenced to death and executed.

In 1908, racial violence in Springfield, Illinois, took the lives of two innocent Black men. A white mob had attempted to lynch two African Americans, one who was in jail charged with raping a white woman and the other charged with murdering a white man. After the local Black community protected these men from lynching, the mob burned their homes

and lynched two innocent African-American men. After the riot, one of the original targets of the lynching was exonerated of rape, and the other man was tried and executed for murder. This racial violence in Abraham Lincoln's hometown and lynchings across the country spurred Ida Wells-Barnett, W.E.B. Dubois, and other African-American and white community leaders to create the National Association for the Advancement of Colored People (NAACP) in 1909. The NAACP and other newly formed civil rights organizations pushed for federal anti-lynching legislation and executive action.²¹

During the “Red Summer” of 1919, violence erupted throughout the South, targeting African-American soldiers returning from World War I and communities organizing for civil and economic rights. Phillips County, Arkansas, was the location of one of the most devastating attacks. In September 1919, Black



The wreckage after white mobs destroyed the houses of the black residents of Rosewood, Florida

sharecroppers met in a church in Elaine, Arkansas to plan a strategy to advocate for fair compensation for their labor. When news of this meeting got out, armed white men surrounded the church and began firing into it. The Black sharecroppers returned fire, and one white man was killed in the ensuing chaos. The governor called on locally stationed soldiers to “round up” the Black sharecroppers whose actions were framed as an insurrection and gave the soldiers license to kill. The soldiers, working with local vigilantes, slaughtered 200 or more African-American

men, women, and children. Five white people were killed during the massacre.²²

No white person was prosecuted for the violence in Phillips County, but dozens of Black men accused of killing white people were charged with murder. Public officials promised a nascent lynch mob that there would be executions, asking the mob to refrain from violence. Witnesses were tortured into confessions, and all-white juries were seated. In the end, twelve Black men were sentenced to death by juries that deliberated for less than five minutes. The NAACP secured legal counsel for the death-sentenced men, and the cases culminated in the landmark United States Supreme Court decision in *Moore v. Dempsey*. The *Moore* Court recognized the mob violence against African Americans that formed the background for the case and held that the defendants were entitled to seek federal habeas corpus relief to challenge their trial. The Court held that when defendants are provided a trial but “the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion” then defendants are entitled to federal habeas corpus relief.²³ Eventually, all twelve defendants avoided execution through commutations, reductions of charges, or dismissals.²⁴



The Red Summer of 1919 was particularly violent, but instances of mass racial terror continued in the following years. In 1921, white Oklahomans razed an affluent section of Tulsa that had been nicknamed “Black Wall Street” under the pretext that a Black man had raped a white woman. In reality, white residents felt threatened by the economic success of the Black community. In 1923, all the Black residents of Rosewood, Florida fled for their lives after local white mobs killed at least six and burnt down the church and all the homes in the

Black section of Rosewood. As was often the case, the violence began with an allegation that a Black man had raped a white woman.²⁵



| Black Wall Street in flames during the Tulsa Race Massacre

Anti-Lynching Campaigns

Black newspapers, newly formed civil rights groups, and other anti-lynching activists worked to end lynchings, mass violence, and the impunity of white perpetrators of racial terror in the early 20th century. Despite these efforts, lynchings continued regularly until the 1930s, and though the movement gained numerous supporters, prominent southern politicians and newspapers continued to defend the practice.

In her anti-lynching campaign, journalist and activist Ida B. Wells-Barnett created a pamphlet, *Southern Horrors: Lynch Law in All Its Phases*, that criticized leading southern figures for condoning and, in some instances, encouraging lynching. Wells-Barnett recounted South Carolina Governor Benjamin Tillman's declaration while "standing under the tree in Barnwell, S.C., on which eight Afro-Americans were hung last year" that he would personally lead a lynch mob if an African-American man raped a white woman.²⁶ She also quoted a portion of an editorial in *The Daily Commercial and Evening Scimitar* of Memphis, Tennessee, which stated:

The generation of Negroes which have grown up since the war have lost in large measure the traditional and wholesome awe of the white race which kept the Negroes in subjection, even



What in the early 1900s was often referred to . . . as 'lynch law' was often regarded by whites as just that—a form of law that had as much legitimacy as the formal, codified laws of the state's justice system.

— Sherrilyn Ifill, *On the Courthouse Lawn* 8 (2007)

when their masters were in the army, and their families left unprotected except by the slaves themselves. There is no longer a restraint upon the brute passion of the Negro.

What is to be done? The crime of rape is always horrible, but (sic) the Southern man there is nothing which so fills the soul with horror, loathing and fury as the outraging of a white woman by a Negro. It is the race question in the ugliest, vilest, most dangerous aspect. The Negro as a political factor can be controlled. But neither laws nor lynchings can subdue his lusts. Sooner or later it will force a crisis. We do not know in what form it will come.²⁷

A RED RECORD.

SOUTHERN HORRORS

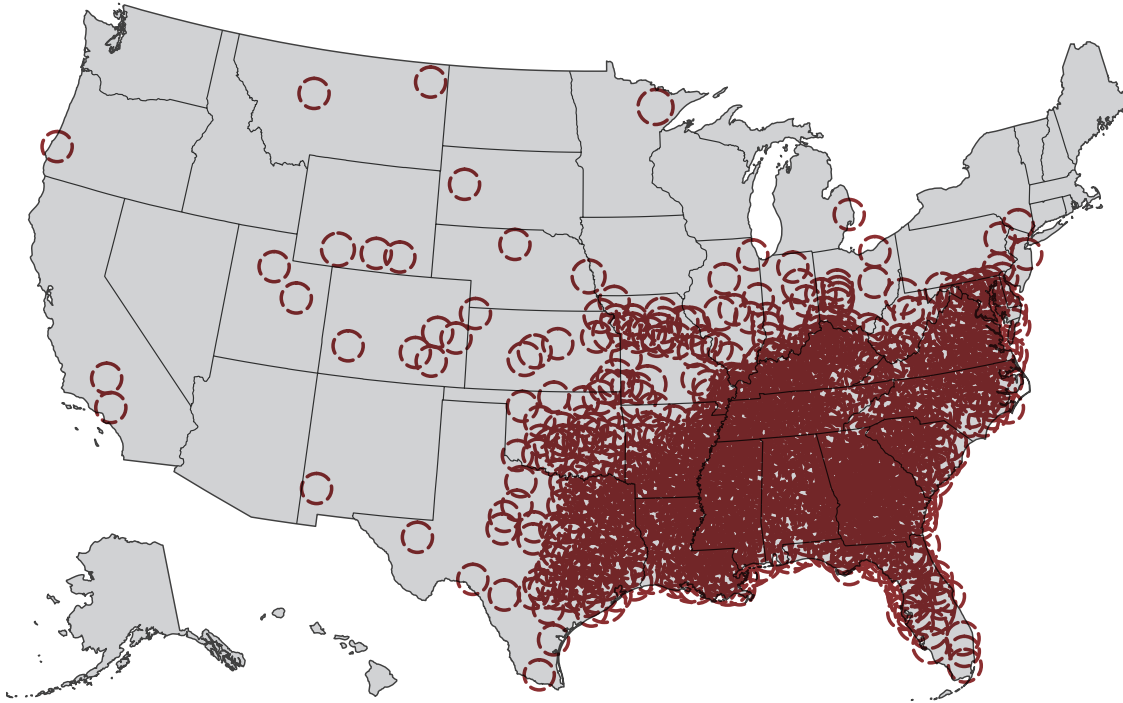
LYNCH LAW IN ALL ITS PHASES

Stereotypes of Black criminality were pervasive, even in criticisms of lynching. In 1906, President Theodore Roosevelt condemned the “epidemic of lynching and mob violence” and called for “even handed justice.” However, he asserted that “the greatest existing cause of lynching is the perpetration, especially by Black men, of the hideous crime of rape.”²⁸ He went on to opine that rape should always be a capital crime and that the death penalty should be available as a punishment for attempted rape.

Despite organized anti-lynching campaigns and expressions of disapproval from the national and

international media, lynchings continued with impunity. Only 1% of all lynchings committed after 1900 resulted in any criminal conviction, and even fewer produced murder convictions.²⁹ Advocates failed to win passage of federal anti-lynching laws.³⁰ The circulation of postcards commemorating lynchings was impeded but not completely stopped by a 1908 amendment to the Comstock Act that banned the mailing of “matter of a character tending to incite arson, murder or assassination.”³¹ However, Congress adopted this prohibition in response to fears of anarchist violence, and officials applied the ban to lynching postcards only as an afterthought.³²

Capital Punishment as an Acceptable Alternative to Lynchings

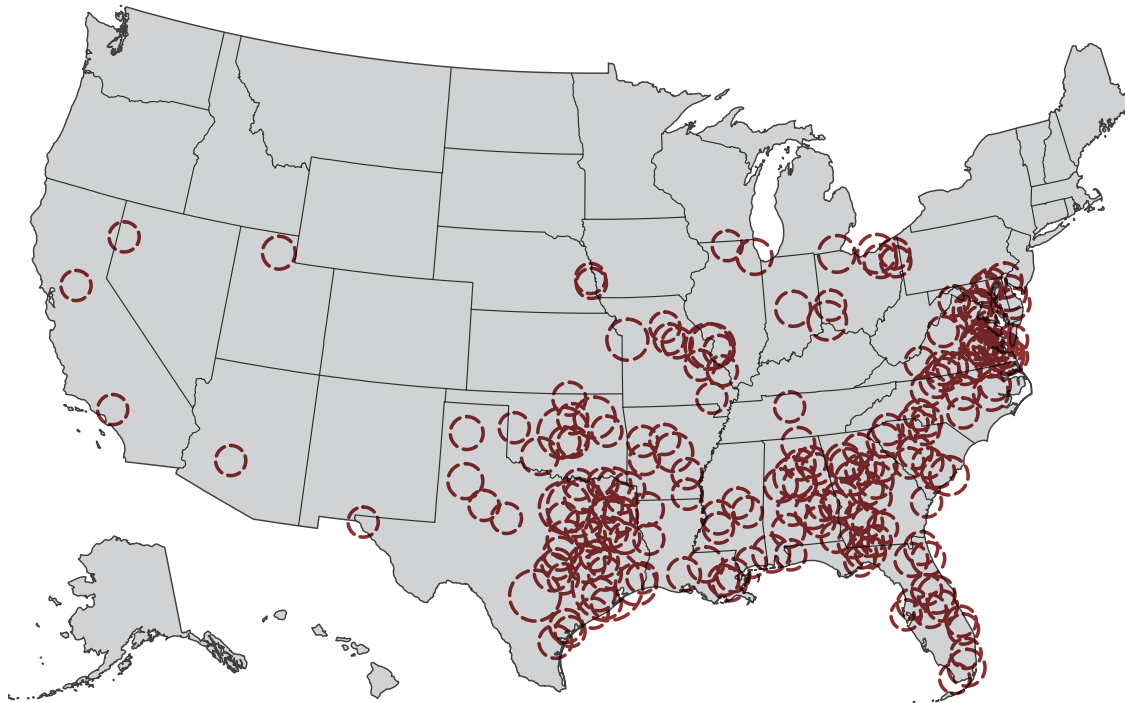


| Lynchings of Black Victims Between 1883 and 1940

Public discussion about lynchings highlighted the connection between non-officially sanctioned mob violence and the legal capital punishment system. “Neither lynching nor ‘legal executions’ required reliable findings of guilt, and complicit law enforcement officers handed over prisoners to the lynch mob.”³³ At times, the promise of a swift officially sanctioned death penalty was used to deter

would-be participants in lynch mobs. Executions following these show trials with little process and a preordained outcome were described by activists as “legal lynchings.”³⁴ In debates about the abolition or reinstatement of capital punishment, public officials were concerned that the absence of capital punishment would lead to communities resorting to lynching for vengeance.³⁵

For interactive visualizations about race and the death penalty, visit the Death Penalty Information Center’s website at deathpenaltyinfo.org



| Executions of Black Defendants Between 1972 and 2020

Following an 1890 lynching in Colorado, the *Rocky Mountain Daily News* called for the reinstatement of capital punishment: “The people of Colorado and the next legislature might as well face the fact that in the absence of capital punishment under the law it is inflicted through the angry mob violence, whenever an especially atrocious crime is committed. . . . To prevent the recurrence of such horrors the death penalty should be restored in this state.”³⁶

In 1914, a Shreveport, Louisiana paper expressed a similar sentiment about the prospect of abolition: “We are having suggestions from some of the newspapers of the State that Louisiana follow the lead of a few other States and abolish the death penalty. . . . Would not one result be to increase the number of lynchings? . . . Would the murderer be permitted to reach State prison in safety from the vengeance of an outraged citizenship, there to plan to elude the guards at the first opportunity?”³⁷

Similarities Between Public Spectacle Lynchings and Public Executions



| The 1893 lynching of Henry Smith in Paris, Texas

Many lynchings took place under cover of darkness with a few people capturing and killing a lynching victim, allowing the community to disclaim collective responsibility. But hundreds of lynchings during the late 19th century and early 20th century were celebratory events conducted in full public view.³⁸ In some cases, pieces of the lynching victim's body were taken as trophies, postcards commemorated the occasion, and newspapers provided advance notice of the expected lynching time and location as well as detailed accounts afterwards.³⁹

These public lynchings were often indistinguishable in appearance from legally sanctioned executions. In the North, public executions fell into disfavor in the 1800s, with many states banning the practice before the Civil War. In the South, executions remained public events well into the 20th century, with the last public execution taking place in Kentucky in 1936.



The 1936 execution of Rainey Bethea in Owensboro, Kentucky

The Last Public Execution

In August 1936, more than 20,000 people gathered in Owensboro, Kentucky to watch the hanging of Rainey Bethea, a 22-year-old African-American man who was accused of raping and murdering an elderly white woman.⁴⁰ At the time, Kentucky law provided that executions for murder would be conducted inside the state prison. Executions for rape, however, could be conducted by public hanging in the county in which the crime occurred.

To ensure a public execution, prosecutors tried and convicted Bethea only on the rape charge.⁴¹ The execution had a carnival-like atmosphere. Newspapers across the country ran articles with headlines like "They Ate Hotdogs While a Man Died on the Gallows" and "Children Picnic as Killer Pays." Although local officials maintained that the event had been somber and respectful, Kentucky banned public executions eighteen months later.⁴²

Race and Executions Between the Lynching Era and the Civil Rights Era

Lynchings began decreasing in the early 20th century, but executions continued in some of the same situations that would previously have drawn a lynch mob. During this time period, racial disparities in executions persisted, with African Americans making up 49% of those executed for murder,⁴³ and white people making up 50% of those executed for murder. The overrepresentation of African-Americans among those executed for murder paled in comparison to disparities among those sentenced to death and executed for rape in which the victim was not killed.

In Alabama, Arkansas, Florida, Georgia, Louisiana, South Carolina, and Tennessee between 1945 and 1965, 823 African-American men were convicted of rape, and 13% were sentenced to death.⁴⁴ During the same time period, 442 white men were convicted of rape, and only 2% were sentenced to death. The same disparities were seen in executions. Between

	Black	White	Other	Total
Rape	405 (89.0%)	48 (10.6%)	2 (0.4%)	455 (100%)
Murder	1630 (48.9%)	1664 (49.9%)	40 (1.2%)	3334 (100%)
Other	31 (44.3%)	39 (55.7%)	0 (0.0%)	70 (100%)
Total	2066 (53.1%)	1751 (45.4%)	42 (1.1%)	3859 (100%)

U.S. Executions 1930-1968

U.S. Dep't of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 45, *Capital Punishment 1930-1968* (1969).

1930 and 1972, 455 men were executed for rape across the U.S. Four hundred and five, or 89.1%, were African American.⁴⁵ The vast majority (443) of these executions occurred in former Confederate states.⁴⁶ An examination of death sentencing for rape in Texas between 1924 and 1972 concluded that “when a black offender was convicted of raping a white woman, he was virtually assured of a death sentence.”⁴⁷

Throughout U.S. history, no white man has ever been executed for the rape of a Black woman or girl in which the victim was not killed.

These alarming disparities across the South led civil rights groups to challenge the continued use of the death penalty for rape. In the 1930s and 1940s, first the NAACP and then the separately incorporated NAACP Legal Defense and Educational Fund, Inc. (“LDF”) began working in the courts to dismantle the South’s Jim Crow racial caste system, focusing on education, voting rights, employment, and eventually criminal justice. LDF’s early criminal justice work focused on defending African Americans who the organization believed were innocent in cases where there was evidence of racial injustice and the opportunity to establish important legal precedent.⁴⁸

Thurgood Marshall, as the head of LDF, characterized the death penalty for rape as “a sentence that had been more consistently and more blatantly racist in application than any other in American law.”⁴⁹

At the same time that LDF was pursuing a courtroom strategy to dismantle Jim Crow, popular momentum was growing to end segregation. As those in the civil rights movement organized, boycotted, marched, and mobilized, public pressure mounted. During the 1960s, the United States Supreme Court under the leadership of Chief Justice Earl Warren recognized constitutional protections of key rights for criminal defendants. Up to this point, the Supreme Court had occasionally intervened in individual death penalty cases, but the Warren court’s expansive criminal justice jurisprudence left open the possibility of broader action.⁵⁰

LDF’s approach to death penalty cases eventually broadened to defending people of all races based on a belief that the only way to eradicate racial injustice from capital punishment would be to end the death penalty entirely. The organization’s legal campaign contributed to a slowing and eventual halt of executions in the 1960s.⁵¹



Emmett Till and his mother Mamie Till Mobley

The End of an Era, but not the End of Lynchings

Although lynchings became rarer by the mid-20th century, they did not disappear completely. The 1955 lynching of Emmett Till for allegedly whistling at a white woman was a pivotal moment in the civil rights movement. His mother, Mamie Till Mobley, courageously decided to hold an open-casket funeral and allow Jet magazine to publish pictures of his body that had been gruesomely disfigured by his murder. The photos were a shocking reminder of the brutality of the Jim Crow South.

Beginning the Modern Era: Race Challenges at the U.S. Supreme Court

In 1972, LDF's campaign culminated in the U.S. Supreme Court declaring in *Furman v. Georgia* that the death penalty was unconstitutional as it was then being administered.⁵² The case was ultimately resolved with a short *per curiam* opinion because the Justices could not reach a controlling consensus on why capital punishment was unconstitutional. Each Justice wrote separately, producing what was then the lengthiest set of opinions in the history of the Court. Yet, most of the opinions contained little discussion of racial discrimination in the death penalty. The holding gleaned from the five concurring opinions was that the death penalty was unconstitutional because it was arbitrary and capricious and had been "wantonly and freakishly imposed."⁵³

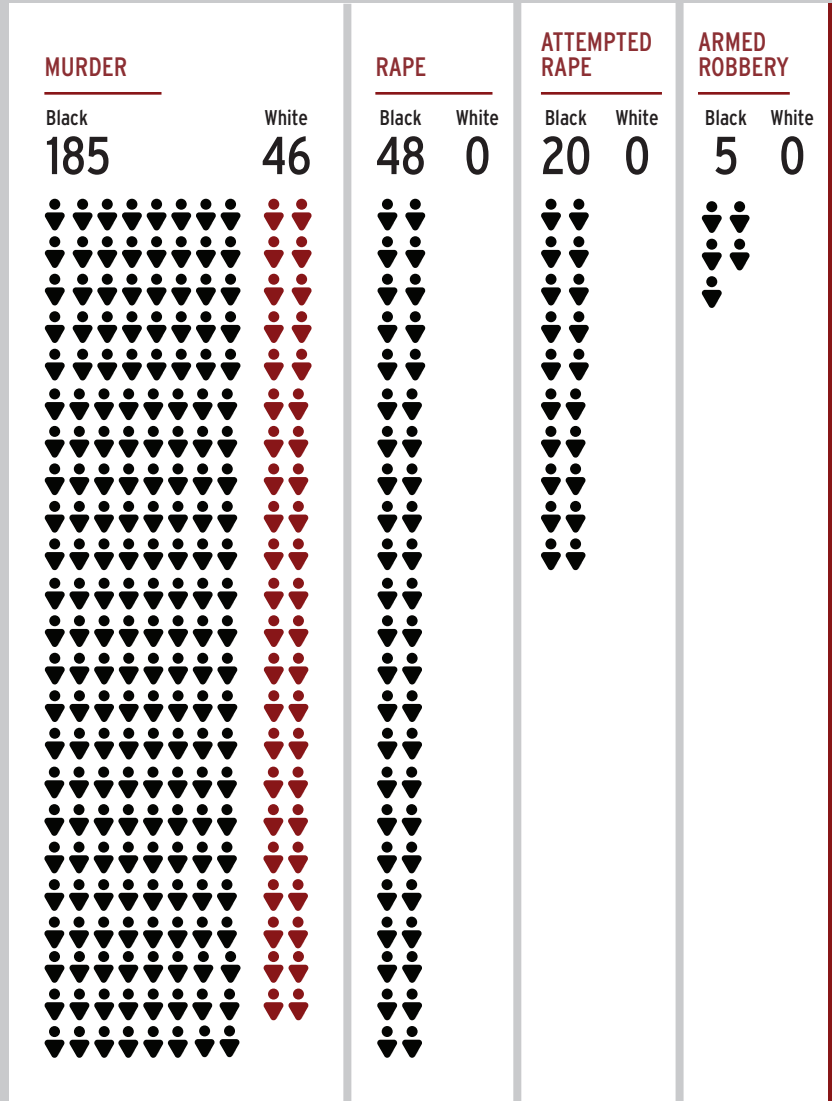
The *Furman* ruling cleared death row, but states immediately began enacting new capital punishment laws. In 1976, the Supreme Court decided in *Gregg v. Georgia* and its companion cases that the new "guided discretion" statutes of Florida, Georgia, and Texas were constitutional but that the mandatory death penalty statutes adopted by North Carolina and Louisiana were unconstitutional.⁵⁴

The *Furman* and *Gregg* decisions contained echoes of the early 20th century tension between lynching and the death penalty. Justice Potter Stewart concurred in *Furman* because of the arbitrary and potentially racist way that the death penalty was being administered,⁵⁵ but he disagreed with the Justices who asserted that the death penalty violates the Eighth Amendment regardless of how it is implemented. He argued instead that the penalty could be an appropriate tool for satisfying the public's desire for vengeance. "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,'" he wrote, "then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law."⁵⁶ Justice Stewart reiterated this sentiment when he wrote the plurality opinion in *Gregg* that upheld the constitutionality of new capital punishment statutes.⁵⁷

Shortly after deciding *Gregg*, the Supreme Court had an opportunity to address one of the areas of the most extreme racial imbalance in capital punishment, the use of the death penalty for rape. In *Coker v. Georgia*, the Court declared the death penalty an unconstitutionally disproportionate punishment for the rape of an adult woman when unaccompanied

Race Disparities in Virginia Executions from 1900-1969

Virginia provides an illustration of how much race determined who was executed for non-murder crimes. Before the Civil War, Virginia explicitly provided different penalties for white people and its enslaved population. By 1848, white people could be sentenced to death only for first-degree murder while enslaved Black people could be executed for a number of non-homicide offenses.⁵⁸ Although this formal distinction was gone by the twentieth century, the state's executions showed that in practice different rules were being applied to white and Black defendants.



by a homicide. Although the briefing in the case described in detail the racially biased application of capital rape statutes, race was never mentioned in the Court's opinion.⁵⁹

In its 1986 decision in *Turner v. Murray*, the Court finally acknowledged the unique susceptibility of capital sentencing decisions to racial prejudice.⁶⁰ Turner, an African-American man, had been

sentenced to death by a Virginia jury for killing a white man. During jury selection, the judge denied defense counsel's request to question potential jurors about racial prejudice. The Supreme Court reversed. Justice Byron White, writing for four Justices, stated:

Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate, but remain undetected. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.⁶¹

Justices Brennan and Marshall agreed that Turner's death sentence should be reversed but believed the Court's ruling was too narrow. The same risk of racial bias permeated the jury's evaluation of a capital defendant's guilt, they said, and required that Turner's conviction be overturned.⁶²

One year later, the Court decided a landmark case about race and the death penalty, *McCleskey v. Kemp*. The challenge was based on an advanced statistical study demonstrating the impact of race on death sentencing. Georgia prosecutors argued that any racial disparities in the administration of the death penalty could be attributed to the higher rate of homicide offending among African Americans. However, Professor David Baldus and his colleagues reviewed more than 2,000 Georgia murder cases and found that when controlling for 230 variables related to the crime and characteristics of the offender, the race of the victim was a strong predictor of who would receive the death penalty. This effect was particularly pronounced in interracial crimes. Baldus found that the odds that a murder defendant would be sentenced to death were 4.3 times greater when the victim was white.⁶³

The Court rejected McCleskey's claim by a bare 5-4 majority. Although the Court claimed to have accepted Baldus' findings, it refused to give the demonstrated race effects constitutional relevance. The Court majority required a defendant to prove "particularized" racial animus in his individual case, dismissing statistical evidence as the basis for proving discrimination. This ruling allowed the racially disproportionate imposition of the death penalty to continue unabated without any significant constitutional checks.

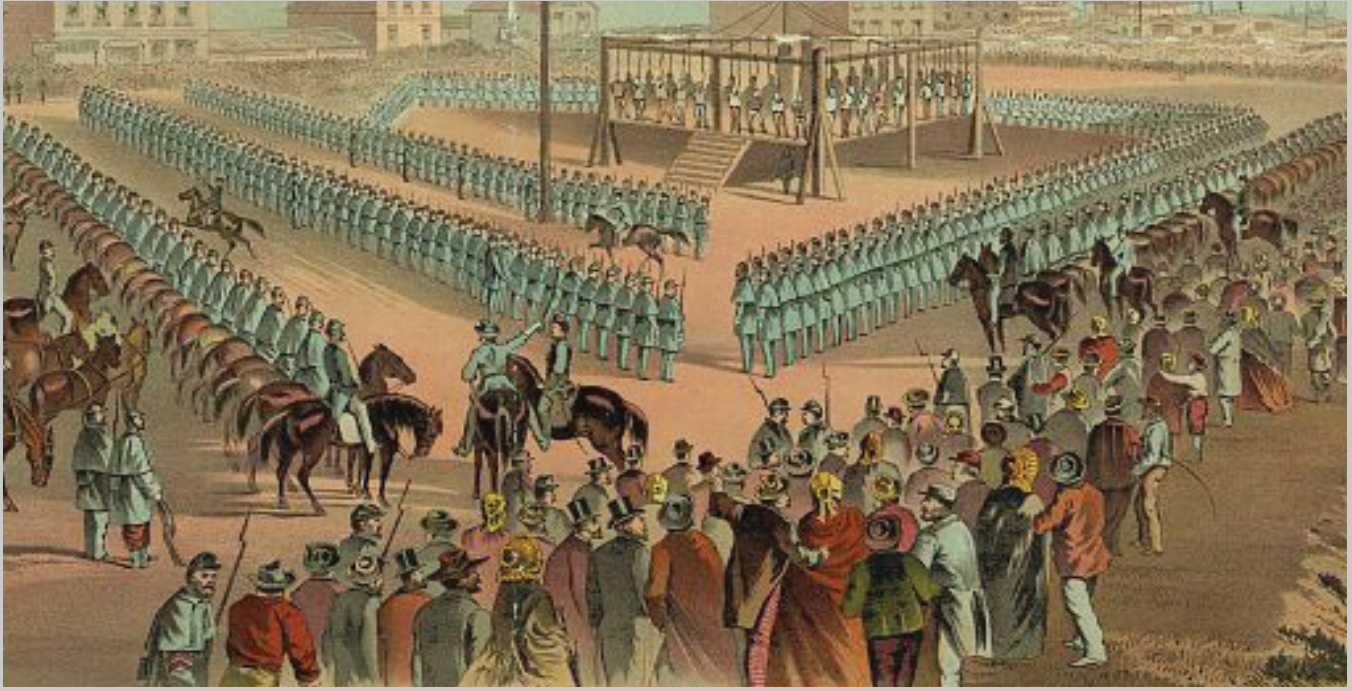
In a decision he later identified as the one vote he most regretted in his tenure on the Court,⁶⁴ Justice Lewis Powell expressed concern that "if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty."⁶⁵ Justice Antonin Scalia went even further in an internal memo to the other members of the Court. He wrote: "Since it is my view that unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof."⁶⁶

In his *McCleskey* dissent, Justice Brennan harshly criticized the majority's resolution of this issue. He wrote: "The Court . . . states that its unwillingness to regard petitioner's evidence as sufficient is based in part on the fear that recognition of McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing. Taken on its face, such a statement seems to suggest a fear of too much justice."⁶⁷ Justice Brennan argued that a decision based on concerns about the breadth of discrimination amounts to a "complete abdication of our judicial role."⁶⁸

McCleskey illustrated the unique treatment of race in the death-penalty context, with the Court refusing to credit evidence that was routinely accepted in equal protection cases involving employment, educational, and housing discrimination.

The *McCleskey* decision was a serious blow to challenging racial discrimination in the application of capital punishment.⁶⁹ With a few exceptions that will be discussed later, the Supreme Court has avoided race issues unrelated to jury selection in death penalty cases.

Beyond Black and White: Race, Ethnicity, Sovereignty, and the History of the Death Penalty



| Mass execution of thirty-eight Dakota men in Minnesota on December 26, 1862

The racial history of the death penalty in the United States is inextricably tied to the enslavement of African people and post-emancipation efforts at social control. But capital punishment's discriminatory application has not been limited to Black people. The use of the death penalty in the United States is intertwined with the history of violence and prejudice against other racial and ethnic groups. The death penalty, both in history and in the present, reflects national and regional tensions. Concerns about "others" committing crimes or violating social norms have led to the targeting of Native

The use of the death penalty in disregard of tribal sovereignty continues to this day.

Americans, immigrants, disfavored ethnicities, and religious minorities.⁷⁰

The Death Penalty, Native American Sovereignty, and U.S. Territorial Conquest

In conjunction with campaigns of genocide and forced displacement, colonial and early American governments used the death penalty to force Native Americans from their lands and to punish those who resisted. Native Americans were subject to extremes of the death penalty, from the executions of young children to mass executions.

Throughout the 18th and 19th centuries, as the U.S. government seized large swaths of tribal land, Native Americans were executed for participation in resistance efforts. On December 26, 1862, following the U.S.-Dakota War of 1862, the federal government hanged 38 members of the Dakota tribe in Minnesota. It was the largest mass execution in United States history.

Three hundred and three Dakota men accused of participating in the U.S.-Dakota war were sentenced to death in a series of rapid trials, sometimes lasting less than five minutes. President Abraham Lincoln had the final say in the sentences, and he approved the execution of 39 of the 303 prisoners. This number was reduced to 38 after one man received a last-minute reprieve. The men were executed on the morning of December 26, 1862 before an estimated crowd of 4,000 spectators and on a specially constructed mass-hanging scaffold. They were left

dangling from the scaffold for half an hour. Afterwards, it was discovered that two men who were not on Lincoln's list had been mistakenly hanged.⁷¹

The use of the death penalty in disregard of tribal sovereignty continues to this day. Lezmond Mitchell was sentenced to death for the 2001 murders of Alyce Slim and her nine-year-old granddaughter on Navajo lands in Arizona. The three were members of the Navajo nation. Mitchell was arrested on a tribal warrant and initially held in a Navajo jail. He was not appointed a lawyer during this period, but he was questioned repeatedly by FBI agents and eventually confessed to the crimes.⁷²

Before Mitchell's trial, Navajo Nation officials wrote a letter to the federal prosecutor explaining that they opposed the death penalty and that "the taking of human life for vengeance" is counter to Navajo culture and religion.⁷³ Slim's daughter, the mother of the nine-year-old victim, also opposed seeking the death penalty against Mitchell. Prosecutors assigned to the case recommended to the United States Department of Justice that the case be tried non-capitally. However, Attorney General John Ashcroft overrode that recommendation and ordered the prosecutor to seek the death penalty. In a dissent from a Ninth Circuit ruling upholding

Mitchell’s death sentence, Judge Stephen Reinhardt noted that the federal government had never executed any Native American for an “intra-Indian crime that occurred in Indian Country.”⁷⁴ This changed on August 26, 2020 when the federal government executed Lezmond Mitchell.⁷⁵

State governments also have pursued prosecutions without respecting tribal sovereignty. In a historic 2020 ruling, the U.S. Supreme Court recognized that Oklahoma had a long-standing practice of unlawfully prosecuting Native-American defendants in state court for crimes committed on reservation land. The Court declared that Congress had never disestablished the Muscogee (Creek) Reservation that was created by treaties signed in the aftermath of the federal government’s forcible relocation of the Creek and four other Indian nations from their homes in Alabama and Georgia. The treaties promised the Creek Nation a “forever homeland” in the land that subsequently became part of the state of Oklahoma. The Supreme Court decision affirmed that these lands were still “Indian Country,” as defined by federal law, within which Oklahoma lacked jurisdiction to attempt to try Native Americans for serious offenses.⁷⁶

Following this ruling, the Court overturned Patrick Dwyane Murphy’s murder conviction and death sentence on sovereignty grounds.⁷⁷ However, Oklahoma had already executed at least three Native Americans who had been unlawfully tried in Oklahoma counties now recognized as part of the Creek Nation.⁷⁸



We don’t expect federal officials to understand our strongly held traditions of clan relationship, keeping harmony in our communities, and holding life sacred. What we do expect, no, what we demand, is respect for our People

—Statement of Navajo Nation President Jonathan Nez and Vice President Myron Lizer on the execution of Lezmond Mitchell

Mob Violence Against Mexican Americans in the West



| Artist's depiction of the 1851 hanging of Josefa Loaiza

As the United States' territorial ambitions expanded to the west coast in the 19th century, there were many instances of lynchings of people of Mexican descent. Scholars have documented hundreds of lynchings and episodes of mob violence that occurred in the Southwest between 1848 and 1928.⁷⁹ The vast majority took place in Texas, California, Arizona, and New Mexico, with a few occurring in other western and southern states.⁸⁰ Although some have alleged that western lynchings could be attributed to the lack of a functional court system

in the West, the vast majority of the lynchings happened *despite* the availability of formal legal remedies.⁸¹ This mirrored the experience of African Americans in the South who were victims of mob violence even though legal mechanisms existed to prosecute legitimate crimes. Attacks on people of Mexican descent often were linked to the tensions caused by territorial conquest and the aftermath of war in the Southwest as well as white settlers' anger at Mexican economic competition and desire to exert social control.⁸²

The hanging of Josefa Loaiza is one of the most notorious of these lynchings. Josefa was hanged in 1851 for killing an Anglo miner in Downieville, California.⁸³ After an alcohol-fueled Fourth of July celebration, the miner had knocked the door off of Josefa's house and barged in. Although news accounts were vague about the details, some speculated that the miner assaulted Josefa. Josefa's husband confronted the miner the next day, and after an argument the miner entered the house again. Josefa then stabbed him. A hastily gathered tribunal was convened, presided over by a local rancher known as Judge Lynch. The tribunal found Josefa guilty and arranged her hanging.

Josefa's case garnered national attention, with news accounts full of Mexican stereotypes about her "uneven temper" and "the fierceness of [her] anger."⁸⁴ Frederick Douglass called the lynching shameful. He believed that if Josefa had been a white woman her act of self-defense would have been praised and that she was killed because of her "caste and Mexican blood."⁸⁵

Some authorities describe Loaiza's hanging as an execution, but contemporaneous accounts described it as a lynching. This discrepancy highlights the thin line between legal and extralegal executions in the Southwest.⁸⁶

The Mexican government and U.S. diplomatic officials stationed in Mexico objected to the continuing violence against those of Mexican descent. Testifying before Congress, Thomas Wilson, the U.S. Consul to Matamoros, Mexico, said that "when an aggression is made upon a Mexican it is not much minded. For instance, when it is known that a Mexican has been hung or killed ... there is seldom any fuss made about it; while, on the contrary, if a white man happens to be despoiled in any way, there is a great fuss made about it by those not of Mexican origin."⁸⁷

This advocacy and that of the larger anti-lynching movement contributed to the decline of lynchings of those of Mexican origin in the 1920s.⁸⁸

Race Still Matters: The Continuing Role of Race in the Modern Death Penalty

Discussions surrounding the impact of victim race on criminal punishment have led scholars to this unfortunate conclusion: the judicial system places more value on the lives of whites, resulting in disproportionately harsh treatment of black criminals who have white victims.

— Frank Baumgartner et al.,

Deadly Justice: A Statistical Portrait of the Death Penalty 73 (2017)



Modern Capital Punishment Trends: Declining Use but Continuing Disparities

The modern era of the death penalty began in 1972 with more than two decades of rising numbers of death sentences and executions, but the last twenty years have seen a significant decline in the use of capital punishment. Of the twenty-two states without the death penalty, ten have abolished it in the 21st century, and three states currently have official moratoria on executions.⁸⁹ Therefore, half of all U.S. states have abolished the death penalty or now prohibit executions.

Each year since 2015, states have conducted fewer than 30 executions and imposed fewer than 50 new death sentences.⁹⁰ This starkly contrasts with the peak of executions and death sentences in the late 1990s, with more than 300 sentences imposed in 1996 and almost 100 executions in 1999. Since then, death sentences have fallen by more than 85%, and executions are down by more than three-quarters.

The small number of counties that account for the majority of recent death sentences have shown increasing racial concentration of death sentencing. Riverside County, California has sentenced more people to die than any other county in the United States since 2013, and 96% (25 out of 26) of those condemned in the county in that time frame have

been Black or Latinx. In Cuyahoga County, Ohio, four of the last six defendants sentenced to death have been Black. In Los Angeles, the last 22 people sentenced to death have been people of color. In Harris County, Texas—home to Houston—19 of the last 21 condemned defendants have been Black or Latinx; a twentieth was of Middle Eastern descent.⁹¹

Public support for the death penalty throughout the U.S. is near a 50-year low, dropping from a high of 80% in 1994 to 56% in 2019. In 2019, for the first time since Gallup started asking the question in 1985, a majority of Americans (60%) said they prefer life without parole to the death penalty as the appropriate punishment for murder.⁹² And in May 2020, a record low of 54% of Americans said the death penalty was morally acceptable.⁹³

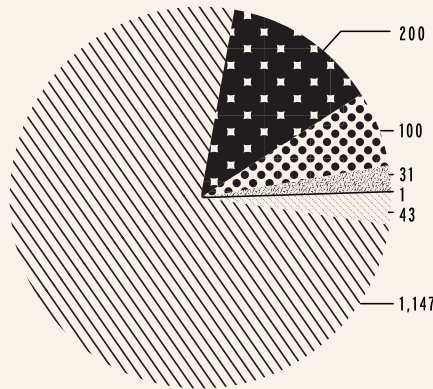
Despite the declining use of the death penalty, racial disparities persist in its application.

Throughout the modern era of capital punishment, people of color have been overrepresented on death row. In 1980, 45.6% of death row prisoners were people of color, and this percentage has increased every decade. By 2019, this percentage had risen to

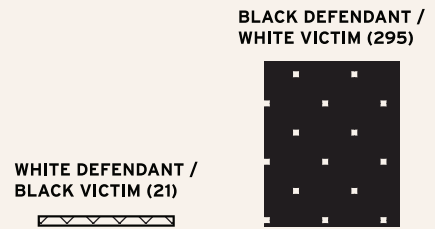
Modern Executions by Race of *Defendant*



Modern Executions by Race of *Victim(s)*



Persons Executed for White-Black Interracial Murders in the U.S. Since 1976



This chart does not include executions for offenses involving victims of multiple races.

57.8%. Currently, white and African-American prisoners each comprise 42% of those on death row and Latinx prisoners make up 13%, with 3% of death row comprised of other races/ethnicities. These figures can be contrasted with the racial and ethnic makeup of the population as a whole. Approximately 60.4% of the population is white.⁹⁴

The opposite trend is apparent in the racial composition of the victims of those who have been executed in the modern era. Seventy-five percent of murder victims in cases resulting in an execution have been white,⁹⁵ even though only half of murder victims are white.⁹⁶ In cases with victims of a single race, 295

African-American defendants have been executed for the murder of white victims, while only 21 white defendants have been executed for the murder of African-American victims.⁹⁷

The raw numbers on the death penalty by race are disturbing, but by themselves they would not necessarily lead to a conclusion that the death penalty is being administered in a racially biased way.⁹⁸ Maybe death sentencing rates could be attributed to different rates of offending? Maybe the interracial murders committed against white victims are generally more serious than those committed against African Americans?

These questions have been answered by a number of studies about the operation of race in the administration of the death penalty. Researchers have studied multiple jurisdictions over a broad range of years and have accounted for hundreds of confounding variables. Most studies have found that the race of the victim is likely to affect whether defendants are charged with a capital crime or are ultimately sentenced to death, especially when the defendant is African American and the victim is white. There is less evidence that the race of the defendant by itself determines the likelihood of receiving a death sentence, but some studies have found that African-American defendants are more likely to be capitally charged or sentenced to death regardless of the race of the victim.⁹⁹

In the late 1980s, the United States General Accounting Office (“GAO”) reviewed all then-existing studies about race and the death penalty. The GAO evaluated the quality of twenty-eight studies that used national, state, or local data to examine the role race plays in the death penalty in the post-*Furman* era. The GAO concluded:

In 82% of the studies [reviewed], race of the victim was found to influence the likelihood of being charged with capital murder or receiving

the death penalty, i.e., those who murdered whites were found more likely to be sentenced to death than those who murdered blacks.

The GAO review found that the role of a defendant’s race was less clear. The race of the defendant was found to affect outcomes in a few studies but was not a statistically significant factor in many. One study found that Black defendants were more likely to be sentenced to death in rural areas, whereas white defendants were more likely to be sentenced to death in urban areas.¹⁰⁰

Recent reviews of capital punishment research are consistent with the GAO’s 1990 report. A 2015 meta-analysis reviewed studies of capital charging and sentencing from across the country. The meta-analysis reported that “each of the 30 studies identified found that killers of Whites were more likely than killers of Blacks to face a capital prosecution. These studies cover a wide range of geographic areas and time periods, and include different sets of statistical controls.”¹⁰¹ When evaluating studies about the decisions made at the capital sentencing stage, the researchers determined that “the vast majority of studies found that killers of Whites are sentenced to death at higher rates than killers of Blacks.” Of the seventy-eight studies examined,

sixty-nine “found significant and substantial race-of-victim effects.”¹⁰²

Much of the research done in this area has not specifically evaluated the impact of the defendant or victim being Latinx. This is both because of gaps in recording the ethnicity of victims and defendants and because the Latinx population in many regions has not been large enough to permit researchers to draw statistically significant conclusions.¹⁰³ However, several studies have included Latinx populations, and most have found disparities between the treatment of crimes involving white and Latinx victims. Studies of San Diego County, Los Angeles County, and San Joaquin County, California have found that death-eligible offenses with Latinx victims are less likely to be pursued capitally than those with white victims.¹⁰⁴ A 2005 study evaluated all reported California homicides between 1990 and 1999 and the resulting death sentences: researchers found that those convicted of killing non-Latinx whites were three times more likely to be sentenced to death than those convicted of killing African Americans and four times more likely to be sentenced to death than those whose victims were Latinx.¹⁰⁵ In Harris County, Texas, two county-level studies conducted over different time periods provided mixed results regarding disparities between the treatment of

cases with Latinx victims when compared with white-victim cases.¹⁰⁶

Researchers have also considered connections between death-sentencing and homicide rates. A 2017 study analyzed the impact of homicide rates on the death-sentencing rates in individual counties between 1990 and 2016. The study found that higher homicide rates were associated with higher rates of death sentencing, but this effect depended on who was being killed. Increases in the Black homicide rate did not affect county-level death sentencing rates, but when more white people were killed, death sentences went up.¹⁰⁷

Race continues to affect case outcomes after a death sentence has been imposed. In a study of capital cases reversed on appeal between 1973 and 1995, researchers found that the race of the victim in a particular case did not affect the chances that the case would be overturned on appeal or in other post-conviction review.¹⁰⁸ Instead, the state’s capital reversal rate was affected by the size of the African-American population and the relative risk of homicide. Death penalty cases were reversed for constitutional error more frequently in states with a large African-American population and where the murder rate for white people was relatively high

compared to the murder rate for Black people.¹⁰⁹ To explain this pattern, the authors proposed that “[t]he larger a state’s African-American minority, . . . the more fear of violent crime some members of the majority may feel, and the more pressure politically influential members of that group may generate to use the death penalty as a protective measure.”¹¹⁰

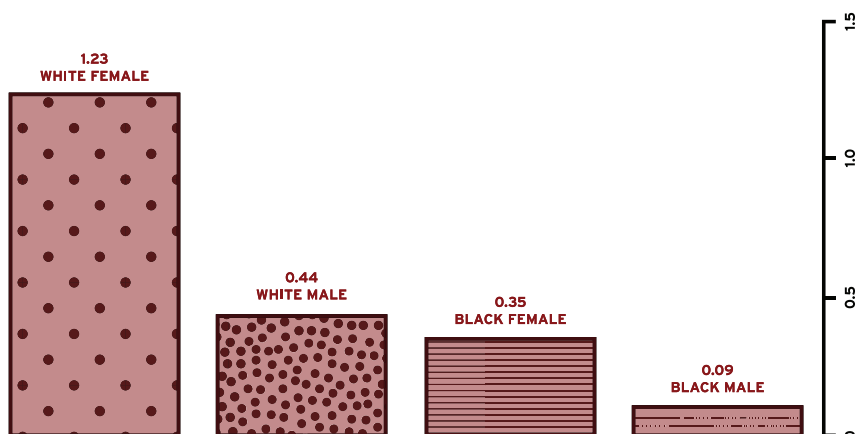
In 2019, Scott Phillips and Justin F. Marceau examined the case outcomes of the Georgia defendants in David Baldus’ seminal study which formed the basis for the *McCleskey v. Kemp* challenge to the death penalty.¹¹¹ Phillips and Marceau found that “racial disparities persist and indeed are magnified by the appellate and clemency processes,” resulting in an overall execution rate that “is a staggering 17 times greater . . . for defendants who killed a white victim.”¹¹²

A comparison of national homicide data and execution data between 1976 and 2014 found that those who kill “white victims have more than four times the likelihood of execution than” those who kill African Americans.¹¹³ The study also found significant disparities based on the race and gender of victims in death penalty cases resulting in execution. The researchers explained:

Black males are . . . roughly 6% of the population but 37% of the homicide victims; whereas this group is by far the most likely to be victimized compared to any other group in the population, their killers have a rate of execution less than 1/13th that of white females, statistically the least likely of any population group to be the victim of homicide.¹¹⁴

Executions as a Percent of Homicides by Victim Race and Gender

Frank Baumgartner et al., *Deadly Justice: A Statistical Portrait of the Death Penalty* 75 (2017)



“[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.”

— Scott Phillips and Justin F. Marceau, *Whom the State Kills* (2020)

Although the U.S. Supreme Court denied the constitutional significance of widespread race effects in capital prosecutions, the years since *McCleskey* have provided overwhelming evidence that racial bias infects every aspect of the administration of the death penalty. Social science research, the observations of courts and capital defense practitioners, the files of prosecutors, and the admissions of jurors all show that race is an important factor in the life-and-death decisions made in a capital case.

Overt racism, structural inequality, and implicit bias influence the administration of the death penalty.

This is not a “post-racial” nation. Overt racism continues and is evident in cases across the country that are being litigated today.¹¹⁵ Prosecutors,¹¹⁶ judges,¹¹⁷ jurors¹¹⁸ and defense attorneys¹¹⁹ have exhibited explicit racist behavior. Experts continue to provide racially biased testimony.¹²⁰ Cases continue to be tried before juries from which people

of color are purposefully excluded.¹²¹

These overt displays of racism are not the only, or even the most prevalent, way in which race permeates capital cases. Capital cases are also affected by structural racism and societal disadvantage. Long-standing patterns of discrimination in housing, employment, education, and overall exclusions from access to opportunity change the ways that people of color interact with the criminal legal system. From jury rolls that are linked to who is registered to vote and who has a drivers’ license to the paucity of lawyers and judges of color, structural barriers to opportunity have an often unacknowledged effect on the administration of justice.¹²²

Structural racism also contributes to implicit bias, the unconscious attitudes and stereotypes we hold about groups of people.¹²³

People are often unaware of these biases and the effects they have on their thoughts and behavior. Social scientists have been exploring the role of implicit bias in human behavior for more than a quarter century.¹²⁴ This emerging science of cognition has confirmed that humans “are not perceptually, cognitively, or behaviorally colorblind.”¹²⁵ In recent years, the general public’s awareness of the role of implicit racial bias has grown mainly through conversations about police violence against African Americans.¹²⁶

Implicit racial bias and America’s history of anti-Black racism has a striking cumulative effect in death penalty cases. Researchers have found that, *at the cognitive level*, Americans connect the concept of retribution with Black people and the concepts of mercy and leniency with white people: they actually

internalize the concepts in racial terms. People who have more anti-Black implicit racial bias are more likely to support retribution as a goal of criminal punishment.¹²⁷

Structural racism and implicit and explicit bias influence decisions made from the earliest stages of a case, before a crime has even been charged, all the way to its conclusion.



Capital punishment is supposed to be reserved for those who commit the ‘worst of the worst’ crimes. Instead, as a result of bias, prejudice and racism, it is disproportionality reserved for those charged with killing white victims.

— Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 Colum. Hum. Rts. L. Rev. 985, 989 (2020)






The Long Shadow of Lynching Over Today's Death Penalty

The heyday of lynching was in the late 1800s and early 1900s. Yet, its legacy remains a part of the American consciousness. Professor Charles Ogletree has argued that “the racially disproportionate application of the death penalty can be seen as being in historical continuity with the long and sordid history of lynching in this country.”¹²⁸

The history of lynching has been connected with a variety of modern-day outcomes: counties' failures to enforce federal hate crime laws, states' incarceration rates, and counties' rates of white-on-black homicides.¹²⁹ States' lynching histories have also been connected to death sentencing and attitudes toward the death penalty. States with higher numbers of lynchings and large Black populations have higher rates of death sentencing.¹³⁰ White residents of states with higher numbers of lynchings are more likely to support the death penalty than those in states where lynchings were not common.¹³¹

At times, the racism that animated lynchings has openly surfaced in modern death penalty trials. In 2010, local news coverage of Andrew Ramseur's North Carolina capital trial unleashed numerous online comments advocating for Ramseur's lynching. Ramseur's defense team included a compilation of internet comments in a brief to the North Carolina Supreme Court:



May 14, 2010

"Why even have a trial and waste my hard earned tax dollars on this scum-bag. He should have been hung before sundown on the day of his arrest."

May 14, 2010

"WTF U NEED A TRIAL FOR?
HANG THAT MONKEY!"

May 8, 2010

"why have a trial at all? Just stand him up it [sic] the Shell parking lot and let family members of those he killed so cowardly have at him. He is a worthless piece of dog shi*."

May 9, 2010

"always bring up rights after the fact. I will kill him and all the others. Then, I can holler about my rights. Just like when the police beat the hell out of some one, save your energy and just shoot the head. Then we act like these bastards and do it ourselves. I WISH I WERE IN DIXIE."

May 29, 2010

"Once upon a time...during another time, these senseless crimes did not happen. There was a group that took care of these people at night. 'WE' were able to sleep at night with our doors unlocked without fear of these vermin. We were all safer. WE ARE NOT SAFE NOW. The law can't and won't take [sic] of us."

May 28, 2010

"Racism, shmacism.
Get a rope and let's go hang us one."

May 28, 2010

"Let's see now....Where did I put that noose?"

May 29, 2010

"He should have never made it to court!!!"

June 4, 2010

"[C]an you say deep south fried." ¹³²

Ramseur sought to move the trial to a less hostile venue, but the trial court refused. On June 8, 2010, tried before an all-white jury, he was sentenced to death. As of the writing of this report, Ramseur's challenge to his death sentence under North Carolina's Racial Justice Act is pending.¹³³

Arrest and Homicide Clearance Rates

From the very beginning of a homicide case, the race of the victim has implications for whether a crime is solved. Race can affect whether a homicide is seen as high profile, how aggressively police respond to homicide, and how well police departments collaborate with communities to solve crimes.¹³⁴ Overall, only 60% of homicides are “cleared” by the arrest of a suspect.¹³⁵ A study of reported homicides between 1976 and 2009 found that “homicides with White victims are significantly more likely to be ‘cleared’ . . . than are homicides with minority victims.”¹³⁶ This disparity can only partially be explained by county-level differences in social and demographic characteristics.¹³⁷

The difference between clearance rates for white victim and Black victim cases means that homicides involving white victims are not only more likely to lead to death sentences, but are more likely to be prosecuted at all.

Prosecutorial Charging

As discussed above, a number of studies have shown that the race of a murder victim influences whether a defendant will be prosecuted capitally. There are several possible reasons for these racial disparities. Crimes committed against white victims can seem more serious given the greater societal value placed on white lives as compared to the lives of people of color and the historical practice of harshly punishing interracial crime committed by African Americans, biases of which prosecutors may not even be consciously aware.¹³⁸

The race of prosecutors may also contribute to this phenomenon. In our 1998 report on race and the death penalty, DPIC highlighted a study that found 95% of prosecutors in death penalty states were white.¹³⁹ Not much has changed in the two decades since. A 2019 study found that 95% of elected prosecutors in the United States were white. In six death penalty states (Arkansas, Idaho, Nebraska, South Dakota, Tennessee, and Wyoming), 100% of elected prosecutors were white.¹⁴⁰

Harris County, Texas: Prosecution in the Capital of Capital Punishment

HARRIS COUNTY, TEXAS is responsible for more executions in the past half-century than any state in the country except Texas, and for twice as many as any other county in the United States.¹⁴¹ Studies of its administration of capital punishment have shown that race affects who will be charged capitally.

A 2008 study of death sentencing in Harris County between 1992 and 1999 found that the district attorney's office pursued the death penalty against about the same percentage of Black, white, and Latinx defendants; however, the Black defendants were often in jeopardy of death for less aggravated murders. From this data, the authors concluded that "the bar appears to have been set lower for pursuing death against black defendants."¹⁴² The study also found that the district attorney's office was less likely to seek death sentences when Black people were killed, even though Black victims were more likely to be killed in aggravated murders, particularly murders with multiple victims.¹⁴³ No statistically significant differences were found between how white and Latinx defendants and cases with white versus Latinx victims were treated.¹⁴⁴ A subsequent study of defendants who committed potentially death-eligible Harris County crimes from 2001 to 2007 relied on a more limited methodology but again found a preference for pursuing the death

penalty in cases with white victims. This study did not find evidence of discrimination against Black defendants.¹⁴⁵

Statistical evidence of discrimination has not been the only cause to suspect racial bias in death penalty cases in Harris County. Harris County District Attorney Chuck Rosenthal, who oversaw 40 death sentences between 2001 and 2008 and who was the long-time deputy before becoming the elected DA, resigned after a civil suit uncovered racist emails he sent using his official email account. One email contained an image that combined stereotypes of Black people using drugs and eating watermelon and fried chicken. Another implied that President Bill Clinton was like a Black man because he "played the saxophone, smoked marijuana and receives a check from the government each month."¹⁴⁶ Prosecutors described an environment in which white prosecutors openly made racist remarks about Black defendants and even Black prosecutors in the office.¹⁴⁷

Nineteen of the last 21 defendants sentenced to death in Harris County have been Black or Latinx. A twentieth was a Middle Eastern immigrant.¹⁴⁸

Jury Selection

American courts have a long history of excluding people of color from jury service,¹⁴⁹ and many of those on death row today were tried and sentenced by all-white or nearly all-white juries. Despite Supreme Court decisions dating back to 1879 that have declared racially discriminatory jury selection unconstitutional,¹⁵⁰ courts have not rooted out this practice. Pools of potential jurors that may not be diverse in the first place are further stripped of people of color by the “death qualification” process, other challenges for cause, and the discriminatory use of peremptory challenges.¹⁵¹

DEATH QUALIFICATION

“Death qualification” is the process of determining whether potential jurors are willing to impose the death penalty in an appropriate case.¹⁵² If questioning by the judge or prosecutor reveals that a juror’s ability to impose the death penalty is substantially impaired, the prosecutor can challenge the juror for cause. Removing a juror for this reason requires the trial judge to agree that the juror is unable to set aside their strong opposition to the death penalty.¹⁵³ Because African Americans are more likely than white people to oppose the death penalty, the death-qualification process disproportionately excludes African Americans from capital

juries.¹⁵⁴ Studies show that jurors who are death qualified exhibit higher levels of racial bias.¹⁵⁵ In fact, “support for the death penalty among whites is highly correlated with measures of anti-black racial prejudice and stereotyping”¹⁵⁶ and has been linked to acceptance of dehumanizing belief systems.¹⁵⁷

A study of South Carolina trials illustrates the drastic effect of death qualification on the racial composition of juries.¹⁵⁸ Ann M. Eisenberg studied jury selection in South Carolina capital cases tried between 1997 and 2012. Although the overall jury pool accurately reflected community demographics, the jury selection process produced whiter juries. Eisenberg found that 51% of Black jurors were excused for cause, as compared to only 33% of white potential jurors. The majority of African Americans were removed because of their anti-death-penalty views. These death-qualification removals excluded 32% of the overall pool of African-American potential jurors. Only 8% of the overall pool of white jurors were excluded for anti-death-penalty views.¹⁵⁹

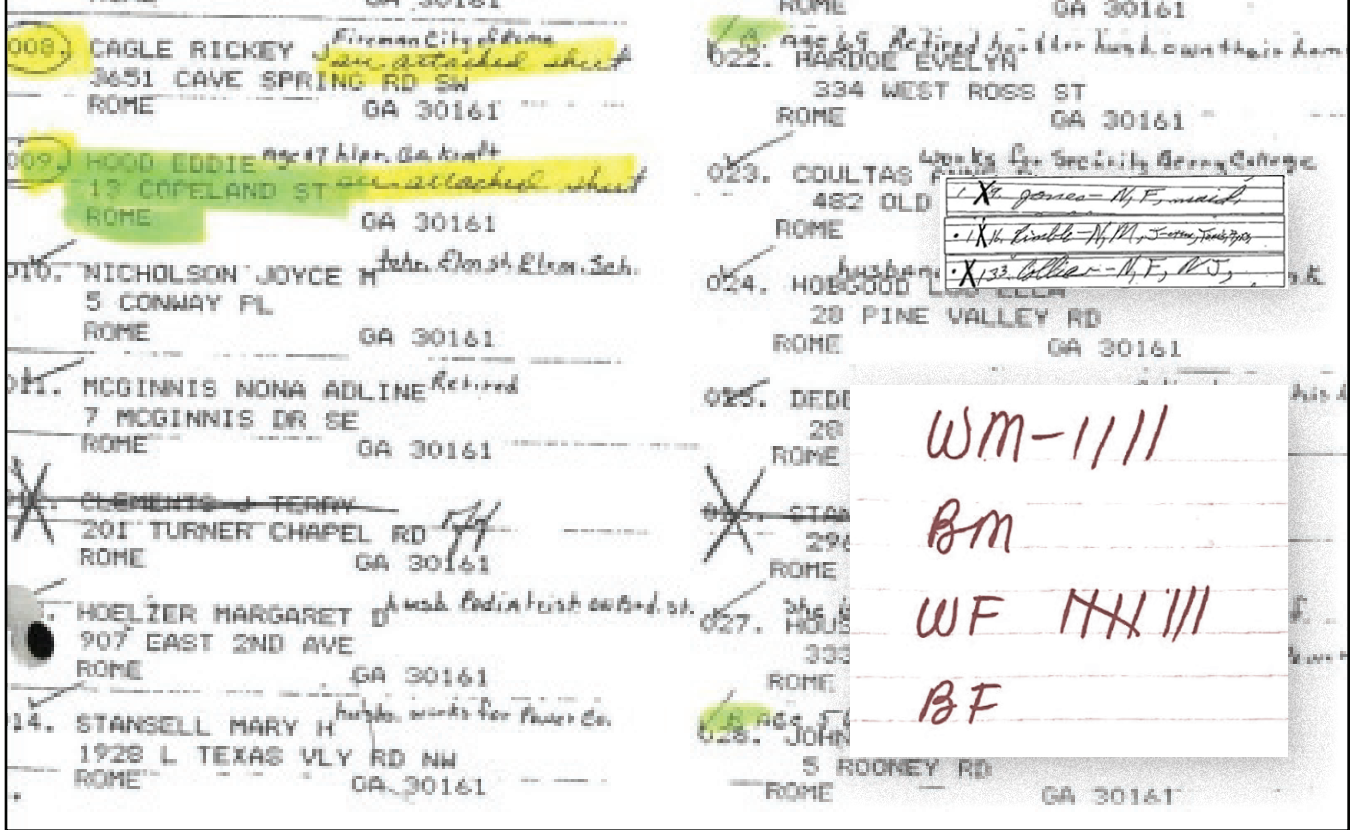
PEREMPTORY STRIKES

Prosecutors and defense attorneys are given discretionary strikes, known as peremptory challenges, that allow them to remove a limited number of jurors for any non-discriminatory reason. The number of allowed strikes is typically larger in capital cases than in other cases.¹⁶⁰ In *Batson v. Kentucky*, the United States Supreme Court established a three-part test ostensibly designed to prevent the discriminatory use of these strikes.¹⁶¹ The *Batson* framework, however, has not rooted out discrimination in jury selection.¹⁶²

A recent Supreme Court case, *Flowers v. Mississippi*, shows how a determined prosecutor can abuse peremptory strikes to systematically exclude potential African-American jurors in trial after trial. Curtis Flowers, an African-American man, was accused of committing a quadruple murder at a white-owned furniture store in Winona, Mississippi. On shaky evidence, District Attorney Doug Evans tried Flowers six times. Flowers' conviction was reversed three times for prosecutorial misconduct, followed by two mistrials, and finally a sixth conviction that was reversed by the U.S. Supreme Court in 2019 for violating *Batson*.

Writing for the Court majority, Justice Brett Kavanaugh explained, "The numbers speak loudly. Over the course of the first four trials, there were 36 black prospective jurors against whom the State could have exercised a peremptory strike. The State tried to strike all 36."¹⁶³ Justice Kavanaugh noted that Evans was found to have discriminated in jury selection in two of the earlier trials. In the sixth trial, Evans accepted the first qualified Black potential juror and then struck the five remaining African Americans in the jury pool. Justice Kavanaugh concluded that, "The State's relentless, determined effort to rid the jury of black individuals strongly suggests that the State wanted to try Flowers before a jury with as few black jurors as possible and ideally before an all-white jury."¹⁶⁴ An analysis of jury selection during Evans' tenure reinforced this pattern. American Public Media Reports' podcast *In the Dark* analyzed 26 years of jury strike records and found that Evans' office had struck Black people from juries at nearly 4.5 times the rate it struck white people.¹⁶⁵

Flowers' case is extreme only because of the sheer number of trials; it is not unusual to find prosecutors exercising peremptory strikes to exclude jurors based on race.¹⁶⁶ Prosecutorial discrimination typically goes unredressed. Researchers found that



Prosecutors' jury selection notes from three Georgia death penalty cases

qualified Black jurors were struck from juries at more than twice the rate of qualified white jurors in 173 North Carolina capital cases between 1990-2010.¹⁶⁷ As of 2010, twenty percent of those on North Carolina's death row were sentenced to death by all-white juries.¹⁶⁸ Yet, in the thirty years after the *Batson v. Kentucky* decision, neither the North Carolina Court of Appeals nor the North Carolina Supreme Court ever granted relief in the more than 100 cases in which a *Batson* issue was contested.¹⁶⁹ The North Carolina Supreme Court's sole grant of *Batson* relief to date occurred in May 2020.¹⁷⁰

A recent review of California *Batson* cases reveals similar treatment of jury discrimination. Between 1989 and 2019, the California Supreme Court

granted relief in only three of the 142 *Batson* cases that came before it, a reversal rate of 2.1%.¹⁷¹ The California courts of appeal had a similarly low rate of reversal, finding *Batson* error in only 2.6% of cases between 2006 and 2018.¹⁷² This does not mean that California prosecutors scrupulously adhere to fair jury selection practices. Between 1993 and 2019, the United States Court of Appeals for the Ninth Circuit found *Batson* error in 15% of California cases in which the issue was raised.¹⁷³ The gulf between the reversal rates in California courts and the Ninth Circuit is striking given the deferential standard that federal courts apply to the review of state criminal cases.



Abu-Ali Abdur'Rahman

ABU-ALI ABDUR'RAHMAN was convicted and sentenced to death in Davidson County, Tennessee in 1987. Abdur'Rahman argued that prosecutor John Zimmerman discriminatorily struck two Black potential jurors and attempted to justify those strikes with purportedly race-neutral explanations that were actually racist stereotypes. For example, Zimmerman struck a college-educated Black pastor, claiming the juror seemed “uneducated” and lacked “communication skills.”¹⁷⁴

In a 2015 training lecture for prosecutors, Zimmerman, now a Rutherford County prosecutor, reportedly advocated for the race-based use of peremptory strikes. He said that in a case with Latinx defendants, he “wanted an all African-Amer-

ican jury because ‘all Blacks hate Mexicans.’”¹⁷⁵ In a letter criticizing Zimmerman’s lecture, current Davidson County District Attorney General Glenn Funk said Zimmerman was “encourag[ing] unethical and illegal conduct.”¹⁷⁶ Zimmerman has also been accused of targeting law-abiding minority business owners in a failed 2018 sting operation.

In 2019, Funk conceded that Abdur'Rahman’s trial had been infected by “overt racial bias” and agreed to a court-approved plea deal to resentence Abdur'Rahman to life in prison. The Tennessee Attorney General’s Office has appealed the decision, and as of the publication of this report, a ruling on the appeal is still pending.¹⁷⁷

THE IMPACT OF NON-DIVERSE JURIES

The exclusion of people of color from juries is not just a sign of second-class citizenship. Non-diverse jury composition also adversely affects trial and sentencing outcomes. Studies of the behavior of mock juries and of actual jurors' sentencing patterns in capital cases have found that all-white juries are more likely to convict than racially diverse juries.¹⁷⁸ All-white juries are also more likely to sentence African-American defendants to death.¹⁷⁹ These issues are not solved by allowing just one juror of color to sit on a case. Studies have found that juries in which white males are overrepresented are more inclined to convict and sentence defendants to death.¹⁸⁰ Diverse juries more thoroughly consider the evidence and are willing to address issues of race instead of ignoring them.¹⁸¹

A 2014 mock jury study of more than 500 southern Californians who had reported for jury service found that white jurors were more likely to sentence to death poor Latinx defendants than poor white defendants. This disparity was most pronounced when the mitigation presented was weak. Latinx jurors' sentencing decisions were largely unaffected by the ethnicity or socioeconomic status of the defendants, even when weak mitigating evidence was presented.¹⁸²

Defense Counsel

Defense counsel's most important penalty-phase function is to try to save their client's life. At a minimum, that requires thoroughly investigating the client's background and upbringing to explain why he should live rather than be sentenced to die. Defense counsel must explore and sympathetically present the client's life history in a way that illuminates "compassionate or mitigating factors stemming from the diverse frailties of mankind."¹⁸³

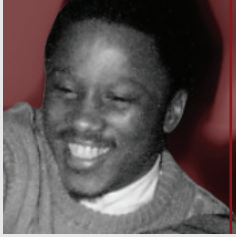
Most capital defense practitioners are white, and they are often appointed to defend clients of color. Studies of implicit bias have found that capital defense practitioners have similar implicit biases to those of the general population. Challenges of interracial representation can create barriers to a defense team's ability to fully understand a client's life experiences. They can also create a barrier between the team and key witnesses whose testimony is vital to persuasively telling the story of the client's life history.¹⁸⁴

Evidence of defense counsel's overt bias has arisen in cases across the country. Curtis Osborne was represented at trial by Johnny Mostiler, a Georgia defense lawyer who told a white client "that little n***er deserves the chair." Osborne's attorney conducted

no mitigation investigation, failing to uncover and present readily available evidence of Osborne’s mental illness and at least three generations of mental illness in Osborne’s family.¹⁸⁵ Osborne was executed in 2008.¹⁸⁶ In Maricopa County, Arizona, defense lawyer Nathaniel Carr—who has represented four clients sentenced to death—wrote that his possibly intellectually disabled client “looks like a killer, not a retarded.”¹⁸⁷



While representing Curtis Osborne, Georgia defense lawyer Johnny Mostiler said “that little n***er deserves the chair.”



Rocky Myers

ROCKY MYERS, a Black man, was convicted of the 1991 murder of his white neighbor, Ludie Mae Tucker. Myers' own lawyer told the jury going into the neighborhood where Myers lived was "literally walking into hell" and compared the people who lived there to animals. As Myers' current lawyers explained, trial counsel "apologized to the jury that he was going to have to be talking about this place, because he knew that wasn't how they lived. So he immediately, from the beginning, set up this 'us versus them,' and put his own client on the side that was the 'other,' the 'different.'" Defense counsel's own notes use a racial slur to characterize jury members, describing one juror as a "n****r-hater."¹⁸⁸

Despite his lawyer's failures, a jury recommended a life sentence by a 9-3 vote. Jurors later said that

the life recommendation was a compromise because the lack of physical evidence and conflicting witness statements left jurors with doubts about Myers' guilt. The trial judge overrode the jury's recommendation and sentenced Myers to death. His challenges to the judicial override process—which Alabama has since abolished—have been unsuccessful.

Investigations by Myers' current counsel have revealed disturbing jury dynamics. The jury was composed of eleven white jurors and one African-American juror. One juror called Myers a "thug" and a "n****r." Several jurors were unconvinced of Myers' guilt because of the lack of physical evidence and conflicting witness statements. They explained the life recommendation as a compromise because other jurors were determined to find Myers guilty.¹⁸⁹

*Sentencing and the Determination
of “Deathworthiness”*

In deciding whether a defendant lives or dies, jurors must evaluate evidence about the seriousness of the crime and the defendant’s culpability. Racial bias can influence jurors’ credibility determinations and their interpretation of ambiguous facts. In one study, participants were given the same fact pattern but provided different photographs of the accused, either with light skin or with dark skin. The darker-skinned person was rated as more culpable, with study participants interpreting ambiguous facts as more consistent with guilt. This bias shapes the interpretation not just of a defendant’s actions but also of witness credibility.¹⁹⁰

The jury’s assessment of aggravating and mitigating evidence is at the heart of its function in a capital sentencing proceeding. Much of the defense team’s sentencing presentation involves creating “bridges of empathy” between the jury and the defendant.¹⁹¹ Looking solely at the facts of a murder, it is easy to see the perpetrator as a monster. The defense team’s role (throughout the trial but especially at sentencing) is to remind the jury of the defendant’s humanity. This can be an uphill battle when jurors are already prone to see a Black defendant as dangerous, more animal-like, and less capable of redemption. Defense

teams must reach jurors on an emotional level, a challenge made harder when that is the plane in which many unacknowledged racial prejudices and stereotypes lie.¹⁹²

Race can act as a silent aggravating factor, putting a thumb on the scale in favor of death. This effect can be particularly pronounced in interracial murders. A study of death-penalty cases in Philadelphia has shown that in cases with Black defendants and white victims, defendants with features more traditionally attributed to African Americans (darker skin, broader lips, kinkier hair) were more than twice as likely to be sentenced to death than other African-American defendants. A Black defendant’s appearance made no measurable difference in cases with Black victims.¹⁹³

Philadelphia data also demonstrates how the race of the victim can impair the jury’s consideration of mitigating evidence. Pennsylvania law requires the jury to impose the death penalty if it finds any aggravating circumstances and no mitigating circumstances. A study of more than two decades of Philadelphia capital trials found that the odds that a jury would reject all mitigating evidence and impose a mandatory death sentence were 4.3 times greater if the victim was white.¹⁹⁴



Examples from Jennifer Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes* (2006)

Implicit racial attitudes and stereotypes about Black criminality can play an outsized role in the consideration of a defendant’s “future dangerousness.” Even in jurisdictions that do not ask juries explicitly to consider future dangerousness in capital cases, whether a defendant will harm others is often at the forefront of jurors’ minds.¹⁹⁵ A juror’s estimation of this probability can be influenced by the juror’s beliefs on whether race affects a defendant’s propensity for criminality.¹⁹⁶ When prosecutors make dehumanizing arguments that portray capital defendants as monsters and animals, they reinforce these beliefs.

Trial courts often ignore dehumanizing language that has clearly been used to activate white jurors’ anger, and appeals courts often dismiss it as

“oratorical flair” or “harmless error.” South Carolina prosecutor Donald Myers relied upon transparently racist language to secure a death sentence against Johnny Bennett in a July 2000 re-sentencing proceeding.

During questioning, the prosecutor signaled that Bennett had violated white jurors’ societal norms by describing the woman with whom Bennett was having a sexual relationship as “the blonde-headed lady.” Myers riddled his closing argument with dehumanizing language. He told the jury that “[m]eeting [Bennett] again will be like meeting King Kong on a bad day.” He called Bennett a “caveman,” a “mountain man,” a “monster,” a “big old tiger,” and a “beast of burden.”¹⁹⁷ Myers’ invocation of racist stereotypes before the all-white jury differed markedly from his more race-neutral presentation during Bennett’s initial trial and sentencing.¹⁹⁸ Yet, the trial court and the South Carolina Supreme Court refused to vacate Bennett’s death sentence.¹⁹⁹ Bennett remained on death row more than a decade-and-a-half before a federal district court finally overturned his sentence because of the combined effect of the prosecutor’s statements and a juror’s racist statements.²⁰⁰

The Supreme Court has recently condemned racist expert testimony about future dangerousness. In *Buck v. Davis*, Texas death-row prisoner Duane Buck asked the Supreme Court to overturn his death sentence because his own lawyer had presented an expert who testified that Buck's race made it more likely he would pose a continuing threat to society.

The potential for future dangerousness is a key sentencing factor in Texas: a jury may not impose a death sentence unless it finds that the defendant poses a continuing threat to society. Psychologist Walter Quijano testified in at least seven capital cases that defendants were more likely to commit future crimes if they were Black or Hispanic. Though Texas officials had conceded in all the other cases that Quijano's testimony was improper, they continued to oppose relief in Buck's case because defense counsel presented Quijano's testimony.²⁰¹

In 2017, the United States Supreme Court granted Buck relief. The Court held that "when a jury hears expert testimony that expressly makes a defendant's race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses." The

Court explained that stereotyping Black men as somehow more violence-prone than others is a "particularly noxious strain of racial prejudice."²⁰² The Court's ruling was an important affirmation of fundamental principles of fairness, but it may not protect defendants for whom racial stereotypes are not explicitly stated.

Wrongful Convictions and Exonerations

Defendants of color are over-represented among those wrongly convicted of capital murder, and they spend on average four years longer on death row than white defendants before being exonerated.²⁰³ Several factors make defendants of color more vulnerable to wrongful capital prosecution. The long history of over-policing in African-American communities affects who will be looked at with suspicion for unsolved murder cases.²⁰⁴ Exonerations of African Americans for murder convictions are 22% more likely to involve police misconduct.²⁰⁵

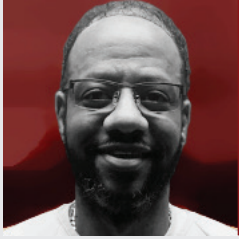
In several death-row exoneration cases, police have targeted a suspect because of his race. Alabama police and prosecutors framed Walter McMillian for an unsolved murder of a white woman in part because he was involved in an interracial relationship.²⁰⁶

Clarence Brandley was one of two high school custodians who discovered the body of a white female student who had been raped and murdered. The Texas Ranger who investigated the case said, “One of you is going to have to hang for this” and, focusing on Brandley, announced, “Since you’re the n****r, you’re elected.”²⁰⁷ Time records documented that Anthony Ray Hinton was at work in a locked warehouse when one of the crimes he was accused of committing occurred. But that was not enough to stop his wrongful conviction. The police officer who arrested him explained what was going to happen next: “First of all you’re Black, second of all you’ve been in prison before, third, you’re going to have a white judge, fourth, you’re more than likely to have a white jury, and fifth, when the prosecution get to putting this case together you know what that spells? Conviction, conviction, conviction, conviction, conviction.” Hinton would spend nearly 30 years on Alabama’s death row before being exonerated.²⁰⁸

The race-of-victim disparities that appear elsewhere in the administration of the death penalty also play a role in exonerations. Researchers at the National Registry of Exonerations concluded: “The disparities we see in our data suggest that innocent defendants who are charged with killing white victims are more

likely to be sentenced to death, and sometimes no doubt executed, than those charged with killing black victims.”²⁰⁹

Marcellus Williams’ case follows a familiar pattern. Williams was sentenced to death in 2001 for stabbing a white woman more than twenty times. St. Louis, Missouri prosecutors, who had a history of excluding African Americans from juries, struck six of the seven Black prospective jurors. In the end, Williams was tried by eleven white jurors and one African-American juror.²¹⁰ Williams was represented by an attorney who admitted he was unprepared for trial.²¹¹ No physical evidence or eyewitness linked Williams to the crime, and the prosecution’s case relied on the testimony of two unreliable witnesses. Fifteen years after his conviction, new DNA testing showed that Williams’ DNA was not on the murder weapon. Despite this evidence, the state went ahead with plans to execute Williams. His execution was only halted by the last-minute intervention of Missouri’s governor who convened a Board of Inquiry to review the case.²¹² Williams remains on death row.



Pervis Payne

PERVIS PAYNE is scheduled to be executed in Tennessee on December 3, 2020. For more than 30 years, Payne, an intellectually disabled Black man, has maintained his innocence of the 1987 murder of Charisse Christopher, a white woman.

According to Payne’s lawyers, his prosecution in Shelby County—the Tennessee county responsible for the most lynchings and death sentences in the state—hinged on a theory that relied on “outdated racial stereotyping.” Without evidence, prosecutors told the jury Payne was “high from ingesting drugs” and “looking for sex,” even though they had refused his mother’s request to administer a drug test. At trial, the prosecution argued that Payne pulled a bloody tampon from Christopher so he could assault her. However, “no tampon was collected when the crime scene was processed,” and no tampon was present in “numerous photos of video of the crime

scene.” The tampon was allegedly found by police two days after the crime.²¹³

Prosecutors also failed to disclose that a bloody comforter, sheets, and pillow were found in the apartment and never tested. The bedding had never been included in any list of evidence in the case and its existence was not known to the defense until 2019, when assistant federal defender Kelley Henry obtained a court order to review the evidence. The prosecution had always maintained that the crime scene was limited to Christopher’s kitchen, so the presence of blood on the sheets, Henry said, “is completely inconsistent with any theory of the case that has ever been presented.”²¹⁴

Payne is seeking DNA testing of the previously hidden evidence, but prosecutors have opposed his request.²¹⁵

The Aftermath of *McCleskey*:

Are Race Challenges Doomed in the Modern Era?

Despite decades of research about the role of race in capital punishment, courts have consistently refused to overturn death sentences or convictions based on evidence of widespread racial disparities.²¹⁶ This hostility can be directly attributed to the framework created by *McCleskey*, in which the Court deemed statistical evidence insufficient to prove a claim of racial bias. Underlying these refusals is the notion—implied in *McCleskey* and made explicit by Justice Antonin Scalia—that acknowledging the constitutional relevance of racial disparities in the administration of capital punishment would require courts to provide relief in a vast number of non-capital cases. Racial disparities pervade the U.S. criminal legal system, and the courts have sought to avoid the chaos of “too much justice.”

There have been a few notable exceptions to courts’ skepticism towards the use of statistical evidence of racial discrimination to challenge death sentences.

For a short period of time, the North Carolina Racial Justice Act (“RJA”) empowered capital defendants to obtain relief based on statistical evidence of discrimination. Enacted in 2009, the RJA allowed death-row prisoners to overturn their sentences if race had been a “significant factor” in jury selection, prosecutors’ decisions to seek a death sentence, or juries’ decisions to impose the death penalty.²¹⁷ Four death-sentenced prisoners successfully pursued relief under the RJA. But when the political composition of the state legislature changed in 2013, the RJA was repealed.

In 2015, the North Carolina Supreme Court vacated lower court decisions finding that race had played an impermissible role in the four cases and remanded them to the lower courts to permit prosecutors to present additional evidence challenging those rulings. When the cases returned to the lower court, however, the judge ruled that the Racial Justice Act no longer applied, dismissed the cases without a hearing, and reinstated the prisoners’ death sentences. The four prisoners who initially won relief appealed the trial court’s ruling.²¹⁸ As of the writing of this report, the North Carolina Supreme Court has decided one of their cases. On August 14, 2020, the court reinstated Marcus Robinson’s life sentence.²¹⁹

After the legislature amended the RJA to limit the evidence of discrimination a death-row prisoner could present, Rayford Burke and Andrew Ramseur presented case- and county-specific evidence of racial animus. Iredell County prosecutors had peremptorily challenged Black jurors at 11 times the rate of white jurors and both Burke and Ramseur had been convicted and condemned by all-white juries. Court staff had roped off several rows of seats behind the defense table with security tape in Ramseur's case and relegated his family to the back of the courtroom. Prosecutors told Burke's jury that he was "a big black bull." Both were denied hearings on their RJA claims.

More than 140 people filed claims under the RJA but did not receive hearings before the law was repealed. Burke and Ramseur challenged this disposition in the North Carolina Supreme Court, and in June 2020 the court ruled that the attempted retroactive repeal of the RJA and the retroactive limitations on evidence were unconstitutional. The court reversed the dismissals of the prisoners' RJA claims and ordered the lower courts to hold hearings.²²⁰

In October 2018, the Washington Supreme Court unanimously struck down the state's death penalty, finding that it had been "imposed in an arbitrary and racially biased manner." In reaching its decision in *State v. Gregory*, the court relied upon a study of twenty-five years of Washington capital prosecutions that demonstrated that Washington juries were 4.5 times more likely to impose a death sentence on a Black defendant than on a white defendant in a similar case.²²¹ The court based its ruling upon its interpretation of the state's constitution and not on federal constitutional protections.

The experiences of North Carolina and Washington point to two potential avenues for challenges to enduring racial bias in the administration of the death penalty: state legislation and state constitutional challenges. Until recently, Kentucky was the only other state to have passed a racial justice act, but because of its limited scope, no Kentucky capital defendants have successfully pursued a challenge under this law.²²² In August 2020, the California legislature passed a racial justice act that applies to capital and non-capital cases.²²³ Challenges based on racial bias in other states have had limited success.²²⁴

The Death Penalty in the Era of the New Jim Crow and Black Lives Matter

Ask any Mexican, any Puerto Rican, any black man, any poor person—ask the wretched how they fare in the halls of justice, and then you will know, not whether or not the country is just, but whether or not it has any love for justice, or any concept of it.

—James Baldwin, *No Name in the Street* (1972)

We may be at a transformational moment in American history as a confluence of pivotal events has begun to change public policy and white Americans' perception of the operation of the criminal legal system.

- In 2010, legal scholar Michelle Alexander wrote *The New Jim Crow*, spurring a national conversation about the ways that the war on drugs has targeted communities of color and reinforced a racial caste system. Alexander's book brought the term "mass incarceration" into common parlance as the country struggled to recover from an economic recession that stretched state budgets and required state governments to critically examine the amount being spent on incarcerating growing numbers of prisoners.

- In 2014, a white police officer killed Michael

Brown in Ferguson, Missouri leading to prolonged protests, national attention to police violence, and national awareness of the Black Lives Matter movement.

- Efforts to end mass incarceration and police impunity for the deaths of Black people have spurred scrutiny of local prosecutorial practices. Prosecutors running on reform platforms have won in jurisdictions across the country.

All of these issues are tied to the history and the future of the death penalty in America. The same "tough on crime" perspective that prioritizes incarceration over justice, devalues Black lives, and rewards the prosecutors who talk the toughest also animates the pursuit of capital punishment in America's most prolific death-sentencing and executing counties.

Targeting Mass Incarceration

Much of the discussion about the role of race in the criminal legal system has focused on mass incarceration. The United States is a world leader in imprisonment, with almost 2.3 million people in prisons or jails.²²⁵ This carceral system is incredibly costly and has not been shown to enhance public safety.²²⁶ It also disproportionately affects communities of color with African Americans imprisoned at a rate that is 5.1 times that of white people and Latinx people imprisoned at 1.4 times the white imprisonment rate.²²⁷

Initially it may seem that the death penalty is out of place in this conversation since the death row population of 2,600 people is a miniscule portion of the entire incarcerated population.²²⁸ However, the death penalty is an important anchor for mass incarceration and long sentences. It drives sentencing lengths by framing life without parole as a compassionate or less severe alternative. It also entrenches one of the attitudes that perpetuates mass incarceration, legitimizing the notion that whole classes of people are unredeemable.

The death penalty served as a focal point in the environment that led to the “tough on crime” policies that continue to affect sentencing today. In the 1988 presidential campaign, political oppo-

nents attacked Massachusetts Governor Michael Dukakis as soft on crime because of his opposition to the death penalty and veto of a bill that would have restricted prison furloughs. A political action committee ran a television ad with the picture of Willie Horton, an African-American man who had raped a white woman after escaping during a prison furlough. This ad exploited the familiar caricature of the dangerous Black rapist to stoke the anger of white Americans. George H.W. Bush easily beat Dukakis in the presidential race.

When Bush was running for re-election, his Democratic challenger, Arkansas Governor Bill Clinton, went to great lengths to demonstrate his “law and order” bonafides. Most notably, Clinton refused to grant clemency to stop the execution of Ricky Rector, an African-American man with severe brain damage. Rector so failed to understand the reality of his execution that he saved his dessert to eat after the lethal injection was completed. To avoid being “out-toughed” on crime, Clinton interrupted his presidential campaign to return to Arkansas to oversee Rector’s execution.²²⁹

The harsh sentencing regimes that supported the war on drugs also created the framework for the modern death penalty. State and federal crime bills

in the 1980s and 1990s heightened punishments and restricted review of constitutional violations. The Anti-Drug Abuse Act of 1988 both reinstated the federal death penalty and created mandatory minimums for the possession of five grams of crack cocaine, amplifying the differential treatment of powder and crack cocaine that has been the source of significant racial disparities in the federal criminal legal system.²³⁰ The Violent Crime Control and Law Enforcement Act of 1994 expanded the federal death penalty to more than 60 new crimes at the same time that it created a federal “three strikes” law and created financial incentives for states to pass “truth in sentencing” laws, adding to the long-term boom in state and federal prison population.²³¹ In the wake of the Oklahoma City bombing Congress passed the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”) in 1996. AEDPA’s proponents marketed the bill by playing on fears about crime and arguing that death-sentenced prisoners were clogging up the courts with frivolous appeals. AEDPA has had a lasting impact on the death penalty by creating procedural hurdles that prevent federal courts from granting relief to capital defendants who have been unconstitutionally convicted and sentenced to death.²³² It has also greatly reduced the availability of federal habeas relief for non-capital prisoners.²³³

Mass incarceration is not just about numbers. Its harms are not evenly distributed but are inextricably connected to America’s continuing racial inequality. An honest look at mass incarceration addresses the harms felt by communities of color after centuries of discriminatory policing, prosecution, and sentencing, and the effects of these injustices outside of the criminal legal system.

Understood in this context, attention to the racial operation of the death penalty becomes even more important as the embodiment of whose lives matter more and whose lives are devalued. Courts are empowered to determine that a defendant’s life has so little redeeming value that the state is willing to execute that person, and this decision is influenced by stereotypes, fear, and comparative valuation of lives. One cannot create a criminal legal system that can be trusted to dispense justice without addressing this extreme example of racial injustice.

Black Lives Matter

As discussed above, the race of a homicide victim makes a difference in whether a suspect is arrested, charged with a death-eligible offense, and sentenced to death. The idea that the death of a white person is seen as more serious than the death of a person of color has been the source of anger and activism in the last decade outside of conversations about the administration of the death penalty.

In 2012, when Trayvon Martin was killed in Sanford, Florida, the nation focused on the questions of how “walking while Black” can be a death sentence.²³⁴ Martin, a Black seventeen-year-old, was walking to his father’s house when he was killed by George Zimmerman. Zimmerman followed, confronted, and killed Martin after telling a 911 operator that Martin “looks like he’s up to no good.”²³⁵ The city of Sanford claimed that police could not immediately arrest Zimmerman because of a troubling provision of Florida law, “Stand Your Ground.”²³⁶ The idea that fear based on stereotypes of Black criminality would allow someone to escape from culpability generated widespread outrage, and the first use of the social media hashtag #BlackLivesMatter.

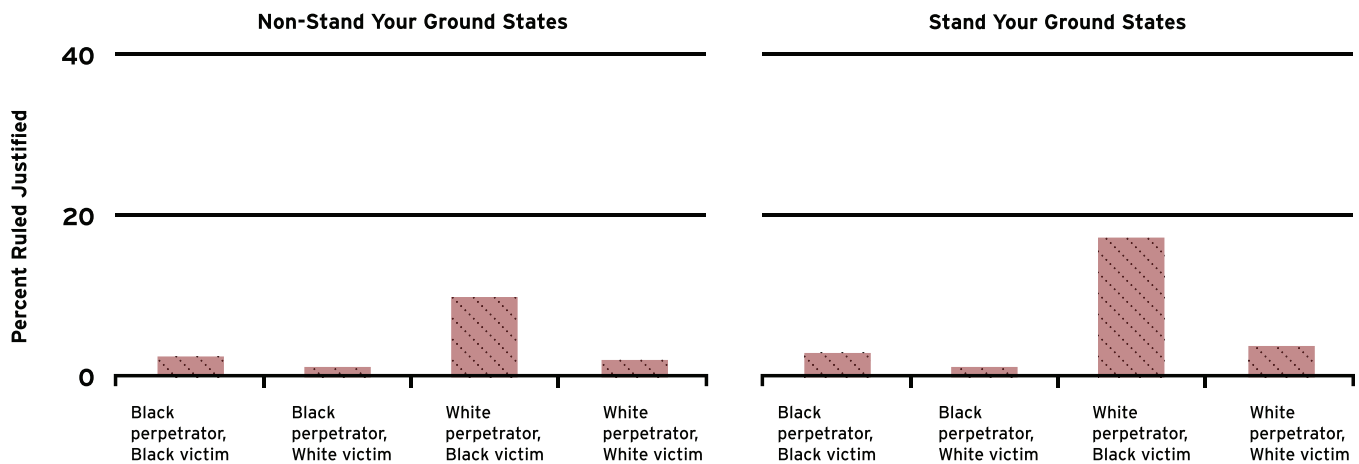
After the 2014 shooting of Michael Brown in Ferguson, Missouri, Patrisse Cullors, Alicia Garza, and Opal Tometi became nationally recognized as leaders of the Black Lives Matter movement.

The movement was born from the understanding that the pain and death of African Americans is undervalued, that Black people are seen as disposable, and violence against Black people is therefore overlooked and even sanctioned by the state. The group’s activism has extended beyond addressing vigilante and police violence to other issues that reflect this perspective. In fact, the Movement for Black Lives—an outgrowth of Black Lives Matter—has adopted a platform that calls for abolition of the death penalty.²³⁷ The group argues that state-sanctioned violence against Black people takes many forms—from vigilante violence by private individuals, to police abuse, to legally sanctioned executions; that extrajudicial killings by law enforcement and judicial killings in the name of law enforcement are part of the same phenomenon.

Local Black Lives Matter groups also have adopted this broader focus. In Los Angeles, BLM protestors have criticized policing and death penalty practices. After an ACLU report documented that the last 22 people sentenced to death in Los Angeles County

Stand Your Ground and Legally Authorized Violence Against Black People

Homicides Ruled Justified 2005–2010 All Cases



Comparison of homicides ruled justified in Stand Your Ground and Non-Stand Your Ground states

John K. Roman, *Race, Justifiable Homicide, and Stand Your Ground Laws: Analysis of FBI Supplementary Homicide Report Data*, Urban Institute 9 (2013).

Florida was one of the first states to enact a “Stand Your Ground” law that allows defendants to claim self-defense in situations in which criminal law generally had required a person to retreat instead of attack. Since Florida adopted Stand Your Ground in 2005, more than 20 states have passed similar laws.

In a Stand Your Ground state, a person can argue that they had an objectively reasonable fear of serious injury that justified the use of deadly force. Florida’s Stand Your Ground law is one of the most

extensive, providing immunity from civil suit and criminal prosecution.²³⁸

Studies of Stand Your Ground laws have shown that African-American defendants are less likely to benefit from a stand-your-ground defense and that this defense often has been invoked to protect a white defendant who killed an African American.²³⁹ In at least twenty-six Florida cases, a court has found a white defendant justified in killing an African-American child.²⁴⁰

Between 2013 and 2019, eight of the ten major city police departments with the highest rates of killing civilians were in counties in the top 2% of death sentencing or executions.²⁴¹

Eight of the ten states with the highest per capita incarceration rates are also in the top ten in their per capita execution rates.²⁴²

were people of color,²⁴³ BLM Los Angeles published “Jackie Lacey’s Seven Deadly Sins,” charging Los Angeles County DA Jackie Lacey with betraying the people who elected her. The group faulted Lacey for a number of regressive policies including refusing to prosecute police officers, relying on corrupt police officer testimony, and “pursuing the death penalty exclusively against defendants of color.”²⁴⁴

The issues that ignited the Black Lives Matter movement have captivated national attention again. In May 2020, public outrage exploded following a series of killings of Black people with no response from local authorities and no indication that their white assailants would be held accountable. While jogging in his Georgia neighborhood, Ahmaud Arbery was murdered by a former law enforcement officer who claimed he was trying to conduct a citizen’s arrest. Arbery’s killer went free for months and was arrested only after public pressure mounted following the release of a videotape of the murder.²⁴⁵ Breonna Taylor was shot and killed by Louisville police who broke her door down while serving a no-knock warrant when the target of their investigation had already been taken into custody across town. Taylor was home in bed when police used a battering ram to enter her apartment.²⁴⁶ Finally, George Floyd was killed by a police officer



kneeling on his neck for eight minutes and forty-six seconds. Floyd lay immobilized on the ground and repeatedly told police that he could not breathe.²⁴⁷ In the days and weeks after video of Floyd's death went viral, hundreds of thousands joined protests across the world.²⁴⁸ Much of the discussion following these protests has focused on not just ending police violence but also confronting larger issues of racial injustice. The Oklahoma City chapter of Black Lives Matter demanded action on a range of policing issues and also called for the release of Julius Jones. Jones is a Black Oklahoma City man on death row with strong claims of innocence who has unsuccessfully challenged racial bias in the Oklahoma death penalty and at his own trial.²⁴⁹

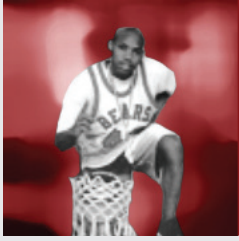
Every year, approximately 1,000 people are killed by police.

Black people are 3 times more likely to be killed by police than white people.

99% of killings by police between 2013 and 2019 have not resulted in criminal charges.

Black people killed by police were 1.3 times more likely to be unarmed than white people killed by police.

Black people have been 28% of those killed by police since 2013 even though only 13% of the population is Black.²⁵⁰



Julius Jones

JULIUS JONES was convicted and sentenced to death by a nearly all-white jury for the 1999 killing of a white businessman. Racial bias pervaded his case: an officer used a racial slur while arresting him; prosecutors struck every Black potential juror but one; and one of his jury members used the n-word to describe Jones.²⁵² Jones was prosecuted under the administration of the late “Cowboy Bob” Macy, who sent 54 people to death row during a 21-year tenure as Oklahoma County District Attorney that was marked by extensive misconduct.²⁵³

Jones’ conviction relied heavily on the testimony of his co-defendant, Christopher Jordan, who avoided the death penalty and was given a substantially reduced sentence in exchange for his testimony. Jones’ court-appointed trial lawyers failed to call any

of several available alibi witnesses, did not bother to cross-examine Jordan and did not call Jones to testify on his own behalf. An eyewitness description of the shooter matched Jordan’s appearance, not Jones’.

Jones’ lawyers petitioned the Oklahoma Pardon and Parole Board for clemency, arguing that Jones was wrongly convicted and that his trial was tainted by racial bias. The petition, filed in October 2019, has drawn support from a diverse range of civic, civil rights, and faith leaders and criminal justice experts.²⁵⁴

Recognizing the Power of the Prosecutor

As policy makers, activists, courts, and legislatures focus on ending mass incarceration and ensuring accountability for police violence, reforming the use of prosecutorial discretion throughout the criminal legal system has become a top priority.²⁵⁵

Racial disparities in the death penalty go hand in hand with geographic disparities in the pursuit of the death penalty. When researchers examine the places of greatest concentration of executions and death sentences, it is clear that a small minority of jurisdictions are responsible for the majority of capital punishment activity.²⁵⁶ A 2013 Death Penalty Information Center report compiled data on death sentences and executions across the country to find that 2% of the counties in the U.S. have been responsible for the majority of modern executions, and the same percentage of counties are responsible for the majority of the death row population.²⁵⁷ By 2020 just 1.2% of U.S. counties accounted for half of the nation's death row.²⁵⁸ And just three high-execution states—Texas, Missouri, and Virginia—accounted for more than half of the federal death row.²⁵⁹

The role of prosecutorial discretion in the geographically isolated use of the death penalty cannot be overstated. A study of capital charging in Georgia between 1993 and 2000 showed a wide variation in



1994 campaign ad for Oklahoma County DA “Cowboy Bob” Macy touting “44 Murderers Put on Death Row”

whether prosecutors would pursue the death penalty against a defendant accused of committing a death-eligible crime. The probability was 6% in the judicial circuit that charged the least often and 62% in the highest charging judicial circuit.²⁶⁰ Racial disparities also varied widely depending on the judicial circuit in which the crime was charged. However, cases with white victims were consistently charged capitally at a higher rate than death-eligible murders of Black victims.²⁶¹

Philadelphia: Race, Prosecution, and Death Sentencing



Anti-slavery activists renamed Philadelphia, Pennsylvania's state house bell "the Liberty Bell," and it became a beloved international symbol of freedom. The city is well known as the home of many prominent slavery abolitionists, but it also has a long history of racial discrimination and segregation.

W.E.B. DuBois published *The Philadelphia Negro* in 1899, examining the many ways in which Black Philadelphians had been relegated to second-class citizenship. In 1918, white mobs attacked African Americans to express their anger against members of the growing Black population moving into white neighborhoods. White attempts to maintain

residential segregation would continue throughout the twentieth century, although Philadelphia remained a major destination for Black families fleeing oppression in the South. The 1960s saw civil unrest with confrontations between Black Philadelphians and a police force led by a racially divisive commissioner, later mayor, Frank L. Rizzo. The *Philadelphia Inquirer* won a Pulitzer Prize in 1978 for its investigative series on police brutality, and the next year, the U.S. Department of Justice followed up with a civil rights suit alleging that Philadelphia police "engaged in pervasive and systematic police brutality."²⁶²

Pennsylvania reauthorized the death penalty in 1978, and prosecutors in Philadelphia soon implemented a practice of indiscriminately seeking it in nearly all death-eligible cases. Death sentences imposed in Philadelphia peaked in the first term of District Attorney Ronald Castille's administration in 1986-1989, with an average of 11.25 death sentences per year. Lynn Abraham, the Philadelphia District Attorney between 1991 and 2010, pursued death "virtually as often as the law will allow" during her first term in office. By the mid-1990s Philadelphia County was the third largest contributor to death row in the country.²⁶³ By 2001, the county had more African Americans on death row than any other U.S. county and the highest African-American per capita death row population of any major-county death row.²⁶⁴

Racial discrimination in jury selection unquestionably contributed to this surge in Philadelphia death sentences. Prior to *Batson v. Kentucky*, Philadelphia prosecutors routinely struck Black prospective jurors in murder trials, arguing that it was lawful to do so as long as they did not empanel all-white juries.²⁶⁵ After *Batson*, the office became notorious for a videotaped jury selection training that taught prosecutors how to discriminatorily conduct voir dire and exercise jury strikes on the basis of race

and provide the courts with pretextual race-neutral explanations.²⁶⁶ A landmark study of jury selection in 317 capital trials from 1981-1997 showed that Philadelphia prosecutors exercised their discretionary strikes to exclude Black jurors at double the rate they challenged other jurors, and they struck non-Black jurors twice as frequently if they lived in integrated neighborhoods than if they lived in highly segregated white neighborhoods.²⁶⁷

As discussed in DPIC's 1998 report *The Death Penalty in Black and White*, a study of Philadelphia death sentences imposed between 1983 and 1993 found that when controlling for the seriousness of the offense and other non-racial factors, African Americans were much more likely to be sentenced to death than similarly situated white defendants.²⁶⁸ The odds that a Black defendant would be sentenced to death were three times greater than for other capital charged defendants, nine times greater than for other defendants convicted of capital murder, nine times greater than for capital-convicted defendants, and nearly 30 times greater in cases in which juries had found aggravating and mitigating evidence and had discretion to impose either a life sentence or a death sentence.²⁶⁹



The study found that the race of victims had a pernicious effect in capital sentencing as well. The odds a defendant would be sentenced to death because a jury that had found at least one aggravating circumstance rejected all mitigating circumstances were 4.3 times greater if the victim was white.²⁷⁰ And a follow-up study found that in white-victim cases, a Black defendant with features traditionally attributed to African Americans was twice as likely to be sentenced to death as other Black defendants, while the appearance of the defendant made no difference in Black-victim cases.²⁷¹ In the years since the report was published, Philadelphia prosecutors decreased their pursuit of capital punishment, but the death sentences imposed in the county became even more

racially disparate. A DPIC analysis of Philadelphia capital sentencing data found that 44 of the last 46 death sentences were imposed on defendants of color.²⁷² After a steep 15-year decline in death verdicts, the last Philadelphia death sentence was imposed in 2016.²⁷³

The next year, Philadelphians elected Larry Krasner to serve as district attorney. Krasner is known for representing Black Lives Matter activists and for a long career as a defense attorney. He campaigned on a criminal legal reform platform, including a promise not to pursue the death penalty.²⁷⁴

In-depth local analyses have highlighted the connections between prosecutors' over-pursuit of the death penalty in outlier jurisdictions and local histories of racial injustice that extend beyond capital punishment.²⁷⁵ A recent study of capital prosecutions in Hamilton County, Ohio combined a rigorous statistical analysis of the pursuit of death sentences with a recognition of the area's history of racial injustice and civil unrest. Researchers found that between 1992 and 2017, the odds that a defendant with at least one white victim would be capitally charged were 4.54 times greater than for all other similarly situated defendants.²⁷⁶ Among capitally charged cases, the odds that a Black defendant accused of killing a white victim would be sentenced to death were 5.33 times higher than for all other cases.²⁷⁷

Hamilton County is also one of the top 2% of counties responsible for the majority of U.S. executions, and it is the county that has produced the most Ohio executions in the modern era.²⁷⁸ Hamilton County Prosecutor Joe Deters has been in office for twenty-two of the past twenty-eight years and has aggressively pursued the death penalty. Deters even suggested a return to the firing squad at times when lethal injection concerns put Ohio executions on hold.²⁷⁹ In a sign of changed times, he is currently

facing an election challenge from an opponent who has vowed not to use the death penalty²⁸⁰ and Deters now asserts "I do not seek the death penalty often."²⁸¹



Confederate flag and memorial outside Caddo Parish Courthouse, Shreveport, Louisiana, 2010

Caddo Parish, Louisiana, exemplifies the historical legacy of racism and defenses of white supremacy that continue to infect the modern-day administration of justice. The Confederate flag flew outside the courthouse until 2011 when legal challenges and local pressure forced its removal. A monument to Confederate soldiers continues to greet litigants whose fate will be decided inside the courthouse walls.²⁸²

While Caddo Parish made up five percent of Louisiana's population, it generated a third of the state's death sentences between 2010 and 2015.²⁸³ Of the 22 defendants sentenced to death in the parish in the modern era, 15 were sentenced for killing white victims. By contrast, no white person has been sentenced to death for killing a Black victim.²⁸⁴ Caddo Parish prosecutors removed African Americans from juries at a rate triple that of other potential jurors.²⁸⁵ One Caddo Parish death penalty case has been reversed because of racial discrimination in jury selection.²⁸⁶

Two of Louisiana's eleven death row exonerates, Glenn Ford and Rodricus Crawford, are Black men from Caddo Parish.²⁸⁷ In response to Ford's release, Caddo Parish Acting District Attorney Dale Cox vowed to pursue the death penalty with even more fervor. He stated, "I think we need to kill more people." He later justified his pursuit of the death penalty by explaining that "[r]evenge brings to us a visceral satisfaction."²⁸⁸ Voters elected a new district attorney in 2015, and in line with sentencing trends throughout the state, no new death sentences have been imposed to date.²⁸⁹

Caddo Parish is just one example of prosecutorial overzealousness intersecting with a history of

racial injustice and present-day racial disparities. But this combination of factors is not unique. The Fair Punishment Project highlighted sixteen outlier counties in which prosecutors aggressively pursued the death penalty.²⁹⁰ The authors concluded that "these counties frequently share at least three systemic deficiencies: a history of overzealous prosecutions, inadequate defense lawyering, and a pattern of racial bias and exclusion."²⁹¹ A companion report focusing on the "deadliest prosecutors" highlighted the role of personality-driven prosecution in fueling death sentencing in some of the counties with the highest number of death sentences.²⁹²

Overly aggressive use of capital punishment has appeared hand-in-hand with other serious law enforcement abuses. Philadelphia, Los Angeles, Houston, Cincinnati, and Chicago all endured decades of unaddressed police brutality as capital convictions and death sentences soared. Between 2013 and 2019, eight of the ten police departments with the highest rate of killings of civilians were in counties in the top 2% of death sentencing or executions.²⁹³

We may now be watching things change. A new generation of prosecutors, elected across the country on a platform of criminal justice reform, are taking a

“smart on crime” approach to criminal justice policies instead of the tough on crime policies of their predecessors. The new prosecutors ran on platforms of reducing incarceration, ending cash bail and “the criminalization of poverty,” promoting police and prosecutorial accountability, and reducing reliance on harsh punishments, including the death penalty.²⁹⁴ Between 2015 and 2018, voters replaced county prosecutors in a third of the U.S. counties with the largest county death rows.²⁹⁵ Many of these new prosecutors have either explicitly decided never to pursue the death penalty or to reduce the use of this punishment. They have provided a number of justifications for these positions, including the high cost of the death penalty, the lack of deterrent effect, and the racial disparities endemic in the death penalty. The reform-prosecutor movement has had a direct impact on the declining use of capital punishment across the country.



I have given this issue extensive, painstaking thought and consideration. ...[W]hile I do have discretion to pursue death sentences, I have determined that doing so is not in the best interests of this community or in the best interests of justice.”

— Orange/Osceola County, Florida State Attorney Aramis Ayala, March 16, 2017

Conclusion



REUTERS / Stephen Lam - stock.adobe.com

Racial bias in the death penalty as it is administered today is connected to America’s history of racial injustice and to the need for broader criminal legal system reform. Although “death is different,” no jurisdiction abuses the death penalty and is fair in the way it administers the rest of its criminal laws. The mechanism by which racial bias operates in the death penalty is similar to the way in which it infects other areas of the criminal legal system. This understanding is important as reformers address the challenge of creating a criminal legal system that lives up to the promise of equal justice. This is the challenge that the *McCleskey* court avoided but that state supreme courts and legislatures continue to grapple with.

The U.S. Supreme Court’s “fear of too much justice” propelled it to ignore blatant discrimination in *McCleskey*, not only allowing racial bias in death sentencing to continue unchecked but closing the door on addressing racial injustices throughout the legal system. If we accept racial bias as inevitable when life or death is at stake, what chance is there that we will reject racial discrimination in policing, prosecution, and incarceration? The culture and practices that permit the law to discriminatorily take a person’s life legitimize the devaluing of Black and brown lives. The racially discriminatory application of capital punishment symbolizes and embodies what America most needs to change.

Endnotes

1 Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. Chi. L. Rev. 243, 245-48 (2015). Although scholars have accumulated extensive evidence of thousands of early American executions, there is little question that some early executions are missing. See M. Watt Espy & John Ortiz Smykla, *Executions in the United States, 1608-2002: The Espy File* 3 (4th ICPSR ed. 2016) (recognizing that though the Espy file is the most extensive data compilation of U.S. executions, some early executions may still be missing “because of the absence of a historical record or the failure to locate an existing historical record”).

2 Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. Chi. L. Rev. 243, 245-48 (2015).

3 David V. Baker, *Women and Capital Punishment: An Analytical History* 33 (2016) (noting the compensation of owners in Alabama, Kentucky, Mississippi, North Carolina, South Carolina, Texas, and Virginia for the execution of 20 enslaved women or girls).

4 Barbara O'Brien et al., *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990-2009*, 94 N.C. L. Rev. 1997 (2016).

5 *McCleskey v. Kemp*, 481 U.S. 279, 329-30 (1987) (Brennan, J. dissenting) (citing Ga. Penal Code (1861)); see Amicus Brief of NAACP et al., *Aikens v. California*, 403 U.S. 952 (1971) (No. 5059), *Appendix A: Pre-Civil War History of Punishment for Rape in Southern States and Washington, D.C.*

6 Amicus Brief of NAACP et al., *Aikens v. California*, 403 U.S. 952 (1971) (No. 5059), *Appendix A: Pre-Civil War History of Punishment for Rape in Southern States and Washington, D.C.*

7 Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. Chi. L. Rev. 243, 245-48 (2015); Daniel J. Flanagan, *The Criminal Law of Slavery And Freedom, 1800-1868*, at 2 (May 1987) (unpublished PhD dissertation, Rice University) (Maryland criminal laws in the 18th century allowed that “for murder, or arson of a dwelling trial courts could sentence slaves to have their right hands cut off before they were hanged. Later, they would be beheaded, quartered, and their bodies left exposed to serve as a warning to their fellows.”).

8 See Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 Calif. L. Rev. 1239, 1262 (2012) (“Through the Black Codes, Southern states criminalized a range of conduct thought to be committed by former slaves. These crimes included vagrancy, absence from work, the possession of firearms, insulting gestures or acts, job or familial neglect, reckless spending, and disorderly conduct. Blacks were also prosecuted for the failure to perform under employment contracts.”); John K. Cochran et al., *Rape, Race, and Capital Punishment: An Enduring Cultural Legacy of Lethal Vengeance?*, 9 Race & Justice 383, 387 (Oct. 2019) (“[T]he defining feature of these Black Codes was the localized and overbroad nature of vagrancy ordinances which allowed local authorities to arrest freed Blacks and to commit them to involuntary labor. Blacks without proof of legitimate employment or who had failed to pay their debts or certain taxes could be arrested for vagrancy and hired out to local landowners and businesses to

work off their debts. Similarly, local ordinances that restricted impudence, swearing, disobedience, and other such acts could also lead to arrest and forced servitude.” (citations omitted)).

9 See Elizabeth Hinton et al., Vera Institute of Justice, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System 2* (2018) (“Policymakers in the North did not legally target black Americans as explicitly as did their southern counterparts, but disparate enforcement of various laws against ‘suspicious characters,’ disorderly conduct, keeping and visiting disorderly houses, drunkenness, and violations of city ordinances made possible new forms of everyday surveillance and punishment in the lives of black people in the Northeast, Midwest, and West.”).

10 Equal Justice Initiative, *Reconstruction in America: Racial Violence after the Civil War* (2020).

11 Amy Kate Bailey & Stewart E. Tolnay, *Lynched: The victims of southern mob violence 2* (2015).

12 In the Southwest, Mexican nationals and Mexican Americans were the victims of lynching. William D. Carrigan & Clive Webb, *Forgotten Dead: Mob Violence against Mexicans in the United States, 1848-1928* (2013) (declining to use the term lynching, but documenting 547 victims of anti-Mexican mob violence and asserting that there are thousands more unnamed victims). Native Americans and people of Asian descent were also lynched in the western United States. Amy Kate Bailey & Stewart E. Tolnay, *Lynched: The Victims of Southern Mob Violence 2* (2015); see Bureau of the Census, *Historical Statistics of the United States: Colonial Times to 1970* (1972) (noting estimates that 45 Native Americans, 12 people of Chinese descent, 1 person of Japanese descent, and 20 people of Mexican descent were lynched between 1882 and 1903).

13 Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror* (3d ed. 2017); David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 Law & Soc’y Rev. 793 (2005).

14 Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror* 44 (3d ed. 2017). The Equal Justice Initiative’s work adds to efforts of civil rights groups and scholars to account for all those who died by lynching. The Tuskegee Institute documented more than 4,700 lynchings between 1882 and 1964. Amy Kate Bailey & Stewart E. Tolnay, *Lynched: The Victims of Southern Mob Violence 5* (2015). The NAACP also kept records of lynchings. Scholars have studied, refined, and added to these data sets over the years. See, e.g., Charles Seguin & David Rigby, *National Crimes: A New National Data Set of Lynchings in the United States, 1883 to 1941*, 5 Soc’us 2 (2019) (counting 4,467 lynching victims between 1883 and 1941).

15 The most active lynching states overall were Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. Outside of the South, the states with the most lynchings were Illinois, Indiana, Kansas, Maryland, Missouri, Ohio, Oklahoma, and West Virginia. Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror* 44 (3d ed. 2017).

- 16 *Id.* at 28.
- 17 *Id.* at 29–32.
- 18 David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 *Law & Soc’y Rev.* 793 (2005).
- 19 Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror* 28 (3d ed. 2017).
- 20 *Helena Men Urge Hill’s Extradition*, *Arkansas Gazette*, Jan. 30, 1920.
- 21 Rachel Otwell, *Efforts To Rebuild After Springfield’s 1908 Race Riot Still Ongoing*, NPR, Aug. 22, 2018.
- 22 Ida B. Wells-Barnett, *The Arkansas Race Riot* (1920); Nan Elizabeth Woodruff, *The Forgotten History of America’s Worst Racial Massacre*, N.Y. Times, Sept. 30, 2019; Francine Uenuma, *The Massacre of Black Sharecroppers That Led the Supreme Court to Curb the Racial Disparities of the Justice System*, *Smithsonian Magazine*, Aug. 2, 2018.
- 23 *Moore v. Dempsey*, 261 U.S. 86, 91 (1923).
- 24 William A. Waddell, Jr., *Scipio Africanus Jones—Appreciation for A Journeyman Lawyer*, 54 *Ark. Law.* 12, 12, 14 (2019) (citing Grif Stockley, *Blood in Their Eyes: The Elaine Race Massacres of 1919*, at 224–25, 227–28 (2001)).
- 25 Oklahoma Commission to Study the Tulsa Race Riot of 1921, *Tulsa Race Riot*, Feb. 28, 2001; Maxine D. Jones et al., *A Documented History of the Incident which Occurred at Rosewood, Florida in January 1923*, Dec. 22, 1993.
- 26 Ida B. Wells-Barnett, *Southern Horrors: Lynch Law in All Its Phases* 11 (1892).
- 27 *Id.* at 17.
- 28 Theodore Roosevelt, *State of the Union Address* (Dec. 3, 1906).
- 29 Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror* 48 (3d ed. 2017).
- 30 As of the writing of this report, federal anti-lynching legislation is the closest it has come to being passed. See Jacey Fortin, *Congress Moves to Make Lynching a Federal Crime After 120 Years of Failure*, N.Y. Times, Feb. 26, 2020.
- 31 Linda Kim, *A Law of Unintended Consequences: United States Postal Censorship of Lynching Photography*, 28 *Visual Resources* 171, 174 (2012); see Meghan Lynn Jordan, *Lynching Photographs and Their Aftermath: The Overlay of the Gaze* 22–23, 22 n.34 (Aug. 19, 2017) (unpublished M.A. thesis, University of Arizona).
- 32 Linda Kim, *A Law of Unintended Consequences: United States Postal Censorship of Lynching Photography*, 28 *Visual Resources* 171, 174–75, 174 n.12 (2012).
- 33 Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror* 60 (3d ed. 2017).
- 34 Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 *U. Chi. L. Rev.* 243, 251 (2015).
- 35 *Id.* at 251. This concern continued even into the 1970s, when Justice Potter Stewart wrote for a four-Justice plurality in *Gregg v. Georgia*, 428 U.S. 153, 183 (1976), that the “expression of society’s moral outrage” channeled by capital punishment “is essential in an ordered society that asks its citizens to rely on legal processes, rather than self-help [i.e., vigilante justice and lynching] to vindicate their wrongs.”
- 36 Bharat Malkani, *Slavery and the Death Penalty: A Study in Abolition* 38 (2018).
- 37 Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 *N.Y.U. L. Rev.* 513, 523–24 (May 2014) (citing G. Ben Cohen, *McCleskey’s Omission: The Racial Geography of Retribution*, 10 *Ohio St. J. Crim. L.* 65, 94 (2012)).
- 38 See, e.g., *Hanged by a Mob*, *Alexandria Gazette*, April 23, 1897.
- 39 David Garland, *Peculiar Institution: America’s Death Penalty in an Age of Abolition* 5, 6, 12, 30 (2010); see generally David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 *Law & Soc’y Rev.* 793 (2005).
- 40 *The Last Hanging: There Was a Reason They Outlawed Public Executions*, N.Y. Times, May 6, 2001.
- 41 David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 *Law & Soc’y Rev.* 793, 815 n.35 (2005); Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization – Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 *L. & Ineq.* 211, 219 (2012).
- 42 *The Last Hanging: There Was a Reason They Outlawed Public Executions*, N.Y. Times, May 6, 2001.
- 43 U.S. Dep’t of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 45, *Capital Punishment 1930–1968* (1969).
- 44 Brief for the American Civil Liberties Union, the ACLU of Louisiana, & the NAACP Legal Defense and Educational Fund, Inc., as Amici Curiae Supporting Petitioner at 10, *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (No. 07–343) (citing Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 *Annals of the Am. Acad. of Pol. and Soc. Sci.* 119, 129 (1973)).
- 45 U.S. Dep’t of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 45, *Capital Punishment 1930–1968* (1969).
- 46 Brief for the American Civil Liberties Union, the ACLU of Louisiana, & the NAACP Legal Defense and Educational Fund, Inc., as Amici Curiae

Supporting Petitioner at 10, *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (citing James W. Marquart et al., *The Rope, The Chair, And The Needle* 39 (1994)).

47 *Id.* at 70.

48 Gilbert King, *Devil in the Grove* 48 (2012) (citing a 1949 memo written by Thurgood Marshall setting forth criteria for the criminal cases LDF would accept: “(1) That there is injustice because of race or color; (2) the man is innocent; (3) there is a possibility of establishing a precedent for the benefit of due process and equal protection in general and the protection of Negroes’ rights in particular.”).

49 *Id.* at 70.

50 Carol S. Steiker & Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* 52-53 (2016).

51 Columbia Ctr. for Oral History Research, Rule of Law Oral History Project, *Oral history interview with Anthony G. Amsterdam* 50-57, 2009.

52 *Furman v. Georgia*, 408 U.S. 238 (1972). The Court’s consideration of *Furman* was consolidated with two other cases that challenged the use of the death penalty for rape, *Jackson v. Georgia* and *Branch v. Texas*.

53 *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

54 *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976), *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

55 *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring) (“[I]f any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.”).

56 *Id.* at 308.

57 *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion) (stating that society must have an outlet to express its moral outrage, asserting that “it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs”).

58 A. Leon Higginbotham, Jr., *The “Law Only As an Enemy”: The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. Rev. 969, 1011 (1992).

59 Thirty years later, in *Kennedy v. Louisiana*, 554 U.S. 407 (2008), the Court followed the same pattern in considering the constitutionality of the death penalty for child rape. Once again, it ignored overwhelming evidence of extreme racial disparities but still found the death penalty unconstitutionally disproportionate when imposed for child rape.

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