

McCleskey's Omission: The Racial Geography of Retribution

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I. INTRODUCTION

Perhaps little more can be said about the 5-4 decision in *McCleskey v. Kemp*.¹ It has been given dishonorable discharge in a number of symposiums,² books, and law review articles.³ In the immediate aftermath of the opinion, the Harvard Law

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¹ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

² See Symposium, *Pursuing Racial Fairness in Criminal Justice: Twenty Years After McCleskey v. Kemp*, 39 COLUM. HUM. RTS. L. REV. 1 (2007); see also John H. Blume, Theodore Eisenberg & Sheri Lynn Johnson, *Post-McCleskey Racial Discrimination Claims In Capital Cases*, 83 CORNELL L. REV. 1771 (1998).

³ See, e.g., *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 119, 156 (1987); see also Howard Ball, *Thurgood Marshall's Forlorn Battle Against Racial Discrimination in the Administration of the Death Penalty: The McCleskey Cases, 1987, 1991*, 27 MISS. C. L. REV. 335, 370 (2008) ("Immediately after the Court's announcement of *McCleskey*, the denunciations were quick to appear in print. A Pulitzer Prize winning Court commentator wrote that the Court had

Review's Supreme Court Review noted that "[i]t is a cruel irony for the Court to require a higher burden of proof for a defendant fighting for his life than it requires for a defendant trying to keep his job."⁴ Anthony Amsterdam, echoing the words of Professor Hugo Bedau, observed, "*McCleskey* is the *Dred Scott* decision of our time."⁵ And, of course, Justice Powell told his biographer that his vote against *McCleskey* was his biggest regret from his years on the Court.⁶

The death penalty's historic, continued intersection with race is deep and well documented.⁷ Justice John Paul Stevens, after his departure from the bench, observed the connection between the death penalty and lynchings: "That the murder of black victims is treated as less culpable than the murder of white victims provides a haunting reminder of once-prevalent Southern lynchings."⁸ Indeed, racial disparities and tensions permeate the criminal justice system generally,⁹ and the death penalty specifically.¹⁰

'effectively condoned the expression of racism in a profound aspect of our law.' *McCleskey* was compared to prior 'self-inflicted' wounds by the Court in racial discrimination cases such as *Dred Scott v. Sanford* [60 U.S. 393] (1856), *Plessy v. Ferguson* [163 U.S. 537] (1896), and *Korematsu v. U.S.* [323 U.S. 214] (1944)."); Constitutional scholars such as Harvard Law School's Randall Kennedy concluded that *McCleskey* "repressed the truth and validated racially oppressive official conduct" (citing Anthony Lewis, *Bowing To Racism*, N.Y. TIMES, April 28, 1987, at 31; Hugh Bedau, *Someday McCleskey Will Be Death Penalty's Dred Scott*, L.A. TIMES, May 1, 1987, at D5); Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 509 (1994) (describing *McCleskey* as a "deeply disturbing opinion about race and the administration of criminal justice in the United States"). Harvard Law Review concluded that *McCleskey* was "logically unsound, morally reprehensible, and legally unsupportable." *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 119, 158 (1987); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment and the Supreme Court*, in *THE SUPREME COURT IN AMERICAN SOCIETY: EQUAL JUSTICE UNDER LAW* 164, 165 (Kermit L. Hall ed., 2001).

⁴ *The Supreme Court, 1986 Term—Leading Case*, *supra* note 3, at 156.

⁵ Anthony G. Amsterdam, Opening Remarks, *Race and the Death Penalty Before and After McCleskey*, 39 COLUM. HUM. RTS. L. REV. 34, 47 (2007).

⁶ See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451 (1994); see also Opinion, *Justice Powell's New Wisdom*, N.Y. TIMES, June 11, 1994, at 20 ("Too late for Warren McCleskey and numerous other executed prisoners, retired Justice Lewis Powell now concedes that he was wrong to cast the deciding fifth Supreme Court vote to uphold Mr. McCleskey's death sentence in a major case.").

⁷ See, e.g., Charles J. Ogletree, *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 16 (2002) ("Like the entire criminal justice system, the administration of the death penalty in America places a disproportionate burden on African Americans."); *id.* at 18 ("[T]he 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."); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 433 (1995).

⁸ John Paul Stevens, *On the Death Sentence*, N.Y. REV. BOOKS, Dec. 23, 2010, at 8, 14 (reviewing DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* (2010)).

⁹ Cf. *Dorsey v. United States*, 132 S. Ct. 2321, 2328 (2012) (noting unjustified race based differences); Jeffrey Fagan & Mukul Bakhshi, *New Frameworks for Racial Equality in the Criminal*

The scholarly response to *McCleskey* has centered on the Court's indifference to overwhelming statistical evidence that race—and especially the intersection of the race of defendant and the race of the victim—plays on the administration of capital judgments.¹¹ The near universal condemnation of *McCleskey* from academics has been met with jurisprudential silence.¹²

Indeed, public concern about the influence of race on the death penalty appears to have dwindled.¹³ Advocates for capital punishment deride concerns about state-wide statistics on race and the death penalty, claiming—echoing *McCleskey*'s majority opinion—that the race of the defendant or victim is not the salient factor in determining a death sentence, that the state-wide racial statistics concerning the death penalty reflect disparities that exist throughout every level of the criminal justice system, or that there is merely an appearance of racial distortion but no actual bias.¹⁴

Law, 39 COLUM. HUM. RTS. L. REV. 1, 7 (2007) (“African Americans are overrepresented in prisons relative to the rate at which they commit crime. Their sentences are longer, reflecting sentencing laws which, in most states, mandate long spells of incarceration for violent crimes and drug offenses with little room for modifications or exceptions in individual circumstances.”).

¹⁰ See, e.g., RICHARD C. DIETER, DEATH PENALTY INFO. CTR., STRUCK BY LIGHTNING: THE CONTINUING ARBITRARINESS OF THE DEATH PENALTY THIRTY-FIVE YEARS AFTER ITS RE-INSTATEMENT IN 1976, at 13 (2011), available at www.deathpenaltyinfo.org/documents/StruckByLightning.pdf; RICHARD C. DIETER, DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN BLACK AND WHITE: WHO LIVES, WHO DIES, WHO DECIDES 12 (1998), available at www.deathpenaltyinfo.org/death-penalty-black-and-white-who-lives-who-dies-who-decides.

¹¹ The excellent Symposium on Pursuing Racial Fairness in Criminal Justice at Columbia Law School in March, 2007, convened legal scholars, practitioners, researchers, and activists focused on the need to “revive the pursuit of racial fairness throughout the criminal justice system.” Fagan and Bakhshi, *supra* note 9, at 19.

¹² Professor Sheri Lynn Johnson has observed that since *McCleskey*, courts have almost universally rejected narrowly tailored and focused statistical challenges to race prosecution. Even in cases where statistics reflect overwhelming race discrimination at the county (as opposed to state) level, claims have been unsuccessful unless race is specifically identified (and proven) as a reason for prosecution. Sheri Lynn Johnson, *Litigating for Racial Fairness After McCleskey v. Kemp*, 39 COLUM. HUM. RTS. L. REV. 178, 179–85 (2008).

¹³ A survey by the Pew Research Center for the People & the Press and the Pew Forum on Religion & Public Life, conducted Nov. 9–14, 2011 among 2,001 adults indicated that only two (2%) percent of the thirty-one (31%) percent who oppose the death penalty do so because of concerns about race. PEW RESEARCH CENTER, MORE CONCERN AMONG OPPONENTS ABOUT WRONGFUL CONVICTIONS: CONTINUED MAJORITY SUPPORT FOR DEATH PENALTY (2012), available at <http://www.people-press.org/2012/01/06/continued-majority-support-for-death-penalty>.

¹⁴ See, e.g., Paul Kamenar, quoted in Conference, *The Death Penalty in the Twenty-First Century*, 45 AM. U.L. REV. 239, 330 (1995) (“I want to mention another study which is not in the GAO report; it came out after their study, by the Rand Corporation. Stephen Klein looked at the death penalty in California and concluded that there was no discrimination there.”); Walter Berns, quoted in Panel Discussion, *The Death Penalty: A Philosophical And Theological Perspective*, 30 J. MARSHALL L. REV. 463, 504–05 (1997) (“For example, there have been studies by the Rand Corporation that undermine some of the statements made here about the races involved in the administration of the death penalty.”); Stephen P. Klein & John E. Rolph, *Relationship of Offender and Victim Race to Death Penalty Sentences in California*, 32 JURIMETRICS J. 33, 44 (1991). The

Others have attempted to craft solutions that reduce the “appearance” that race plays a role in capital sentencing. The Federal Death Penalty Act, for instance, requires jurors to certify—after imposing a death sentence—that “consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision.”¹⁵ Others have suggested reform to death penalty statutes to limit the impact that race plays in capital sentencing. For instance, Ronald Tabak suggests that reform could force the legislature to create a non-discriminatory statute, then the death penalty could co-exist with the Racial Justice Act. Indeed, the Baldus study presented in *McCleskey* found, as Justice Blackmun’s dissent noted, that in the most aggravated cases (the ones most often cited by proponents of capital punishment), no pattern of racial disparity existed.¹⁶

Former federal prosecutor Rory Little similarly suggests that legislators and prosecutors address issues of race “to truly narrow and limit their results to such indisputable high-end cases.”¹⁷ Both Little and Tabak suggest a version of reading *McCleskey* that offers a “fix” to the perception that race plays a role in the operation of the death penalty. Alternatively, legislation passed in Kentucky¹⁸ and North Carolina,¹⁹ and suggested in other jurisdictions,²⁰ has offered to fix the appearance that race plays a role in capital punishment by allowing defendants to use state-wide statistical evidence to support a claim of race discrimination.

In contrast to these suggested legislative modifications or reform efforts, this article suggests that racial disparities are not merely a byproduct of capital punishment but are inexorably connected to retribution—one of the two penological justifications for the death penalty.²¹

Twenty-five years after the Court in *McCleskey* refrained from addressing the overwhelming evidence that race, and particularly the race of the victim, plays a

United States Government has cited a study by the Rand Corporation for the proposition that a thorough analysis of relevant data “found no evidence of racial bias” in the operation of the Federal Death Penalty. See *United States v. Edison Burgos Montes*, Crim. No. 06–009, Doc. 496, (JAG, filed Jan. 9, 2012) (citing STEPHEN P. KLEIN, RICHARD A. BERK & LAURA J. HICKMAN, RAND CORP., RACE AND THE DECISION TO SEEK THE DEATH PENALTY IN FEDERAL CASES 111 (2006), available at http://www.rand.org/pubs/technical_reports/TR389).

¹⁵ 18 U.S.C. § 3593(f) (2006).

¹⁶ Ronald J. Tabak, *The Continuing Role of Race in Capital Cases, Notwithstanding President Obama’s Election*, 37 N. KY. L. REV. 243, 270 (2010).

¹⁷ Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh*, 53 DEPAUL L. REV. 1591, 1614 (2004).

¹⁸ KY. REV. STAT. ANN. § 532.300(2) (LexisNexis 1998).

¹⁹ North Carolina Racial Justice Act, N.C. GEN. STAT. §§ 15A-2010-2012 (2009).

²⁰ Olatunde C.A. Johnson, *Legislating Racial Fairness in Criminal Justice*, 39 COLUM. HUM. RTS. L. REV. 233, 238–44 (2007) (noting unsuccessful efforts in Congress, Georgia, Mississippi, and New York to promulgate legislation that addresses appearance of racial inequity).

²¹ See Parts II–V *infra*.

role in the administration of the death penalty, with no corrective measures taken to ensure that the worst of the worst offenders receive the death penalty, the death penalty in America is as arbitrary as it ever was. However, until Americans recognize that race is not merely a statistical consequence of the death penalty, but a historical facet of its origin in post-Reconstruction America, indifference prevails. By fastening retribution to its race-based origin, "the burden shifts to the party defending the action to show that this factor was not determinative."²² More significantly, it connects the modern application of the death penalty to previously unaddressed racial injustices.

This article suggests that the United States Supreme Court decision in *Kennedy v. Louisiana*, calls for further inquiry concerning the role of retribution in supporting the validity of the capital punishment. In *Kennedy*, the Court warned that "retribution" "most often can contradict the law's own ends . . . When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint."²³

Because it originates from a desire to appease racially-motivated lynchings through the authority of law, retribution is an illegitimate, and as a result, unconstitutional, justification for the death penalty. Like the original sin in the Constitution's Three-Fifths Compromise,²⁴ the legacy of the modern death penalty is predicated on an unwillingness to confront county-by-county lynchings, appeasing rather than criminalizing lawless terrorism inflicted on African-Americans and sympathetic white Republicans. Because of the racial origins of retribution in this context, it cannot serve as a justification for the Eighth Amendment's validation of capital punishment.

This article suggests that while both the majority and the dissent in *McCleskey* noted the history of racism in the South, neither confronted the manner in which racism was imbedded in the goal of retribution, nor reconciled the sordid history of lynching with the modern system of capital punishment. This reading of *McCleskey*'s omission suggests that those interested in reducing the influence of race bias on the administration of capital punishment should view *McCleskey*-type state-wide statistical challenges to the death penalty as a wrong turn. The problem with such evidence of race discrimination is that, if proved and actionable, it leaves state-wide death penalty schemes (or the federal scheme) susceptible to affirmative-action death sentences, increases rather than reduces arbitrariness, and

²² *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008) (citing *Hunter v. Underwood*, 471 U.S. 222, 228 (1985)).

²³ *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008).

²⁴ Article I, Section 2, Clause 3 of the Constitution of the United States says: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." The Three-Fifths Compromise provided southern states with representation in Congress while simultaneously depriving slaves' personhood, and is widely recognized as a stain on the Constitution.

fails to capture the local level at which race, retribution and the death penalty exist in America. Moreover, these challenges fail to identify the origins of the influence of race,²⁵ assume the possibility of a system for imposing the death penalty disconnected from race, and offer nothing but window-dressing justice.²⁶

McCleskey sought to use statistics to prove the stain of racism in the flag of America's death penalty. Such a claim seemed to suggest that racism was a stain that might be washed out. However, this article suggests that the law's original reliance on retribution as a constitutional basis for imposing a death sentence sewed racism into the law's very fabric, rendering it illegitimate under the Fourteenth Amendment's promise of due process and equal protection of the law.

This article unfolds in five parts. Part I briefly recaps the decision in *McCleskey* rejecting the use of state-wide statistical evidence to establish unconstitutional racial discrimination. Part II notes the continued role of race in the operation of the death penalty at both the state and federal levels, suggesting, however, that a focus on local county-level death sentences reveals the intersection between race and retribution. Part III notes the local level of lynching. Part IV details the legal landscape of retribution, noting the Court's growing discomfort with its purpose in respect to the death penalty. Part V observes the constitutional significance of the racial origins of retribution. The article then concludes that the historic connection between race and retribution in the context of the death penalty vitiates the validity of retribution as penological justification for capital punishment.

Future challenges to the constitutionality of capital punishment should address the validity of retribution as a basis for imposing the death penalty and the impact that desire for retribution has on county-level administration of the death penalty. Specifically, these challenges to the death penalty could include: 1) historical inquiry into the legacies of lynching, the lack of judicial or law enforcement response to race-related crimes, and disenfranchisement, at the county level; 2) sociological inquiry into the circumstances that explain why a small number of communities are empowered to impose a death sentence; and 3) challenges that focus on the intersection of localized geography and race. A significant corollary to this study is that unlike McCleskey, who sought to implicate myriad prosecutors across a state, various juries, and a large constituency of law enforcement officials in the racist imposition of the death penalty—and failed because of an inability to prove intentionality of any one party—the focus of this study is both narrower, as it focuses on the current practices within specific counties, and broader, as it implicates the judiciary itself in the genesis of the problem.

Ultimately, it may be that these challenges succeed as *Furman*-type²⁷ arbitrariness claims, i.e., establishing that there is no meaningful way to separate

²⁵ See Part III *infra*.

²⁶ See, e.g., Little, *supra* note 17, at 1613–14.

²⁷ *Furman v. Georgia*, 408 U.S. 238 (1972).

the just deserts of those who are sentenced to death from those who are eligible for the death penalty but receive a sentence less than death. Or, more persuasively, these challenges may successfully place the legal burden on proponents of the death penalty to establish that race has played no role in the administration of the death penalty—or as Bryan Stevenson has put it, to force, under law, proponents of the death penalty to answer the “moral question”: “[not] whether those convicted of violent crime deserve to die [but] whether state and federal governments deserve to kill those whom it has imprisoned.”²⁸

II. *MCCLESKEY V. KEMP*: TOLERATING STATISTICAL EVIDENCE ESTABLISHING THE INFLUENCE OF RACE

Professors David Baldus, Charles A. Pulaski, and George Woodworth collected evidence of racial discrimination in Georgia to help “prove” that “the impermissible basis of race” provided an explanation for why some similarly-situated death-eligible offenders receive a death sentence while most do not. To make the claim, Baldus created a comprehensive statistical study that tracked more than 2,000 Georgia murder cases.²⁹ The raw numbers established that defendants charged with killing white persons received the death penalty in 11% of cases, whereas defendants charged with killing black persons received the death penalty 1% of the time.³⁰ The raw numbers also established that black defendants charged with killing white victims (as opposed to those who killed black victims) were twenty-two times more likely to be sentenced to death.³¹ Once adjusted to account for more than 200 case-related factors, the Baldus study demonstrated that a defendant charged with killing a white victim was 4.3 times more likely to receive a death sentence than a defendant charged with killing a black victim.

In *McCleskey v. Kemp*,³² the U.S. Supreme Court granted certiorari to address, *inter alia*, whether the Georgia capital punishment scheme at issue violated the Eighth Amendment because it was arbitrary and capricious, facially or in its application. Explaining that the post-*Gregg*³³ Georgia statute “focus[ed] discretion on the particularized nature of the crime and the particularized characteristics of the individual defendant,” the Court assumed the statute at issue solved the arbitrariness concerns at the core of *Furman* and discounted the racial history of the death penalty.³⁴ These assumptions placed the Court in a lost geography. The

²⁸ Bryan Stevenson, *Close to Death: Reflections on Race and Capital Punishment in America*, in *DEBATING THE DEATH PENALTY* 76, 97 (Hugo Adam Bedau & Paul G. Cassell eds., 2004).

²⁹ *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 297–98.

³³ *Gregg v. Georgia*, 428 U.S. 153 (1976).

³⁴ *McCleskey*, 481 U.S. at 308 (“Although our decision in *Gregg* as to the facial validity of

McCleskey Court accepted, for the sake of argument, the race disparities described in the Baldus study, but concluded that the studies could not prove that intentional race bias affected *McCleskey*'s trial in particular.³⁵

In dissent, Justice Brennan framed the case as presenting a risk analysis issue: Did *McCleskey* demonstrate with sufficient probability that race influenced death sentencing in Georgia, and thus that the death penalty was not being imposed rationally and consistently as *Furman* mandated?³⁶ Justice Brennan believed *McCleskey*'s proof in the form of the Baldus study met the burden. He wrote, "[o]f the more than 200 variables potentially relevant to a sentencing decision, race of the victim is a powerful explanation for variation in death sentence rates—as powerful as nonracial aggravating factors such as a prior murder conviction or acting as the principal planner of the homicide."³⁷ Justice Brennan located the heart of the majority's opinion, not in a competing conception of Eighth Amendment arbitrariness, but rather in the Court's position that statistical race claims "would open the door to widespread challenges to all aspects of criminal sentencing."³⁸ Justice Brennan labeled this concern as "a fear of too much justice."³⁹

III. THE CONTINUED ROLE OF RACE IN THE OPERATION OF THE DEATH PENALTY

African Americans and other minority group members are overrepresented on death rows across the country.⁴⁰ Statistics continue to show that defendants are

the Georgia capital punishment statute appears to foreclose *McCleskey*'s disproportionality argument, he further contends that the Georgia capital punishment system is arbitrary and capricious in application, and therefore his sentence is excessive, because racial considerations may influence capital sentencing decisions in Georgia."); *see also id.* at 298 n.20 ("Although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent.").

³⁵ *Id.* at 292–93 ("[T]o prevail under the Equal Protection Clause, *McCleskey* must prove that the decision-makers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence.").

³⁶ *Id.* at 322–23 (Brennan, J., dissenting).

³⁷ *Id.* at 326.

³⁸ *Id.* at 339 ("[T]he Court next 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.").

³⁹ *Id.*

⁴⁰ As of January 2010, there are 3,261 defendants on death row in the United States of America, 44% of these defendants are white. The rest are minority defendants. *See* DEBORAH FINS, CRIMINAL JUSTICE PROJECT OF THE NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A.: WINTER 2010, 1 (2010), available at http://www.naacpldf.org/files/publications/DRUSA_Winter_2010.pdf.

more likely to be sentenced to death for killing a white victim than a black victim.⁴¹ Blacks are also executed disproportionately—and have been since 1976.⁴²

The political energy or capital necessary to secure an execution appears to exist when African Americans are convicted of killing white victims, but hardly ever when whites are convicted of killing African Americans. Since *Gregg*, two hundred and sixty-four executions have involved African-American defendants convicted of killing white victims. In contrast, only nineteen times since *Gregg* has a white person been executed for killing only an African-American victim.⁴³

Indeed, of the thirty-six jurisdictions that have imposed death since 1977, twenty-four jurisdictions have never executed a white person just for the murder of an African-American citizen.⁴⁴ Of the twelve jurisdictions that have imposed a death sentence on a white person for killing an African American, three jurisdictions have only done so when the defendant killed both white and black victims.⁴⁵

A. State-Level Discrepancies Focus on Race of the Victim

Researchers have continued to identify state-wide race disparities in the application of the death penalty. In addition to the detailed Baldus study, through state by state analysis, researchers have continued to show that race, and particularly race of victim, plays a significant role on the operation of the death penalty. For instance, Professors Gross and Mauro found by looking at hypothetical high-aggravation and low-aggravation cases in Oklahoma, North Carolina, Mississippi, Virginia, and Arkansas that the likelihood of receiving the death penalty was much higher for white-victim homicides than for black-victim homicides.⁴⁶ Studies in California,⁴⁷ Colorado,⁴⁸ Florida,⁴⁹ Illinois,⁵⁰ Kentucky,⁵¹

⁴¹ See *McCleskey*, 481 U.S. at 286.

⁴² To date, African Americans and minorities make up 44% of the individuals executed since 1976. See *Nat'l Statistics on the Death Penalty and Race*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976> (last visited June 11, 2010).

⁴³ See *infra* note 44.

⁴⁴ Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Montana, Nebraska, New Mexico, Nevada, Oregon, South Dakota, Utah, Washington, and Wyoming have never executed a white person for the murder of a black person. See *Searchable Execution Database*, DEATH PENALTY INFORMATION CENTER EXECUTION DATABASE, <http://www.deathpenaltyinfo.org/views-executions> (last visited Sept. 10, 2012).

⁴⁵ Timothy McVeigh, for instance, killed 129 white individuals, 32 African Americans, 2 Native Americans, and 5 Latino Americans. He was sentenced to death in federal court. Similarly, Frank Spisak in Ohio and Daryl Holton in Tennessee were executed for killing both white and black victims. Of the more than 1,300 executions since *Gregg*, only twenty-seven involved white defendants convicted of killing African Americans (and nine of these defendants killed both white and black victims).

⁴⁶ Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 74, 95 (1984).

Maryland,⁵² Missouri,⁵³ Nebraska,⁵⁴ New Mexico,⁵⁵ North Carolina,⁵⁶ and South Carolina⁵⁷ confirmed that race of victim plays a central role in the death penalty.

⁴⁷ Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990–1999*, 46 SANTA CLARA L. REV. 1, 19 (2005) (finding, after controlling for aggravating circumstances, that those who were convicted of killing white victims had a higher probability of being sentenced to death than those convicted of killing minority victims).

⁴⁸ Stephanie Hindson, Hillary Potter & Michael L. Radelet, *Race, Gender, Region and Death Sentencing in Colorado, 1980–1999*, 77 U. COLO. L. REV. 549, 553 (2006) (“Equally distressing is our finding that the odds of seeking a death sentence were much higher for those suspected of killing whites than for those suspected of killing blacks or Hispanics, and much higher for those suspected of killing white women than for other homicide suspects in the 110 cases where the death penalty was sought between 1980 and 1999.”).

⁴⁹ Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1, 28, 28 (1991) (noting that defendants convicted of killing whites were 3.42 times more likely to receive a death sentence than those suspected of killing blacks).

⁵⁰ Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois 1988–1997*, 81 OR. L. REV. 39, 43 (2002) (observing that sixty percent of all defendants with death sentences were convicted of killing at least one white victim).

⁵¹ Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976–1991*, 20 AM. J. CRIM. JUST. 17, 27 (1995) (concluding that juries considered the killing of a white by a black more deserving of the death penalty than other offender/victim racial combinations); Justin R. Arnold, Note, *Race and the Death Penalty After McCleskey: A Case Study of Kentucky’s Racial Justice Act*, 12 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 93, 100 (2005).

⁵² Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978–1999*, 4 MARGINS 1, 36 (2004) (concluding that “the odds that a death eligible defendant will be sentenced to death is almost four times higher if they kill a white victim than if no victim was white.”).

⁵³ Katherine Barnes, David Sloss & Stephen Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 338–39, 360 (2009) (noting interaction between geography and race, that “create[s] or exacerbate[s] large racial disparities in prosecution of capital offenses.”).

⁵⁴ David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999)*, 81 NEB. L. REV. 486, 662, 666 (2002) (noting interplay between geography and race to conclude that the administration of the Nebraska death penalty has an “adverse disparate impact” on racial minorities).

⁵⁵ Marcia J. Wilson, *The Application of the Death Penalty in New Mexico, July 1979 Through December 2007: An Empirical Analysis*, 38 N.M. L. REV. 255, 300 (2008) (“Moreover, the data strongly suggest that race, ethnicity, and gender affect the application of the death penalty in New Mexico. Prosecutors seem to be more likely to seek the death penalty and juries are more likely to vote for it if the victim is white, even though seventy percent of the homicide victims in New Mexico are Hispanic, American Indian, or black. Similarly, prosecutors are more likely to seek the death penalty and juries are more likely to vote for it if the victim is female.”).

⁵⁶ Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing In North Carolina, 1980–2007*, 89 N.C. L. REV. 2119, 2120 (2011) (“[T]he odds of a death sentence for those suspected of killing Whites are approximately three times higher than the odds of a death sentence for those suspected of killing Blacks”); ISAAC UNAH & JACK CHARLES BOGER, RACE AND THE DEATH PENALTY IN NORTH CAROLINA: AN EMPIRICAL ANALYSIS, 1993–1997, at 4 (2001), available at

A meta-review of all of the state-wide statistical studies, conducted by Professors David Baldus and George Woodworth, concluded that disparities exist based (solely) upon the race of the victim throughout the operation of the death penalty in the United States.⁵⁸

Indeed, at the state level, the intersection of race and gender appear to play the strongest role in determining who lives and who dies. When taking race and gender of the victim into account, defendants convicted of killing white females are far more likely to have received death sentences than defendants convicted of killing African-American or minority women.⁵⁹

B. *Federal Death Penalty*

The application of the federal death penalty appears similarly riddled with racial bias.⁶⁰ As the recent article *The Racial Geography of the Federal Death Penalty* noted,⁶¹ the statistics concerning the federal death penalty today mirror the statistics more than ten years ago when then Deputy Attorney General Eric Holder was “disturbed” and “troubled.” The article notes that in 2000, 80% of all cases in which a United States Attorney requested permission to seek the death penalty involved a minority defendant; second, 72% of the cases where the Attorney General authorized a capital prosecution involved minority defendants; and third, United States Attorneys sought death-authorization twice as often in cases involving black defendants and non-black victims as in cases involving black defendants and black victims.⁶² Evidence indicating the influence of race continues today. The ACLU Capital Punishment Project tracked statistics over the course of three separate Attorneys General in a report titled *The Persistent Problem of Racial Disparities in the Federal Death Penalty*:

<http://www.unc.edu/~jcboger/NCDeathPenaltyReport2001.pdf> (noting that the odds of receiving a death sentence rose by 3.5 times for defendants who murdered white persons).

⁵⁷ Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 761 (1983) (finding significant impact based upon race and geography, resulting in statistically significant disparity based upon race of victim).

⁵⁸ David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194, 198–203 (2003).

⁵⁹ Jefferson E. Holcomb et al., *White Female Victims and Death Penalty Disparity Research*, 21 JUST. Q. 877, 898 (2004).

⁶⁰ *Federal Death Row Prisoners*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/federal-death-row-prisoners> (last visited July 2, 2012).

⁶¹ G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, 433–34 (2010).

⁶² *Id.* (citing U.S. DEP’T OF JUSTICE, *THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988–2000)* (2000), available at <http://www.justice.gov/dag/pubdoc/dpsurvey.html>).

Across all three Attorneys General, the AG death penalty seek rate was 35% (146/416) in White victim cases, compared with 19% (212/1090) in all other cases. This represents a statistically significant 16-percentage point disparity between the two rates. It means that the risk of a death penalty authorization is 1.8 times higher (35%/19%) in White victim cases than in other cases. It also means that the risk of a death penalty authorization is 84% higher (16/19) in White victim cases than in other cases.⁶³

As of April 5, 2011, according to an affidavit by Kevin McNally, 484 defendants were authorized for a federal capital prosecution. Two hundred and forty-seven (51%) were African Americans; 127 (26%) were Caucasian; 88 (18%) were Hispanic; and 22 (5%) were other minorities.⁶⁴ Not only are African Americans and minorities overrepresented in the category of defendants authorized for federal capital prosecution, but African Americans are overrepresented in the category of defendants receiving the federal death penalty. Minorities constitute 35 of the 57 (60%) inmates on federal death row.⁶⁵ Two of the three defendants executed under the federal death penalty were people of color.⁶⁶

The Bureau of Justice Statistics indicates some 594,323 homicides between 1976 and 2005.⁶⁷ Datasets maintained by the Bureau of Justice Statistics reflect racial information on defendant and victim in 403,183 of these instances.⁶⁸ In the vast majority of these murders—359,651 (89%)—the crime was intra-racial (meaning black-on-black, white-on-white, minority-on-minority).⁶⁹ And yet the most salient feature of the federal death penalty appears to be that it is used most frequently for inter-racial offenses where the defendant is black and the victim is white. Thirty-three of the 57 (58%) current federal death sentences involved white victims.⁷⁰ And although minority-on-white killings make up an incredibly small

⁶³ ACLU CAPITAL PUNISHMENT PROJECT, THE PERSISTENT PROBLEM OF RACIAL DISPARITIES IN THE FEDERAL DEATH PENALTY 3 (2007), available at http://www.aclu.org/pdfs/capital/racial_disparities_federal_deathpen.pdf; see also Kevin McNally, *Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DEPAUL L. REV. 1615 (2004).

⁶⁴ Federal Death Penalty Resource Counsel, *Federal Death Penalty Statistics*, June 12, 2012, http://www.capdefnet.org/FDPRC/pubmenu.aspx?menu_id=94&id=2094.

⁶⁵ *Id.*

⁶⁶ See *Searchable Execution Database*, *supra* note 44. Timothy McVeigh is the only white person to have been executed under the federal death penalty in the modern era.

⁶⁷ See BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES (2007), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=966>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See Federal Death Penalty Resource Counsel, *supra* note 64.

fraction of the total number of murders, defendants convicted in these cases make up 23% of the federal death row.⁷¹

McCleskey challenges fail, however, because, as former federal prosecutor Rory Little observed: “Arguments about race disparity will never persuade supporters of capital punishment to the position of abolition, or even moratorium, for guilty, heinous, ‘high-end’ killers. Indeed, ‘race disparity’ appears to disappear in such high-end cases.”⁷²

Professor Little suggests that the Federal Death Penalty be limited to “high-end cases” of aggravation: “[R]eform of existing capital punishment structures, to truly narrow and limit their results to such indisputable high-end cases, is a solution that can appeal to supporters and opponents alike. Legislators and prosecutorial policymakers should turn their attention to such reforms now.”⁷³

The expansion of federal jurisdiction permits the federal government to seek capital punishment in the vast majority of handgun murders—killings involving drug deals or robberies. Yet capital punishment is sought in only a handful of federal cases. Race and geography appeared to play a strong role in which cases result in death. The vast majority of federal districts have not imposed a federal death penalty, and the majority of death sentences came out of a handful of districts. As the *Racial Geography of the Federal Death Penalty* observes, “the vast majority of the federal death sentences come from a narrow band of jurisdictions. While there are ninety-four federal jurisdictions, forty-three (75%) [federal] death sentences have come from sixteen districts; and just nine districts have returned nearly half (twenty-nine) of the death sentences.”⁷⁴ A significant number of these federal death penalty jurisdictions—such as the Eastern District of Virginia, the Eastern District of Louisiana, and the Eastern and Western Districts of Missouri—involved counties of offense (Orleans Parish; Richmond, Virginia; St. Louis; and Kansas City) that had rejected the death penalty. As such, the article noted, the Government transformed the demographics of the venire by choosing to prosecute federally.

The *Racial Geography of the Federal Death Penalty* observed that federal death sentences appear clustered in districts where the county of the offense was majority African American, but the decision to prosecute federally resulted in a transformation of the demographics resulting in a majority white jury. The decision to seek the federal death penalty appeared to occur in locations where the county of the offense had rejected the death penalty (either formally by state statute or constitutional amendment, or by local practice). We suggested that the discriminatory outcomes of federal death penalty prosecutions could be reduced

⁷¹ *Id.*

⁷² Little, *supra* note 17, at 1614.

⁷³ *Id.*

⁷⁴ Cohen & Smith, *supra* note 61, at 434.

by, *inter alia*, selecting juries from the county of the offense rather than the district or division at hand.⁷⁵

But it is possible, however, that the authors (or at least this author) of *The Racial Geography of the Federal Death Penalty* mistook the problem for the cure. Upon further reflection, might it be that race plays the greatest role in the administration of the death penalty at the county level, and that the anomalous distribution of the federal death penalty merely reflects the exploitation of this in a small number of jurisdictions? In this context, the limited number of federal jurisdictions that return federal death sentences prove the exception to the rule, that vengeance and retribution are generally local affairs driven in a limited number of communities. In this context, the cure is not prosecuting federal cases with juries from the county of offense but, rather, fully incorporating and rendering applicable to the states, through the full incorporation of the Fourteenth Amendment's Privileges and Immunities Clause, the Sixth Amendment's textual guarantee of a trial in the district of the offense.⁷⁶

IV. THE LOCAL LEVEL OF RETRIBUTION, RACISM, AND ARBITRARINESS

The lynch mob and the lethal injection are found in the same American neighborhoods. Where a lynching history is absent, there is a lower-than-average chance that executions take place.⁷⁷

States, themselves, have very little to be angry about. Beyond mass-killings, acts of terrorism, and cross-jurisdictional serial killings, states are largely interested in issues of governance. Anger, and as such retribution, is largely a local affair—and like an unhappy family—often unique in its own anger.⁷⁸ Social scientists have observed that retribution is perceived, particularly in the South, as local, community-level interest. Indeed, they suggest that the death penalty has survived politically because it is not seen as a statewide program, but rather as a

⁷⁵ An equal if not better solution, however, would be to simply ensure that no opportunity to discriminate existed—by eliminating the distinction between venues in state trials and federal trials.

⁷⁶ See Cohen & Smith, *supra* note 61, at 442 (noting that Reconstruction Amendments and federal legislation passed after the Civil War were directed at ensuring “a more diverse jury could be drawn from the entire federal district.”); see also *id.* at 442–43 (quoting Senator Coburn’s “rationale for broadening the geographic scope of the jury pool beyond the location where the crime occurred,” because “jurors [] taken from the State, and not the neighborhood [] will be able to rise above prejudices or bad passions or terror more easily.”).

⁷⁷ FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 118 (2003); see also David Jacobs, Jason T. Carmichael & Stephanie L. Kent, *Vigilantism, Current Racial Threat, and Death Sentences*, 70 AM. SOC. REV. 656, 657 (2005); Press Release, Ohio State Univ. Research Commc’ns, *Death Sentences Linked to History of Lynching in States*, available at <http://researchnews.osu.edu/archive/dthpity.htm> (last updated Sept. 26, 2005).

⁷⁸ LEO TOLSTOY, *ANNA KARENINA* 1 (Helen Edmundson trans., Nick Hern Books 1994) (1878) (“Happy families are all alike; every unhappy family is unhappy in its own way.”).

local endeavor subject to the discretion of county-level actors.⁷⁹ Looking at the death penalty at a county-level of operation reveals the sordid influence of race and vitiates the validity of retribution as a constitutional purpose.

Addressing racial inequity that arises at the county level also offers evidence of intentionality that either is hidden or does not exist at a state-wide level. For instance, in the modern death penalty era, juries have imposed twenty death sentences in the Caddo Parish courthouse.⁸⁰ This includes fifteen death sentences imposed upon African Americans.⁸¹ Ten death sentences have been imposed on African-American defendants charged with the murder of a white victim.⁸² Five death sentences involve a white defendant convicted of a crime against a white victim.⁸³ No white defendant has ever been sentenced to death in Caddo Parish for killing an African-American victim.⁸⁴ Investigation into the circumstances of

⁷⁹ See *infra* notes 80–83.

⁸⁰ See Alex Mikulich & Sophie Cull, *Jesuit Soc. Research Inst., Diminishing All of Us: The Death Penalty in Louisiana* 14 (2012), http://catholicismobilizing.org/wp-content/uploads/2012/03/Death-Penalty-in-Louisiana_Full.pdf.

⁸¹ *Id.* These African-American defendants sentenced to death for killing African-American victims in Caddo Parish are: Lamondre Tucker, Darryl Draughn, Corey Williams, Michael Cooks, and James Tyler.

⁸² *State v. Dorsey*, 74 So. 3d 603, 638–39 (La. 2011) (“There are very few potential sources of passion, prejudice, or other arbitrary factors in the instant case, aside from the allegations that: (1) racism pervades Caddo Parish, which defendant contends is the best predictor of who will face a capital prosecution in that parish; and (2) the potentially actual perpetrator of the murder, Randy Wilson, escaped capital prosecution by presenting false testimony against defendant . . . Beyond those concerns, the record does not reveal any potential indicia of passion, prejudice, or arbitrariness. Defendant, an adult black male, killed a white retired fireman and received a sentence of death from a jury consisting of eleven whites and one black”); *State v. Campbell*, 983 So. 2d 810, 875 (La. 2008) (“Otherwise, we note that this was a trial of a young, African-American man accused of killing a 51-year old Caucasian woman during an armed robbery The UCSR indicates that the jury which unanimously found the defendant guilty of first degree murder and sentenced him to death was composed of eleven white jurors and one black juror.”); *State v. Coleman*, 970 So. 2d 511, 514 (La. 2007) (finding a *Batson* violation where Court observed that prosecutor’s explanation for striking an African-American juror was “[t]here is a black defendant in this case. There are white victims.”); *State v. Edwards*, 750 So. 2d 893, 913 (La. 1999) (“Although the victim was white and the defendant black, there is no indication that race played a part in the crime.”); *State v. Hampton*, 750 So. 2d 867 (La. 1999) (white victim and African-American defendant); *State v. Davis*, 637 So. 2d 1012 (La. 1994) (white victim and African-American defendant); *State v. Code*, 627 So. 2d 1373 (La. 1993) (African-American defendant and white victims), *State v. Ford*, 489 So. 2d 1250 (La. 1986) (African-American defendant and white victim); *State v. Wilson*, 79 So. 3d 1265 (La. Ct. App. 2012) (African-American defendant and white victim, death sentence reversed based upon defendant’s age at time of offense).

⁸³ *State v. Mickelson*, 51 So. 3d 3 (La. 2010) (mem.); *State v. Holmes*, 5 So. 3d 42 (La. 2008); *State v. Irish*, 807 So. 2d 208 (La. 2002); *State v. Deal*, 802 So. 2d 1254 (La. 2001); *State v. Davis*, 26 So. 3d 802 (La. Ct. App. 2009) (victim is white child age five; offense was aggravated rape not murder).

⁸⁴ See Mikulich & Cull, *supra* note 80, at 18.

Caddo Parish reflects a historical connection to race, that may be more obvious than in other parishes.



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Understanding death sentences requires a county (or parish) level focus. While statewide data may indicate generally that African-American defendants are disproportionately represented on death row, it does no more than provide the general data similar to the Baldus study in *McCleskey*. Moreover, statewide data concerning states like Louisiana is unable to assimilate the circumstances of parishes, such as Orleans and Lafayette, that have for all basic purposes stopped imposing death sentences. Indeed, all statewide data can suggest is that the arbitrariness arises from differences in localized determinations concerning whether to seek a death sentence. Focusing on specific parishes, however, reveals both the extent, and origins of, race discrimination.

⁸⁵ Photo courtesy of Cecelia Trenticosta. The Caddo Parish Commission voted to take the Confederate Flag down on November 6, 2011, after more than a sixty-year presence in front of the Caddo Parish Courthouse. The monument to the Confederacy's Last Stand remains in front of the Courthouse. *Id.* at 13.

While the notion of retribution has existed in the criminal law for thousands of years, the late part of the nineteenth century and early part of the twentieth century saw a re-birth in reliance on retribution, especially in the South, at a county level, as part of a political order to conform the community and ameliorate the tendencies of the mob. This reliance on retribution as a basis for the death penalty in post-Reconstruction America is one explanation for why the death penalty exists still in America while it has been discarded by the rest of western civilization.⁸⁶

A. The Connection Between Community and the Racial Geography of Retribution

A wide variety of sociological research has noted the corollary between support for vigilante justice and support for the death penalty:

Whites who distrust the government are significantly more likely to support capital punishment. In addition, the main effect of the vigilante tradition is significant. Net of a wide array of individual attributes and features of the social context, whites who reside in states where lynching was more prevalent during the latter part of the nineteenth and early part of the twentieth centuries are significantly more likely than others to support the death penalty.⁸⁷

Indeed, in his seminal book on the death penalty, *The Contradictions of Capital Punishment*, Professor Zimring notes that the death penalty is oddly cherished most where Americans trust government the least.⁸⁸ This lacuna in reasoning depends on citizens understanding the death penalty as a uniquely local act, explaining why “the lynching patterns of a century ago [are] a *better* predictor of current levels of official execution than the patterns of official execution during the lynching period.”⁸⁹

Historians have also observed that lynchings themselves were not evenly distributed across the South,⁹⁰ but clustered in county or region.⁹¹ Numerous

⁸⁶ This re-birth of retribution as a purpose for the death penalty was itself in response to nineteenth century efforts to abolish capital punishment. As Professor Jeffrey Kirchmeier observed, “in the early 1800s, a religious revival fueled the anti-death penalty cause as well as other humanitarian issues. ‘By the 1830s, constituents were flooding state legislatures with petitions demanding an end to capital punishment.’” Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 7 (2002) (citing David Greenberg, *The Unkillable Death Penalty*, SLATE MAG. (June 2, 2000), http://www.slate.com/articles/news_and_politics/history_lesson/2000/06/the_unkillable_death_penalty.html).

⁸⁷ Steven F. Messner, Eric P. Baumer & Richard Rosenfeld, *Distrust of Government, the Vigilante Tradition, and Support for Capital Punishment*, 40 LAW & SOC’Y REV. 559, 579 (2006).

⁸⁸ ZIMRING, *supra* note 77, at 112–13.

⁸⁹ *Id.* at 110.

⁹⁰ Still, as has been noted, the fourteen states with one hundred or more lynchings in the

sociologists have further noted the correlation between lynchings and the current use of the death penalty.⁹² Professor Zimring, for instance, finds a statistical association between past lynching and current executions. By locating the death penalty as an extension of a vigilante tradition, Zimring explains how the racial overtones associated with lynching continue to motivate the legalization and use of capital punishment.⁹³

Authors Ryan King, Steven Messner, and Robert Baller note “[h]istory reveals clues to contemporary criminal justice behavior” and illustrate the current consequences of conflict-laden histories.⁹⁴ They explained:

Our research investigates the association between legacies of past lynching and contemporary law enforcement responses to hate crimes. We regard the lynching of blacks nearly a century ago as indicative of two conditions pertinent to this research. First, lynching was perhaps the most egregious expression of overt prejudice and demands for white supremacy during the Jim Crow era. Second, lynching dramatically depicts the state’s failure to protect a racial minority group from violent, extra-legal social control.⁹⁵

This local circumstance of lynching appears to play out in the administration of capital punishment schemes. A map of lynchings throughout this era developed by the Tuskegee Institute reflects that lynchings were not equally spread out across counties throughout the South, but rather clustered in specific counties.

United States from 1882–1968 (Mississippi, Georgia, Texas, Louisiana, Alabama, Arkansas, Florida, Tennessee, Kentucky, South Carolina, Missouri, Oklahoma, North Carolina, and Virginia) account for the top ten states in legal executions since *Gregg*: Texas, Virginia, Missouri, Florida, Oklahoma, Georgia, Louisiana, South Carolina, Arkansas, and Alabama.

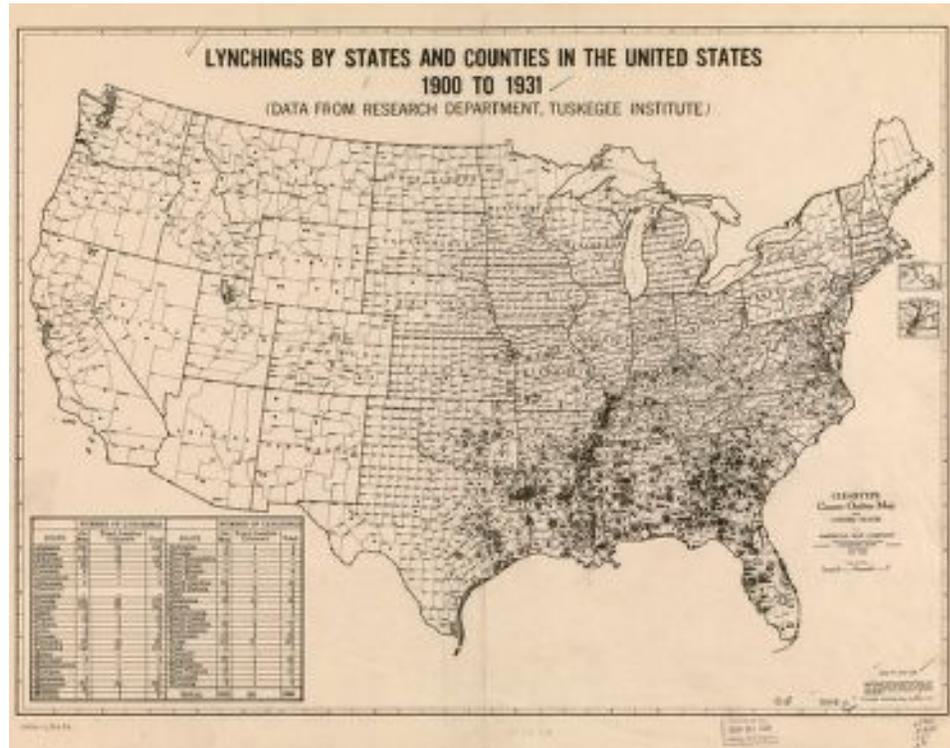
⁹¹ STEWART E. TOLNAY & E. M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHING, 1882–1930 50 (1995); *see also* Stewart E. Tolnay, Glenn Deane & E. M. Beck, *Vicarious Violence: Spatial Effects on Southern Lynchings, 1890-1919*, 102 AM. J. SOC. 788, 791 (1996) (noting that lynching was not distributed evenly across the Southern region. Rather, these incidents were clustered in geographic space).

⁹² *See also* Steven F. Messner, Robert D. Baller & Matthew P. Zevenbergen, *The Legacy of Lynching and Southern Homicide*, 70 AM. SOC. REV. 633, 634 (2005) (suggesting that “the legacy of lynching during this dark era of America’s past may help explain variation in the level of homicides within the South in more contemporary times”).

⁹³ Ryan D. King, Steven F. Messner & Robert D. Baller, *Contemporary Hate Crimes, Law Enforcement, and the Legacy of Racial Violence*, 74 AM. SOC. REV. 291, 293 (2009) (citing ZIMRING, *supra* note 77, at 114–15).

⁹⁴ *Id.* at 311.

⁹⁵ *Id.* at 292.



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Lynchings and other racial violence were pervasive in the South during the period after Reconstruction. As explained by scholars on the subject, “the scale of this carnage means that, on the average, a black man, woman, or child was murdered nearly once a week, every week, between 1882 and 1930 by a hate-driven white mob.”⁹⁶

However, it is significant to note that lynching in the South was not merely “vigilante justice.” African-Americans were not lynched in the Deep South because of a lack of judicial resources. Rather,

[t]he arbitrary nature of lynching also had a powerful effect on the lives of blacks. Because any act perceived as racial insubordination could trigger violence, lynching imposed social, educational, and political controls on black life. While laws restricting the civil rights of blacks were external prohibitions on black advancement, lynching encouraged

⁹⁶ *Lynchings by States and Counties in the United States, 1900-1931*, LIBR. OF CONG., available at [http://memory.loc.gov/cgi-bin/query/r?ammem/gmd:@field\(NUMBER+@band\(g3701e+ct002012\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/gmd:@field(NUMBER+@band(g3701e+ct002012))) (last visited June 24, 2012).

⁹⁷ Phyllis E. Bernard, *Eliminationist Discourse in a Conflicted Society: Lessons for America from Africa?*, 93 MARQ. L. REV. 173, 180 (2009).

blacks to curb their own behavior, to turn away from opportunities for advancement, and to restrict their own individual and community growth and development.⁹⁸

Lynchings and massacres were an essential element of the post-Reconstruction effort of white Democrats to re-seize power in the South.

Indeed, the historic circumstance of lynching, and the state and federal acquiescence to the angry mob are not disconnected from the political circumstances that exist today. Rather, as demonstrated in Charles Lane's *The Day Freedom Died: The Colfax Massacre, The Supreme Court, and the Betrayal of Reconstruction*, there is a direct line between the federal government's failure to redress civil rights violations, and the political system that exists in much of the South today.⁹⁹

Authors Cecelia Trenticosta and Will Collins document the vigilante violence that occurred in northern Louisiana—not in the context of misguided law enforcement—but rather as part of what can only be described as a genocide:

1868 was an especially bloody year in a bloody decade for Caddo Parish, with at least 154 blacks killed almost exclusively by white perpetrators. In September of 1868, white vigilantes hunted down, tortured, and killed nearly 100 freedmen in the Caddo-Bossier area, with at least fifty more believed by the Bureau to have gone unreported

General lawlessness abounded in Caddo in the 1870s. A Caddo Parish judge testified before a congressional committee in 1875 that it “was not an uncommon thing for a colored man to be found dead.” Indeed, the killing of a black by a white was not considered murder by whites in Caddo and no local grand jury would indict a white for such a murder Between 1865 and 1876, at least 416 blacks were killed in Caddo Parish Mob violence erupted in the Caledonia settlement, about twenty-five miles south of Shreveport, in 1878. The riot initially involved about seventy-five blacks and twenty whites, but as most blacks were unarmed, the whites quickly drove them to the swamps and other hiding places. As white reinforcements arrived, a “negro hunt” began. At least twenty blacks were tortured and murdered that night

The culture of lynching steadied as Shreveport grew in the 1890s and early 1900s Congressional commissions deemed the parish

⁹⁸ Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 LAW & INEQ. 263, 287 (2003).

⁹⁹ CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* (2008).

“Bloody Caddo” and those who took part in the violent intimidation of blacks and Republicans the “Caddo Parish Bulldozers.” After five blacks were lynched in rural Caddo in December of 1914, the Louisiana Prison Reform Association called the lynchings a “regression into the barbarism of the dark ages.”¹⁰⁰

Scholars have observed that throughout the South, lynching was in fact a “means of political and social control over minorities.” America’s archetype and reality of race-based lynchings may have appeared random, spasmodic, or isolated. However, they served specific functions:

First, to maintain social order over the black population through terrorism [namely, by unleashing lethal mob violence for seemingly minor infractions of “caste codes of behavior”]; second, to suppress [or] eliminate black competitors for economic, political, or social rewards; third, to stabilize the white class structure and preserve the privileged status of the white aristocracy.¹⁰¹

Lynching in much of north Louisiana during the period when federal troops left as part of the Hayes-Tilden¹⁰² Compromise had the direct effect of securing an all white, all Dixie-Democrat Louisiana Constitutional Convention in New Orleans in 1898.¹⁰³ Sarma and Smith observe that:

¹⁰⁰ Cecelia Trenticosta & William C. Collins, *Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 125, 130–31 (2011).

¹⁰¹ Bernard, *supra* note 97, at 182.

¹⁰² As many authors have noted, “By the end of the nineteenth century, the citizenship rights won by the former slaves after the Civil War had been stripped of all but their ceremonial meaning in a series of political deals like the Hayes-Tilden Compromise in 1876. There, to settle a presidential election dispute that threatened a renewed civil war, the North, in order to secure the presidency for the Republican, Hayes, agreed to withdraw federal troops from the South, leaving the already hard-pressed blacks to the not too tender mercies of the former slave owners.” Derrick Bell, *Learning the Three “I’s” of America’s Slave Heritage*, 68 CHI.-KENT L. REV. 1037, 1041 (1993); *see also* W. E. BURGHARDT DU BOIS, *BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880* 670 (1935); ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877* 575–87 (1988); C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* (Doubleday Anchor Books rev. ed. 1956).

¹⁰³ Recent focus on this history has connected the historic and political circumstances of the period after Reconstruction with the modern criminal justice issues. *See* Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361, 374–76 (2012).

After employing brute force to capture the Louisiana government in the 1870s, the Democrats used the 1898 Constitutional Convention to steal suffrage from African-American citizens. As the Convention's President, Ernest Benjamin Kruttschnitt revealed that the sinister purpose of the Convention was to create a racial architecture in Louisiana that could circumvent the Reconstruction Amendments and marginalize the political power of black citizens. The Chairman of the Convention's Judiciary Committee, Judge Thomas Semmes, held nothing back: "We [are] here to establish the supremacy of the white race, and the white race constitutes the Democratic party of this State." Or, as Judge Wisdom wrote, "[t]he Convention of 1898 interpreted its mandate from the [Louisiana] people to be, to disfranchise as many Negroes and as few whites as possible."¹⁰⁴

It is not that all of Louisiana (or Alabama, South Carolina) suffer from the circumstances of this racial violence. And state-wide inquiry mediates the influence of race. But localized focus demonstrates that in some locations the power secured through racial violence still permeates the political discourse. Focusing on specific communities where lynching occurred—especially those that correlate with locations which rely heavily on capital punishment—reveals the heightened racial geography of the landscape. This focus may explain factors that cause some juror-citizens to see a fellow human-defendant as less than human. As cognitive scientist David Livingstone Smith writes, "thinking of humans as less than human" is essential to the thinking that *allows* one human being to exterminate another human being in "cold blood."¹⁰⁵ This research may reflect how one community comes to accept, incorporate African-American citizens, and offer the possibility of restorative justice while another community comes to generate the moral imperative that *requires* one human being to exterminate another, to insist on retribution.

B. *The Local Geographic Circumstances of Race and Retribution in the Death Penalty*

Inquiry into the death sentences imposed over the last ten years supports consideration of local geography. The death penalty operates at a county level, much like lynchings in the 1900–1930s. This is not to suggest an exact correlation between the counties that impose the death penalty today and the counties that had multiple lynchings during this post-Reconstruction period. Nevertheless, death

¹⁰⁴ *Id.* at 374–75.

¹⁰⁵ DAVID LIVINGSTONE SMITH, *LESS THAN HUMAN: WHY WE Demean, ENslave, AND EXTERMINATE OTHERS* 15, 203 (2011).

sentences are concentrated in very few jurisdictions, a number of which had significant histories of lynchings.

The clustering of death sentences in a limited number of counties provides the opportunity to obtain hard data on the level of racism that permeates the death penalty in America. Moreover, the broad correlation between counties with high death sentencing rates today and counties that had multiple lynchings in the early 1900s justifies specific inquiry.

A county focus is appropriate because it is often the level at which charging decisions are made, venires are conformed, publicity generated, and the interplay of race exists. Moreover, because retribution—a keystone to the constitutionality of capital punishment schemes—operates at the county level, scrutiny of county-level discrepancies is appropriate.

While there are 3,141 counties in the country, just 29 counties are responsible for roughly 44% of the death sentences imposed between 2004-2009.¹⁰⁶ In *The Geography of the Death Penalty and its Ramifications*, Professor Robert Smith notes that an understanding of America's death penalty requires a review of county-level sentencing schemes.¹⁰⁷ The article observes that 90% of the counties in the country have not imposed a death sentence between 2004 and 2009, and that executions do not occur in 99% of the counties in the country.¹⁰⁸

Indeed, even in the states that impose the death penalty regularly, the majority of counties do not. Eight states accounted for more than two-thirds of sentences returned anywhere in the United States from 2004 to 2009.¹⁰⁹ A significant majority of counties within these busiest death-sentencing states did not sentence anyone within that same time period.¹¹⁰ Within those few counties within the busiest states that do return death sentences (for example, one-third of California counties returned a single death sentence) few still account for a disproportionate number of the state's total sentences (for example, three California counties account for more than half of death sentences imposed from 2004 to 2009).¹¹¹ Indeed, there are so few counties in the country that regularly return death sentences that it makes more sense to gauge death sentencing at the county level: 10% of counties in the country imposed a death sentence between 2004 and 2009.¹¹² Fewer than 5% of counties sentenced to death two or more offenders.¹¹³

¹⁰⁶ The author also notes: "This clustering is not as surprising as it seems at first blush. County size varies widely." Nonetheless, the extreme nature of the distribution suggests a freakishness that extends beyond size effects. Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 227 n.1, 228, 233 (2012).

¹⁰⁷ *Id.* at 228.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 230–31.

¹¹⁰ *Id.* at 228.

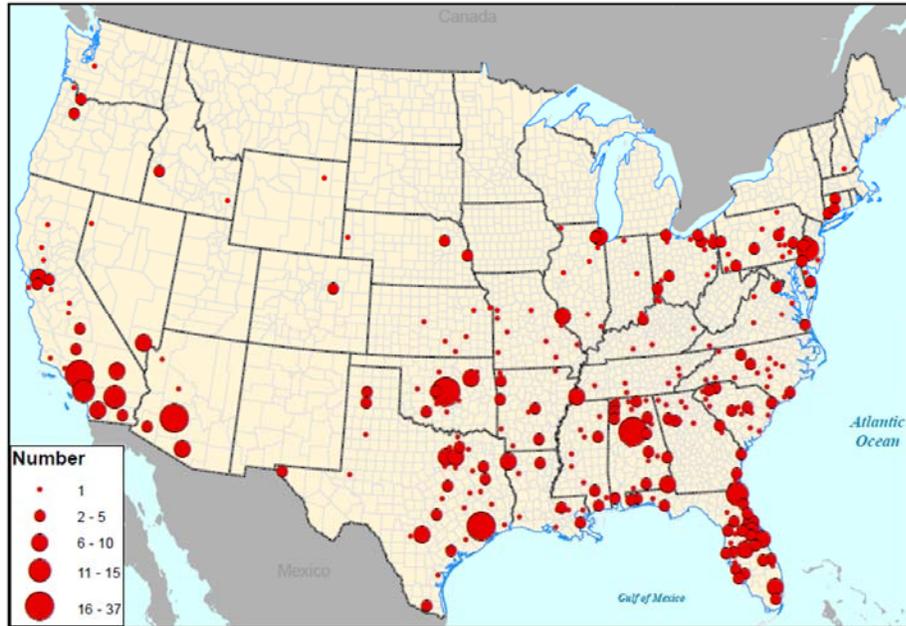
¹¹¹ *Id.* at 231.

¹¹² *Id.* at 228.

¹¹³ *Id.* at 233.

Less than 1% of counties in the country sentenced people to death at a rate of one or more new sentences per year.¹¹⁴ That 1% of counties accounts for nearly half of all death sentences imposed.¹¹⁵

Death Penalty Sentences by County: 2004 to 2009



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The same idiosyncratic distribution of executions reflects both the dearth of support for capital punishment throughout the majority of the country, along with—Ohio and parts of Kentucky aside—the fact that the death penalty is for all practical purposes a Southern practice, limited even in the South to a small number of counties.

Robert J. Smith’s study, *The Geography of the Death Penalty and Its Ramifications*, demonstrates that the death penalty has essentially been abandoned in the vast majority of the communities across the country, and that only a sliver of counties nationwide retain and use the death penalty.¹¹⁷ Smith observes, “[t]he geographic distribution of death sentences reveals a clustering around a narrow band of counties: roughly 1% of counties in the United States returned death sentences at a rate of one or more sentences per year from 2004 to 2009.”¹¹⁸ The

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 234 (crediting the sources of the image: the American Judicature Society and tabulations by the Charles Hamilton Houston Institute based on published news sources).

¹¹⁷ *Id.* at 227.

¹¹⁸ *Id.* at 228.

majority of these death sentencing counties are south of the Mason-Dixon line. Moreover, they are the exception to the rule of abolition.

A county-level scrutiny provides a clearer picture concerning the influence of race. While state-wide analysis suggests only that race of the victim plays a role in the administration of the death penalty, the state-wide analysis also misleadingly underestimates the influence of the defendant's race, the influence of inter-racial murders, and the circumstance of geography.

Efforts to look at specific counties and identify race-specific circumstances have begun to emerge. Professor Scott Phillips recently observed that a "comprehensive review of the literature" failed to look at the specific jurisdictions in which the death penalty is imposed. He noted that Harris County, for instance, had more executions than any other state besides Texas itself, and when just Harris County is examined, evidence of racial bias emerges that is not seen on a state level.¹¹⁹

State-wide statistical analysis can mask the influence of defendant-race bias. Counties with small populations, little diversity, and few murders may return death sentences where the victim is white but have no opportunity to discriminate based upon race of defendant. Professor Phillips observed that state-wide analysis produces the "conventional wisdom . . . that the race of the victim is pivotal, but the race of the defendant is not."¹²⁰ However, Professor Phillips's county-level research in Houston County suggests that "the race of the defendant and victim are both pivotal in the capital of capital punishment: death was more likely to be imposed against black defendants than white defendants, and death was more likely to be imposed on behalf of white victims than black victims."¹²¹

A county-level study of death sentences in East Baton Rouge (the capital of Louisiana and one of the leading death parishes) similarly discovered, after reviewing hundreds of homicides, that a significant corollary existed between death sentences and intra-racial killings, where the defendants were black and the victims white:

[A] statistically significant relationship [emerges] between the imposition of a death sentence and the combination of the race of the defendant and the race of the victim . . . 30% of the blacks convicted of killing whites were sentenced to death, followed by 12% of the whites convicted of killing whites and 8.3% of the blacks convicted of killing blacks. None of the three whites convicted of killing blacks was sentenced to death. This relationship is statistically significant, with

¹¹⁹ *Id.* at 238 n.61.

¹²⁰ Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. 807, 811 (2008).

¹²¹ *Id.* at 811-12.

inter-racial homicides with white victims far more likely to end with a death sentence than intra-racial homicides.¹²²

And a study of local communities in Arkansas similarly revealed significant evidence of racial disparity in southwest Arkansas, not seen on the state level.¹²³ A state-wide study of the death penalty in Missouri revealed the overlap between geographic and racial factors, observing: “Nevertheless, this study demonstrates that, in Missouri, local community standards play a crucial role in the decision-making process that determines whether a convicted murderer lives or dies.”¹²⁴ While courts routinely reject statistical claims of race discrimination in state and federal cases and federal government lawyers have begun to deride these claims as “perfunctory in modern federal capital cases,”¹²⁵ tracing the impact of race at a county-level provides an opportunity to assess the probability of racial bias in acts of individual prosecutors and local decision makers. Localized analysis also reveals that the problem is more troubling than generalized state-wide and federal studies have shown. Perhaps even more significantly, it explains how retribution—working at a local level—is inexorably connected to race.

V. THE LEGAL LANDSCAPE OF RETRIBUTION

Traditionally, three social purposes (or penological justifications) undergirded the constitutionality of capital punishment: incapacitation, deterrence, and retribution. The first rationale is in serious doubt, however. As Justice Stevens wrote in *Baze v. Rees*, “the recent rise in statutes providing for life imprisonment without the possibility of parole demonstrates that incapacitation is neither a necessary nor a sufficient justification for the death penalty.”¹²⁶

The second rationale remains in dispute. Stevens continued: “Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders. In the absence

¹²² Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990–2008*, 71 LA. L. REV. 647, 661 (2011).

¹²³ David C. Baldus, Julie Brain, Neil A. Weiner & George Woodworth, *Evidence of Racial Discrimination in the Use of the Death Penalty: A Story from Southwest Arkansas (1990–2005) with Special Reference to the Case of Death Row Inmate Frank Williams, Jr.*, 76 TENN. L. REV. 555, 585 (2009). The study observed that in specific locations “[b]lack defendants are at greater risk of advancing procedurally and ultimately receiving a death sentence than other defendants . . . indeed, every death-sentenced case involved a black defendant and white victim.”

¹²⁴ Barnes, Sloss & Thaman, *supra* note 53, at 308.

¹²⁵ Cf. Brief for Plaintiff at 1, *United States v. Edison Burgos Montes*, No. 06–009 (JAG)(D.P.R. Jan. 9, 2012).

¹²⁶ *Baze v. Rees*, 553 U.S. 35, 78 (2008) (Stevens, J., concurring).

of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment.”¹²⁷

Justice Stevens, therefore, saw the third justification—retribution—as the driving force for the death penalty.¹²⁸ The relationship between race and retribution, however, perverts the underlying social purpose that justifies the death penalty’s continued constitutionality.¹²⁹

The legal landscape of the modern death penalty reflects an uncomfortable accommodation of retribution as a basis for imposing the death penalty. Focusing on the invalidity of retribution as a constitutional basis for imposition of the punishment transforms the question of punishment into a concern over the availability of incapacitation. It generates the question whether a community has given up the moral authority to impose retribution through execution.

A. *Kennedy v. Louisiana: Retribution Contradicts the Law’s Own Ends*

In *Kennedy v. Louisiana*, the Court confessed that its capital jurisprudence is “still in search of a unifying principle.”¹³⁰ If the Court’s jurisprudence cannot identify a single unifying principle for capital punishment, there nonetheless is an unquestionable unifying flaw: arbitrariness in the inability to identify a legitimate basis for distinguishing the very few murderers who receive a death sentence from those who are eligible but spared.

In *Kennedy v. Louisiana*, the Court noted only two constitutionally acceptable bases for imposition of the death penalty—“deterrence, and retribution.”¹³¹ The Court explained that retribution “reflects society’s and the victim’s interests in seeing that the offender is repaid for the hurt he caused.”¹³² However, the Court warned: “It is the last of these, retribution, that most often can contradict the law’s own ends When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.”¹³³

¹²⁷ *Id.* at 79.

¹²⁸ *Id.* at 79–80 (“We are left, then, with retribution as the primary rationale for imposing the death penalty. And indeed, it is the retribution rationale that animates much of the remaining enthusiasm for the death penalty.”).

¹²⁹ *Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008) (explaining that the death penalty is unconstitutionally “excessive when it . . . does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence.”).

¹³⁰ *Id.* at 437; see also Bidish Sarma, *Still in Search of a Unifying Principle: What Kennedy v. Louisiana and the Supreme Court’s Denial of the State’s Petition for Rehearing Signal for the Future*, 118 *YALE L.J. Pocket Part* 55, 59 (2008).

¹³¹ *Kennedy*, 554 U.S. at 441.

¹³² *Id.* at 442.

¹³³ *Id.* at 420.

Though unmentioned in *Kennedy*, it appears that Justice Kennedy was invoking the sordid origins of retribution in the Court's capital jurisprudence. And his concern about the use of retribution as a constitutional basis for imposing a death sentence warrants significant attention.

B. *Original Sins: The Eighth Amendment Accommodation of the Angry Mob*

The originating Eighth Amendment jurisprudence which forms the structure for the modern death penalty depends on retribution. In 1972, the United States Supreme Court struck down the death penalty in *Furman v. Georgia* because no principled basis existed to distinguish the few people sentenced to death from thousands of others who committed crimes as bad or worse but were not sentenced to death.¹³⁴ The multiple opinions issued by the Justices presented a multiplicity of rationales for abolishing the death penalty, but race, retribution, and arbitrariness were the trilogy of themes.¹³⁵ Justice Stewart's concurrence found that "retribution is a constitutionally [p]ermissible ingredient in the imposition of punishment," because "[t]he instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law."¹³⁶ "When . . . organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,'" Justice Stewart continued, "then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law."¹³⁷

Justice Stewart's view later won the day in *Gregg v. Georgia*, where the Court observed that "capital punishment is an expression of society's moral outrage at particularly offensive conduct," which, though "unappealing to many," remains "essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs."¹³⁸

Though it recognized that retribution was "no longer the dominant objective of the criminal law" and "may be unappealing to many," it held that retribution

¹³⁴ See *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring) ("I simply conclude that the *Eighth* and *Fourteenth Amendments* cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.").

¹³⁵ Justices Stewart, White, and Douglas authored narrow opinions controlling the outcome that are cited as representing the holding of *Furman*. See James S. Liebman & Lawrence C. Marshall, *Less is Better: Justice Stevens and the Narrowed Death Penalty*, 74 *FORDHAM L. REV.* 1607, 1614 (2006). In *Gregg*, the Court described the opinions of Justice Stewart and White as the holding. "Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds—Mr. Justice Stewart and Mr. Justice White." *Gregg v. Georgia*, 428 U.S. 153, 169 n.12 (1976).

¹³⁶ *Furman*, 408 U.S. at 308 (Stewart, J., concurring).

¹³⁷ *Id.*

¹³⁸ *Gregg*, 428 U.S. at 183.

performed a necessary act of expressing the community's anger. In words that do nothing but continue to astonish as they locate the source of authority for the death penalty, the Court held that the death penalty is acceptable because it satisfies and channels the instinct for retribution, and thus prevents "the seeds of anarchy—of self-help, vigilante justice, and lynch law."¹³⁹

Gregg continued what had been almost a century of practice in which the death penalty through the courts served as a release valve for the illegitimate and illegal efforts at intimidation through lynching.

As Carol and Jordan Steiker observe in *Crimes And Punishment: Capital Punishment: A Century Of Discontinuous Debate*, in the early part of the twentieth century, "the death penalty [was seen] as a necessary antidote to lynching."¹⁴⁰ They noted that

[s]upporters of capital punishment urged that the maintenance of the death penalty was a necessary antidote to lynching; indeed, it may well be that some who might otherwise have opposed the death penalty came reluctantly to support it as a lesser evil, given that the anti-lynching voices tended to come from the more politically progressive members of communities in which lynching was most prevalent.¹⁴¹

VI. THE CONSTITUTIONAL SIGNIFICANCE OF THE RACIAL ORIGINS OF RETRIBUTION

This is what is at stake: To the extent that the death penalty relied upon retribution to establish the constitutionality of capital punishment under the Eighth Amendment, capital punishment's effort to appease the angry lynch-mob raises constitutional concerns under the Fourteenth Amendment. As the United States Supreme Court recently explained in *Snyder v. Louisiana*:

In other circumstances, we have held that, once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative. See *Hunter v. Underwood*, 471 U.S. 222, 228, 105 S. Ct. 1916, 85 L. Ed. 2d 222 (1985).¹⁴²

¹³⁹ *Id.*

¹⁴⁰ Carol S. Steiker & Jordan M. Steiker, *Centennial Symposium: A Century of Criminal Justice: I. Crimes And Punishment: Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 646 (2010).

¹⁴¹ *Id.* at 649.

¹⁴² *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008).

One of the failures of *McCleskey* was that it permitted the legitimacy of retribution as a valid basis for imposing a death sentence, even though the purpose of retribution was to accommodate racialized vigilante “justice.” In *McCleskey*, defendants took on the burden of using statistical evidence to prove that the system was racially biased, rather than focusing on how retribution was inexorably connected to race-based motivations, vitiating the validity of capital punishment.

Retribution was deemed a constitutionally valid purpose for imposing a death sentence rather than a life sentence, because executions appeased the angry mob and limited the legacy of lynching. When a movement arose in post-Reconstruction Louisiana, for instance, to abolish the death penalty, editorials opposed the campaign noting that capital punishment was necessary to reduce and prevent lynching:

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?¹⁴³

However, what is significant about the origins of post-Reconstruction reliance on retribution in response to an explosion of lynchings and mob rule¹⁴⁴ was that the Court embraced the death penalty rather than prosecuting the lynchers. Lynching and mob rule were pervasive because of the failure of political will and moral commitment of the Court in cases such as *Cruikshank*¹⁴⁵ and *Shipp*¹⁴⁶ to protect the rights of citizens.

¹⁴³ See, e.g., Mikulich & Cull, *supra* note 80, at 13.

¹⁴⁴ The demographic consequences of this history of lynching, and the ascendance of white political power occurred across the South. See Ifill, *supra* note 98, at 273–74. Ifill notes that “Reconstruction ushered in a period of tremendous economic and educational advancement and widespread political participation by blacks Blacks also made tremendous political gains during this period. Thousands of blacks were registered to vote after the 1870 passage of the Fifteenth Amendment. It is estimated that 700,000 blacks voted in the 1872 presidential election, and that fifteen percent of all public officials in the South were black by 1870.” *Id.* Ifill observes that the response to this advance of enfranchisement occurred as a result of “the removal of the last federal troops from the South after the disputed 1876 presidential election,” thereafter “Southerners unleashed a wave of repression against the now unprotected blacks White mob violence was yet another means by which blacks were disenfranchised.” *Id.* Similarly, Trenchicosta and Collins note that in Louisiana, “Between the 1868 election and the next year, the number of black voters statewide fell from 130,344 to 5,320. By 1940, it had sunk to 886.” Trenchicosta & Collins, *supra* note 100, at 130.

¹⁴⁵ *United States v. Cruikshank*, 92 U.S. 542 (1875). See also LEEANNA KEITH, *THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION* (2008); LANE, *supra* note 99; NICHOLAS LEMAN, *REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR* 163 (2006) (noting that *Cruikshank* “dealt a heavy blow to Reconstruction”).

Concomitant to an increased historical focus on the original intent of the drafters of the Bill of Rights,¹⁴⁷ a similar attention to the historical circumstances that gave rise to the Thirteenth, Fourteenth, and Fifteenth Amendments, and the Court's infidelity to them, is essential to an understanding of how race continues to play a role in the administration of justice. Indeed, the original sin in the Court's Fourteenth Amendment jurisprudence was the failure of the Court to sufficiently criminalize lynching, violence, and the disenfranchisement of African Americans. Instead of confronting the ugly legacy of slavery and lynchings, the judicial system set out to offer capital punishment to appease or accommodate the angry mob. It is not inappropriate to allay responsibility with Southern states in post-Reconstruction era. The Louisiana Constitutional Convention of 1898, like the Mississippi and South Carolina conventions, promulgated the grandfather clause to ensure "universal white suffrage" and the "hegemony of the white race," through "race neutral" terms because, as the President of the 1898 Convention observed, "we were not free to deal with the suffrage as we desired, by reason of the Fifteenth Amendment."¹⁴⁸ However, the responsibility lay not only in the actions of the Southern states but in the indifference of the Northern States and national government. The Louisiana Constitutional Convention of 1898 developed strategies that had the effect of disenfranchising all African-Americans but provided a veneer of race neutrality to appear as "fair and pure as those in the State of Massachusetts;" so that, in the words of E.B. Kruttschnitt, Louisiana could "appeal to the conscience of the nation, both judicial and legislative, and I don't believe that they will take the responsibility of striking down the system which we have reared in order to protect the purity of the ballot box and to perpetuate the supremacy of the Anglo-Saxon race in Louisiana."¹⁴⁹

¹⁴⁶ *United States v. Shipp*, 214 U.S. 386, 431 (1909). Ed Johnson, an African-American man, was convicted of raping a white woman in Chatanooga, Tennessee, based upon wholly inconclusive evidence in the face of seventeen alibi witnesses. When the Supreme Court granted a stay of execution, an angry mob was permitted to take the defendant from his jail cell and he was lynched. Sheriff Shipp was given less than a ninety day sentence for contempt of court for allowing the lynching and was released a home-town hero. No arrests were made for Mr. Johnson's murder. See Ogletree, *supra* note 7, at 19–21 (discussing the failure of the justice system that occurred when Sheriff Shipp permitted the lynching of Ed Johnson); George C. Thomas III, *Bigotry, Jury Failures, and the Supreme Court's Feeble Response*, 55 BUFF. L. REV. 947, 948 (2007).

¹⁴⁷ *Cf. District of Columbia v. Heller*, 554 U.S. 570, 591–92 (2008).

¹⁴⁸ See OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA: HELD IN NEW ORLEANS, TUESDAY, FEBRUARY 8, 1898, at 380 (1898) [hereinafter LOUISIANA CONSTITUTIONAL CONVENTION JOURNAL].

¹⁴⁹ See Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361, 362 n.5 (2012) ("E.B. Kruttschnitt was the legal architect of a system that was designed to ensure the 'supremacy' of the Anglo-Saxon race through terms that would avoid the scrutiny of 'Massachusetts' judges" (citing LOUISIANA CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 148, at 381)). As noted in the article, Chairman Kruttschnitt described the goal of the Constitutional Convention as to "protect the purity of the ballot box and to perpetuate the supremacy of the Anglo-Saxon race in Louisiana." *Id.* (LOUISIANA CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 148, at 381). See also LOUISIANA

The post-Reconstruction death penalty sought to accommodate the values of these Conventions and the lynch mob rather than to target civil rights violators. This is the very history recounted in *McDonald v. City of Chicago*:

In that case, the Court reviewed convictions stemming from the infamous Colfax Massacre in Louisiana on Easter Sunday 1873. Dozens of blacks, many unarmed, were slaughtered by a rival band of armed white men. Cruikshank himself allegedly marched unarmed African-American prisoners through the streets and then had them summarily executed. Ninety-seven men were indicted for participating in the massacre, but only nine went to trial. Six of the nine were acquitted of all charges; the remaining three were acquitted of murder but convicted under the Enforcement Act of 1870, 16 Stat. 140, for banding and conspiring together to deprive their victims of various constitutional rights, including the right to bear arms. The Court reversed all of the convictions, including those relating to the deprivation of the victims' right to bear arms.¹⁵⁰

Justice Thomas's concurrence incisively cuts at *Cruikshank*, as an opinion that eviscerated the protections that should have been offered to African-American defendants:

Chief among those cases is *United States v. Cruikshank*, 92 U.S. 542, 23 L. Ed. 588 (1876). There, the Court held that members of a white militia who had brutally murdered as many as 165 black Louisianians congregating outside a courthouse had not deprived the victims of their privileges as American citizens to peaceably assemble or to keep and bear arms.¹⁵¹

When the federal government, and the United States Supreme Court refused to protect the rights (and lives) of African-American citizens in the South, lynchings and mob rule took the day.

The history of racial violence vitiates the validity of retribution as a constitutional basis for the death penalty. Race has been at the core of retribution ever since, not just as a corollary but as a cause. As Professor Ifill explained in *On*

CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 148, at 381 ("I say to you, that we can appeal to the conscience of the nation, both judicial and legislative and I don't believe that they will take the responsibility of striking down the system which we have reared in order to protect the purity of the ballot box and to perpetuate the supremacy of the Anglo-Saxon race in Louisiana.").

¹⁵⁰ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3030 (2010) (citing LANE, *supra* note 99, at 265–66, and *Cruikshank*, 92 U.S. at 544–45).

¹⁵¹ *Id.* at 3060 (Thomas, J., concurring) (citing KEITH, *supra* note 145, at 109).

the Courthouse Lawn: Confronting the Legacy of Lynching in the Twenty-First Century,¹⁵² when capital punishment was imposed, it was often done to avoid an inevitable lynching.

Ifill's observation of the connection between lynching and capital punishment on the Eastern Shore of Maryland applies throughout the South. For instance, in 1924, Jackson Parish, Louisiana three African-American men were arrested and brought to the Caddo Parish jail and charged with the murder of Sherriff Rentz, where "prominent residents of Jackson parish . . . expressed the opinion that lynching[s] were only averted by removal of the prisoners to points outside the parish as soon as they were captured."¹⁵³

Cases like this continue to inform race relations in the community in Louisiana. In a recent capital case there, an African-American man charged with capital murder was faced with a juror who specifically noted "when my daddy was twenty years old, he was appointed to the hanging crew in Jackson Parish, Louisiana. Three men had killed Sheriff Rentz . . . and that's the way I think justice should be done. They didn't stay in prison forty years costing us tax payers dollars. They hung them, courthouse square, Jonesboro, Louisiana."¹⁵⁴

This legacy of lynching—informing the constitutional purpose of retribution—provides a clear backdrop to the legal landscape of modern day capital jurisprudence. Instead of a vigorous defense of rights, and the rule of law, communities were offered capital punishment to appease the angry mob. The injustice of this exchange is made clear by the fact that lynchers were rarely prosecuted and never convicted. As Professor Ifill notes in *On the Courthouse Lawn*, "[i]n the fourteen cases of reported lynchings in Maryland beginning in 1885 and ending in 1933, no suspected lynchers were ever indicted."¹⁵⁵ In a number of instances the "state's attorneys refused to even consider convening a grand jury to indict members of the mob who attempted to lynch [the defendants]," and in other instances grand juries returned a no bill where dozens of witnesses to the lynchings were called before the grand jury.¹⁵⁶

¹⁵² SHERILYN A. IFILL, *ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY* 18 (2007).

¹⁵³ *Swift Justice Will be Dealt Three Negros*, THE JACKSON INDEPENDENT, Aug. 28, 1924, at 1. The trial took place less than two weeks after the men were apprehended, the trial "consumed less than four hours time and the jury reached its verdict, giving capital punishment, four minutes after it received the case." *Negro Murderers Sentenced to Hang*, THE BIENVILLE DEMOCRAT, Sept. 11, 1924, at 1. All three men were subsequently hanged on the courthouse lawn. R.R. Peyton, *Negros Pay with Lives for Rentz's Death: Boon, Washington, Coleman Calm to End; Crowd Scrambles for Pieces of Rope*, THE SHREVEPORT TIMES, Oct. 4, 1924, at 1. "A barbed wire barricade around the jail was badly damaged by the morbidly curious crowd that climbed it to get a closer view of the bodies. Pieces of the ropes taken from the negros necks were sought by so many for souvenirs and many got portions." *Id.*

¹⁵⁴ State v. Carter, 2010-KA-0614, R. 2099.

¹⁵⁵ IFILL, *supra* note 152, at 56.

¹⁵⁶ *Id.* at 55.

Instead of attacking retribution as a core justification for the death penalty, the challengers in *McCleskey* focused on state-wide statistical outcomes. This, however, is not the salient arbitrariness that infects the process. Nor is affirmative action death sentences against white defendants a valid remedy for past and current racism.¹⁵⁷ Rather, the arbitrariness operates on death penalty schemes because their origins are in retribution, a value steeped in racial discrimination.

The schemes have not focused on the worst of the worst offenses (or offenders), but rather from the outset sought to give a legal framework to express the anger and outrage that would otherwise result in lynchings or mob-rule. In this context, the fact that death sentences were disproportionately returned where the victim was white, especially a white girl or woman, could not be surprising.

Indeed, the salient failure of America's death penalty, therefore, is not that African-American men are targeted by racist prosecutors for the death penalty, but rather that judges have acquiesced in a system where capital punishment is imposed as both a release-valve to reduce a community's illegal tendency towards self-help and as a continued expression of social control. Instead of providing justice to African-Americans disenfranchised and terrorized in the aftermath of Reconstruction, the courts offered the death penalty to accommodate the angry mob. Not surprisingly then, the death penalty is enforced against black defendants while permitting white defendants and killers of African-Americans exemption from capital punishment. This failure to respond to racial injustice, and the corresponding accommodation of the angry mob, has been sewn into the very fabric of the modern death penalty.

VII. CONCLUSION

Twenty years after Justice Blackmun provided the deciding vote to reinstate the death penalty in *Gregg v. Georgia*,¹⁵⁸ he observed that, despite the Court's effort to eliminate racism, race continued to play a role in the death penalty's operation: "Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die."¹⁵⁹

¹⁵⁷ See Johnson, *supra* note 12, at 179 (citing as the only case in which a defendant has ever prevailed on a *McCleskey* claim *State v. Kelly*, 502 S.E. 2d 99 (S.C. 1998), *cert. denied*, 525 U.S. 1077 (1999) ("By analogy, if the victims in this case had been white, and the deputy prosecutor had stated that the white community would have been upset if the State had not sought death, then clearly it would be an unconstitutional race-based decision to seek death, and a new trial would have been required. It is no different when the deputy prosecutor states that the concerns of the black community were discussed and considered in the State's decision to seek death."). See also *id.* at 179-80 ("What is ironic about this comparison is that no relief has ever been granted for a black defendant with a white victim, despite the fact that this is the classic form race discrimination of which statistical proof was offered in *McCleskey*, despite the fact that numerous studies have found the same pattern of discrimination, and despite the fact that statistical evidence has been proffered—and peremptorily rejected—in a number of cases since *McCleskey*.").

¹⁵⁸ 428 U.S. 153 (1976).

¹⁵⁹ *Callins v. Collins*, 510 U.S. 1141, 1153 (1994) (Blackmun, J., dissenting from denial of

Indeed, a plurality of justices who had previously supported and upheld the constitutionality of the death penalty, after their departure from the court or in the last period of their tenure, came to regret their stance on the death penalty. After Warren McCleskey's execution, and Justice Powell's retirement from the bench, Powell was asked whether he would change his vote in any case. He responded: "Yes. *McCleskey v. Kemp*."¹⁶⁰ Professor Jeffries' follow up question, however, made clear that Powell did not simply object to the presence of racial disparities, but had concluded that the modern death penalty experiment sanctioned by *Gregg* had failed altogether:

Q: Do you mean you would now accept the argument from statistics?

A: No, I would vote the other way in any capital case.

Q: In *any* capital case?

A: Yes.

Q: Even in *Furman v. Georgia*?

A: Yes. I have come to think that capital punishment should be abolished.¹⁶¹

Justice Powell's comments reflect the dissatisfaction with the death penalty systems that were unable to identify the worst of the worst offenders.

Justice Powell was not alone in his regret. Justice Blackmun, one of the *Furman* dissenters and a member of the majority in *Gregg*, ultimately concluded that "despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake."¹⁶² He noted that "the problems with the death penalty today" were not "identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form."¹⁶³

In a 2008 concurring opinion in *Baze v. Rees*,¹⁶⁴ Justice Stevens cast doubt on the accuracy of the "decisions in 1976 upholding the constitutionality of the death penalty [on the] belief that adequate procedures were in place that would avoid the danger of discriminatory application . . . arbitrary application . . . and . . .

certiorari). Justice Powell, who wrote the majority opinion upholding the death sentence, observed after he retired that this was the only vote he would change.

¹⁶⁰ JEFFRIES, *supra* note 6, at 451.

¹⁶¹ *Id.*

¹⁶² *Callins*, 510 U.S. at 1144 (Blackmun, J., dissenting from denial of certiorari).

¹⁶³ *Id.*

¹⁶⁴ *Baze v. Rees*, 553 U.S. 35 (2008).

excessiveness.”¹⁶⁵ Justice Stevens, who voted with the Court in *Gregg*, observed after his retirement, that it was the one decision he regretted.¹⁶⁶

Thus, three members of the (five-member) *Gregg* majority ultimately determined that the modern death penalty experiment had failed. Each pointed to the fact that the construction of elaborate mechanics to channel discretion and guard against arbitrariness—including, but certainly not limited to, racial arbitrariness—had failed. As scholars, litigants, and advocates build upon the critiques of Powell, Blackmun, and Stevens it is important to consider whether and how the failed attempt in *McCleskey* should inform future reform efforts.

Moreover, it is important to consider the sentiment expressed by Justice Kennedy in *Kennedy v. Louisiana*, when he described the effort to ensure that the death penalty is consistently reserved for the worst offenders who commit the worst offenses as “not all together satisfactory.”¹⁶⁷ This article contemplates that the regret expressed by Justice Stevens, Powell, and Blackmun, and the discomfort expressed by Justice Kennedy, arises from a dissatisfaction with retribution—and its corollary of arbitrariness—as a constitutional basis for imposing the death penalty. Ultimately, this contemplation implicates the Court itself in the sordid history of retribution.

While the legal jurisprudence has noted the history of extra-judicial violence, the Court has failed to examine its own participation in that history. As Rita Lomio observed:

The *Furman* opinions can be crudely divided into two categories: those that contain a race-conscious history and those that do not. However, even those that mention such a history use it for different purposes (e.g., in support of or opposition to abolition) and present it in different forms (e.g., past official policy or statistics). The appearance of this racial history alone cannot be mapped to the outcome of the opinion as it is present in both concurring and dissenting opinions, and absent in both.¹⁶⁸

Absent from *Furman*, *Gregg*, and *McCleskey* itself, was an acknowledgment of the law’s own failure to redress the lynching and mob-violence crimes against African-Americans. Indeed, instead of redressing the lynching crimes that were an essential component of post-Reconstruction racial oppression, the Court gave credence to, and attempted to accommodate the mob, through capital punishment.

¹⁶⁵ *Id.* at 84 (Stevens, J., concurring).

¹⁶⁶ See Nina Totenberg, *Justice Stevens: An Open Mind on a Changed Court*, NPR (Oct. 4, 2010), <http://www.npr.org/templates/story/story.php?storyId=130198344>.

¹⁶⁷ *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008).

¹⁶⁸ Rita K. Lomio, *Working Against the Past: The Function of American History of Race Relations and Capital Punishment in Supreme Court Opinions*, 9 J.L. Soc’y 163, 167 (2008).

As noted at the outset, Professor Anthony Amsterdam, echoing the words of Hugo Bedau, observed that “*McCleskey* is the *Dred Scott* decision of our time.”¹⁶⁹ And that is perhaps true enough—in capturing the moral invidiousness of the decision. But in legal terms, perhaps it is more relevant to state that *Gregg* is the *Cruikshank* decision of our time. The Court in *Cruikshank* chose to not address the significant constitutional injury inflicted on African-Americans in Colfax, Louisiana. It tolerated the rise of vigilante justice. In doing so, the Court tolerated what might be described as the original sin in Fourteenth Amendment jurisprudence. *Gregg*, like *Cruikshank*, ignored the central purpose of the Fourteenth Amendment. Instead of holding fast to the premise that those who lynch and seek vigilante justice should be prosecuted to the fullest extent of the law, *Gregg* held the death penalty constitutional based upon the need for retribution—to accommodate the instinct to lynch and terrorize. This accommodation renders retribution in significant constitutional tension with the Fourteenth Amendment, and suggests that whatever value retribution served under the Eighth Amendment, it is no longer—and since Reconstruction never was—a legitimate basis for imposing death.

¹⁶⁹ Amsterdam, *supra* note 5, at 47.