

# VALUING BLACK LIVES: A CASE FOR ENDING THE DEATH PENALTY

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## ABSTRACT

Since *Furman v. Georgia*, capital punishment jurisprudence has equipped decisionmakers with increased structure, guidance, and narrowing in death sentencing in an effort to eliminate the arbitrary imposition of death. Yet, these efforts have been largely unsuccessful given the wide discretion built into capital sentencing which allows for prejudice, bias, and racism to persist. Juries continue to sentence a disproportionately high number of defendants who have been convicted of murdering white victims to death. As a result, death sentencing schemes tend to undervalue Black murder victims' lives. Any effort to eliminate the disparity must center on the undervaluation of Black lives.

This Article suggests that the next challenge to the death penalty should be on equal protection grounds based on the undervaluation of Black lives. It highlights that the Fourteenth Amendment was originally intended, in part, to extend the equal protection of the laws to Black victims of crime. The Article then explores the pitfalls of other race-based challenges to the death penalty. And demonstrates that a challenge based on disparities in capitally prosecuting white and Black victim cases could end capital

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punishment. The Article concludes with a road map for what a challenge based on the undervaluation of Black lives would look like.

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## INTRODUCTION

On October 15, 1986, Mary Beth Westmoreland appeared before the United States Supreme Court on behalf of the State of Georgia to defend the State's racially disparate death sentencing scheme.<sup>1</sup> One of the Justices asked Ms. Westmoreland to explain why Georgia treated "white victim cases . . . [as] consistently more serious."<sup>2</sup> She responded,

[O]ut of the black victim cases . . . you'll find perhaps over a thousand occur in something like a family dispute, a lover dispute, a fight involving liquor of some sort, where some . . . one party is drunk or the [o]ther party is drunk. Those types of disputes occur so frequently in black victim cases that they . . . fall out of the system much earlier, and—leaving the much m[o]re aggravated, the more highly aggravated white victim cases, involving armed robberies, and such things as property disputes. . . . And for whatever reason, frequently more times we'll see torture cases involving white victim cases than you do in black victim cases."<sup>3</sup>

Each of Ms. Westmoreland's examples—drunken disputes, family disputes, disputes among lovers—reflected racist stereotypes and unfounded value judgments as to the worthiness of Black lives; none of these cases were supported by empirical evidence. The case, brought by Warren McCleskey, a Black man sentenced to die for murdering a white victim, relied on a detailed statistical study to propose a different explanation: that Georgia unconstitutionally relied on race—the victim's white race and the defendant's Black race—when determining who to sentence to death. In fact, relying on the study's findings, John Boger, arguing on behalf of Mr. McCleskey, explained that Georgia's death penalty treated "[t]he color of a defendant's skin . . . or that of his victim . . . as grave an aggravating circumstance . . . as those expressly designated by Georgia's legislature."<sup>4</sup> Moreover, that such discrimination was based on "a

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1. Transcript of Oral Argument at 30, *McCleskey v. Kemp*, 481 U.S. 279 (1986) (No. 84-6811).

2. *Id.* at 43.

3. *Id.*

4. *Id.* at 4; *see also* Brief for Petitioner at 33, *McCleskey v. Kemp*, 481 U.S. 279 (1986) (No. 84-6811) ("[T]he race of the defendant and the race of the victim proved to be as powerful determinants of capital sentencing in Georgia as many of Georgia's statutory aggravating circumstances.").

century-old pattern in the State of Georgia of animosity” against Black defendants, particularly those accused of harming white victims.<sup>5</sup>

Since its inception, the disproportionate imposition of the death penalty has denied murdered Black victims the equal protection of the laws. Capital punishment is supposed to be reserved for those who commit the “worst of the worst” crimes.<sup>6</sup> Instead, as a result of bias, prejudice and racism, it is disproportionality reserved for those charged with killing white victims.<sup>7</sup> Over the last fifty years, death penalty jurisprudence has provided increasing amounts of structure, guidance, and narrowing to eliminate the arbitrary imposition of death.<sup>8</sup> I argue that these efforts have been largely unsuccessful given the wide discretion built into capital sentencing which allows for racism to operate undetected.<sup>9</sup>

In 1972, a plurality of the Supreme Court held in *Furman v. Georgia* that capital punishment, as administered at the time, violated the Constitution.<sup>10</sup> In so holding, members of the Court acknowledged

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5. Transcript of Oral Argument at 26, *McCleskey v. Kemp*, 481 U.S. 279 (1986) (No. 84-6811).

6. *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting); *see also* *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (“Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002))); Editorial Board, *Louisiana’s Color-Coded Death Penalty*, N.Y. TIMES (May 9, 2016), <https://www.nytimes.com/2016/05/09/opinion/louisianas-color-coded-death-penalty.html> (on file with the *Columbia Human Rights Law Review*) (arguing that although the death penalty is supposedly reserved for the “worst of the worst,” it is instead imposed based on skin color).

7. *See* Sheri Lynn Johnson et al., *The Delaware Death Penalty: An Empirical Study*, 97 IOWA L. REV. 1925, 1941 (2012) (reporting race-of-victim disparities in Delaware and eight other states).

8. *See, e.g.*, *Furman v. Georgia*, 408 U.S. 238 (1972) (plurality) (holding death sentencing schemes nationwide violated the Eighth Amendment); *Gregg v. Georgia*, 428 U.S. 227 (1976) (approving death sentencing schemes requiring bifurcated trials and juries to weigh aggravating and mitigating circumstances in sentencing); *Coker v. Georgia*, 433 U.S. 584 (1977) (prohibiting death penalty for non-homicidal offenses); *Ford v. Wainwright*, 477 U.S. 399 (1986) (prohibiting death penalty for those adjudicated insane); *Atkins v. Virginia*, 536 U.S. 304 (2001) (prohibiting execution of defendants with intellectual disability); *Roper v. Simmons*, 543 U.S. 551 (2006) (prohibiting death penalty for individuals under age 18 at time of offense); *Madison v. Alabama*, 586 U.S. \_\_\_, 139 S. Ct. 718 (2019) (prohibiting execution of defendant whose mental illness prevented memory of the crime).

9. *See* *Turner v. Murray*, 476 U.S. 28, 35 (1986) (“Because of the range of discretion . . . in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.”).

10. *See* *Furman*, 408 U.S. at 238.

that the death penalty had only been applied in “freakishly or spectacularly rare” cases, with little predictability relative to the nature of the crime.<sup>11</sup> The decision immediately voided all death sentences in the nation.<sup>12</sup> However, shortly after *Furman*, the Court reinstated capital punishment in *Gregg v. Georgia*, approving death sentencing schemes that provided prosecutors and jurors with guided discretion in an attempt to eradicate prejudice and bias in the administration of death.<sup>13</sup>

As was the case prior to *Furman*, the death penalty continues to be administered to the most disfavored members of society: the poor, those with mental illness, and Black people.<sup>14</sup> The death penalty is still disproportionately sought and imposed against defendants accused of murdering white victims.<sup>15</sup> For example, in 1990, the U.S. General

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11. *Id.* at 293 (Brennan, J., concurring); *id.* at 310 (Stewart, J., concurring).

12. See Fred P. Graham, *Court Spares 600*, N.Y. TIMES (June 30, 1972), <https://www.nytimes.com/1972/06/30/archives/court-spares-600-4-justices-named-by-nixon-all-dissent-in-historic.html> (on file with the *Columbia Human Rights Law Review*).

13. *Gregg*, 428 U.S. at 227.

14. See Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1840 (1994) [hereinafter Bright, *Counsel for the Poor*] (writing that many people on death row are “distinguished by neither their records nor the circumstances of their crimes, but by their abject poverty, debilitating mental impairments, minimal intelligence, and the poor legal representation they received”); see also Stephen Bright, *The Role of Race, Poverty, Intellectual Disability, and Mental Illness in the Decline of the Death Penalty*, 49 U. RICH. L. REV. 671, 675 (2015) (“Capital punishment then [at the time *Furman* was decided], as it is now, was very much tied to race—the oppression of African Americans, carried out by this country’s criminal courts.”).

15. See, e.g., David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1711–15 (1998) (finding evidence from Philadelphia of race-of-victim disparities in death penalty sentencing); Scott Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era*, 50 HOUSTON L. REV. 131, 135 (2012) (noting that in Houston from 2001 to 2008, death sentences were more likely to be imposed when the victim was white); Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina: 1980–2007*, 89 N.C. L. REV. 2119, 2123 (2011) (similarly finding race-of-victim disparities in death sentencing in North Carolina from 1980 to 2007) [hereinafter Radelet & Pierce, *North Carolina*]; Christopher Slobogin, *The Death Penalty in Florida*, 1 ELON L. REV. 17, 54 (2009) (making recommendations for Florida death sentencing based on studies finding racial disparities); Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978–1999*, 4 U. MD. L.J. RACE RELIGION GENDER & CLASS 1, 90 (2004) (finding race-of-victim disparities at different decision-making points in death penalty sentencing in Maryland from 1978–1999); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial*

Accounting Office (“GAO”) conducted a comprehensive study of death penalty cases decided since *Furman*. The GAO concluded that “[i]n 82 percent of the studies . . . those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks.”<sup>16</sup> In addition, the report found that “[t]he race of victim influence . . . was stronger for the earlier stages of the judicial process (e.g. prosecutorial decision to charge defendant with a capital offense . . .).”<sup>17</sup> These trends have remained consistent over time.

Any death sentencing scheme is unlikely to eradicate racism from its operation where the American public and the justice system continue to undervalue Black lives.<sup>18</sup> Where multiple actors in the justice system—law enforcement, prosecuting attorneys, and the jury—all contribute to consistent race-of-victim disparities in death sentencing, there can be no constitutional administration of capital punishment. My argument, therefore, is that a successful challenge to the death penalty must be centered on the undervaluation of Black lives. If proven, the appropriate remedy is *not* to extend capital punishment to those who murder Black victims,<sup>19</sup> because absent automatic death sentencing for certain crimes, which the Court already invalidated,<sup>20</sup> the law cannot force prosecutors to seek death and juries to impose death in Black victim cases. Rather, the appropriate remedy is to abolish the death penalty altogether.

To date, the Court has never made an equal protection determination regarding the constitutionality of the death penalty vis-à-vis the undervaluation of Black lives.<sup>21</sup> In order to assert this claim,

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*Discretion in Homicide Cases*, 19 LAW & SOC. REV. 587, 612 (1985) (finding that prosecutors in Florida were more likely to selectively upgrade a case to justify the death penalty when the victim is white).

16. U.S. GEN. ACCOUNTING OFF., GAO GDD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990).

17. *Id.*

18. See Anthony C. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After McCleskey*, 39 COLUM. HUM. RTS. L. REV. 34, 38–40 (2007).

19. See Randall Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1392 (1988) (“[M]ost killers of blacks are other blacks. Thus, if killers of blacks are sentenced to death with the same frequency as similarly situated killers of whites, the number of blacks sentenced to death may well increase.”).

20. See *Gregg v. Georgia*, 428 U.S. 199 n. 50 (1976).

21. See *McCleskey v. Kemp*, 481 U.S. 279, 291 (1987) (examining whether Georgia’s death penalty violated the Eighth and Fourteenth Amendments because “persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death

a Black defendant sentenced to death for the murder of a white victim would therefore be required to show that the state declined to seek death against another defendant in a similarly aggravated case involving a Black victim, present data supporting that showing, and provide proof that the decision makers in the Black victim case acted with discriminatory purpose in declining to seek death.

An examination of early criminal laws and the legislative history of the Fourteenth Amendment make a strong case for advancing this challenge. Part I surveys existing scholarship on racial disparities in death sentencing based on the race of the victim. Part II covers antebellum history of racial disparities in criminal laws and how the passage of the Fourteenth Amendment was intended, in part, to extend the equal protection of the law to Black victims of crime. Part III discusses the Court's decision in *McCleskey* and the lessons learned. Lastly, Part IV proposes what a challenge based on the undervaluing of Black life would look like.

### I. EXISTING SCHOLARSHIP ON RACIAL DISPARITIES

Multiple actors in the criminal justice system contribute to death sentencing disparities based on the victim's race. Recent scholarship indicates that the police are one of the first actors to contribute to this disparity when they identify potential suspects during the investigation of death-eligible cases.<sup>22</sup> Further, numerous studies show that prosecuting attorneys contribute to the disparity when determining whether to seek death in a murder case<sup>23</sup> and when

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than white murderers.”). In denying Mr. McCleskey's challenge, the Court noted that he was “not seek[ing] to assert . . . the rights of black murder victims in general.” *Id.* at 8.

22. See Jeffrey Fagan & Amanda Geller, *Police, Race, and the Production of Capital Homicides*, 23 BERKELEY J. CRIM. L. 261, 266 (2018) (reviewing “every homicide reported between 1976 and 2009,” and finding “that homicides with White victims are significantly more likely to be ‘cleared’ by the arrest of a suspect than are homicides with minority victims.”).

23. See generally Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998) (discussing the role race plays in a prosecuting attorney's exercise of discretion). For discussions of prosecutorial decision making, race, and the death penalty, see David Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 709–10 (1983) (finding that prosecutors sought the death penalty in 70% of cases involving a Black defendant and a white victim, while in only 15% cases involving a Black defendant and Black victim, and in 19% of cases involving a white defendant and Black victim); Raymond Paternoster, *Prosecutor Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial*



unlawfully removing Black people from juries.<sup>24</sup> Studies also show that juries are more likely to sentence defendants to death when the victim is white.<sup>25</sup>

These troubling trends are the result of death sentencing laws that give broad discretion to police, prosecutors, and juries. Capital punishment post-*Gregg* enables state actors to rely on prejudice, bias, and racism—implicit or otherwise—when determining whether to seek death against similarly situated death-eligible defendants, and when

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*Discrimination*, 18 LAW & SOC. REV. 437, 440 (1984) (noting that “evidence also suggest[ed] that killers of whites are more likely to be charged with capital homicide in the first instance”); Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 521–23 (1995) (describing prosecutorial discretion and mentioning multiple studies showing that prosecutors are more likely to seek death when defendants are charged with murdering white victims than when they are charged with murdering Black victims); John M. Scheb II et al., *Race and the Death Penalty: An Empirical Assessment of First Degree Murder Convictions in Tennessee After Gregg v. Georgia*, 2 TENN. J. RACE GENDER & SOC. JUST. 1, 20–22 (2013) (finding that prosecutors are almost twice as likely to seek death when the victim is white).

24. See EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 43 (2010), <https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf> [https://perma.cc/Y5T9-43CK] (“Exclusion of qualified citizens of color from jury service amounts, then, to the near-complete absence of minority perspective, influence, and power in the criminal justice system.”); see also William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors’ Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 241 (2001) (finding that all-white juries are much more likely to sentence Black defendants to death in cases involving white victims than when there is the presence of one or more Black males on the jury); *id.* at 242 (“only white jurors are much more likely to vote for death as a result of their perception of the defendant’s dangerousness” in cases involving Black defendants/white victims).

25. See Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 583 (2011) (describing a study where participants were significantly more likely to sentence Black defendants to death than similarly situated white defendants, and likelihood was greater for simulations involving a Black defendant and white victim); see also Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 385 (2006) (“The salience of race [in cases involving white victims] may incline jurors to think about race as a relevant and useful heuristic for determining the blameworthiness of the defendant and the perniciousness of the crime.”).

deciding how much weight to assign aggravating and mitigating evidence during the sentencing hearing.<sup>26</sup>

#### A. Race of Victim Studies

In 1998, Professor David Baldus led a thorough examination of post-*Furman* death penalty cases analyzing racial discrimination in capital sentencing.<sup>27</sup> Baldus and his team surveyed existing studies measuring the impact of race-of-defendant and race-of-victim on death sentencing, most of which focused on cases involving Black defendants/white victims and white defendants/white victims. These studies showed that the chance of a case resulting in the death penalty were highest in Black defendant/white victim cases.<sup>28</sup> Baldus also looked specifically at cases from Philadelphia to determine whether there was race-of-victim impact. Researchers identified nearly 1000 death eligible cases from 1983 to 1993 and analyzed the penalty phases of capital trials to determine what impact, if any, the defendant and victim's race had on sentencing.<sup>29</sup> Baldus concluded that victim race was "particularly prominent" during the jury's determination of mitigation, and that the "magnitude and consistency" of the results would not be observable "if substantial equality existed in this system's treatment of defendants."<sup>30</sup>

Six years later Baldus led another team to analyze the extent of racial discrimination in death sentencing.<sup>31</sup> Baldus noted that prior to *Furman*, researchers paid little attention to race of victim data, focusing mostly on race of the defendant. Regardless, pre-*Furman* research from Georgia revealed that prosecutors were 4.3 times more likely to seek the death penalty against a defendant charged with murdering a white victim than a similarly situated defendant charged with murdering a Black victim.<sup>32</sup> After surveying post-*Furman*

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26. See, e.g., *Pulley v. Harris*, 465 U.S. 37, 55 (1984) (Stevens, J., concurring) ("[T]he schemes [in *Furman*] vested essentially unfettered discretion in juries and trial judges to impose the death sentence."); *Turner v. Murray*, 476 U.S. 28, 35 (1986) (explaining that the "range of discretion" afforded jurors in "capital sentencing hearing[s]" provides a "unique opportunity for racial prejudice to operate but remain undetected.").

27. Baldus et al., *supra* note 15, at 1643.

28. *Id.* at 1658 n.61 (noting the 1990 GAO study).

29. *Id.* at 1665–75.

30. *Id.* at 1714–15.

31. David Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment*, 53 DEPAUL L. REV. 1411 (2004).

32. *Id.* at 1423.

scholarship, the team concluded that “race-of-victim influence was found at all stages of the criminal justice system” and was strongest at the earliest stages, such as when the prosecutor decided to seek death and in whether to proceed with trial rather than a plea offer.<sup>33</sup>

One of the starkest race-of-victim disparities comes from a 2015 study of Louisiana murders.<sup>34</sup> Using FBI statistics, Frank Baumgartner and Tim Lyman analyzed all homicides that occurred in the state between 1976 and 2011, and then continued to analyze death sentence and execution data through July 2015.<sup>35</sup> Those who murdered white women were 12 times more likely to be sentenced to death than a defendant who murdered a Black male.<sup>36</sup> Although Black men made up the majority of homicide victims in the state (61%), only 8% of those cases led to the execution of the perpetrator. Conversely, white women represented only 7% of all homicide victims, but 47% of those cases led to the defendant’s execution.<sup>37</sup> Here, the researchers concluded that “the families and communities of murdered black males [were] denied” equal protection of the laws.<sup>38</sup> Indeed, no white person had been executed for a crime against a Black person in Louisiana since 1752.<sup>39</sup>

Turning to North Carolina, Jack Boger and Isaac Unah examined death penalty cases from 1993 to 1997, finding that defendants whose victims were white were 3.5 times more likely to be sentenced to death than those with non-white victims.<sup>40</sup> Unah noted that no matter how he and Boger analyzed the data, the whiteness of homicide victims “operate[d] as a ‘silent aggravating circumstance’ that ma[d]e[] death significantly more likely to be imposed.”<sup>41</sup> Michael

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33. *Id.* at 1425.

34. Frank R. Baumgartner & Tim Lyman, *Race-of-Victim Discrepancies in Homicides and Executions, Louisiana 1976–2015*, 7 *LOY. J. PUB. INT. L.* 129 (2015).

35. *Id.* at 130–31.

36. *Id.* at 135 (noting that based on the race and gender of the victim in murder cases, death sentences imposed per 1000 homicides ranged from 57 for white female victims; 28 for white male; 18 for Black female; and only 5 for Black male victims).

37. *Id.* at 134.

38. *Id.* at 142.

39. *Id.* at 130; *see also* CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT*, 110 (2016).

40. Jack Boger & Isaac Unah, *Race and the Death Penalty in North Carolina—An Empirical Analysis: 1993–1997*, DEATH PENALTY INFO. CTR. (2001), <https://deathpenaltyinfo.org/resources/publications-and-testimony/studies/race-and-the-death-penalty-in-north-carolina> [<https://perma.cc/A9EZ-HRYA>].

41. *Id.*

Radelet and Glenn Pierce came to a similar conclusion when reviewing data from North Carolina capital cases from 1980 to 2007.<sup>42</sup>

The race-of-victim impact also extends to who gets executed. This means that defendants who attempt to obtain appellate relief from their death sentence are also impacted by the victim's race. The Death Penalty Information Center notes that post-*Gregg*, "when executions have been carried out . . . 75 percent of the cases involve the murder of white victims, even though blacks and whites are about equally likely to be victims of murder."<sup>43</sup> In Georgia, defendants convicted of murdering white victims are 17 times more likely to be executed than defendants convicted of murdering Black victims.<sup>44</sup> When rape was still a death-eligible crime, researchers found that of the 455 men executed for rape between 1930 and 1967, 89 percent were Black.<sup>45</sup>

Findings consistently show that the murder victim's race is a driving force at multiple decision points throughout death sentencing. The Court's decision in *Furman* afforded state actors significant discretion at each of these points, enabling them to insert racism, bias, and prejudice into their decision making. Thus, even with guided discretion, that most decision-makers are white—investigative law enforcement, the prosecution,<sup>46</sup> judges,<sup>47</sup> and juries<sup>48</sup>—means that

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42. Radelet & Pierce, *North Carolina*, *supra* note 15, at 2127 (after reviewing different data from partially overlapping time periods, finding "that in recent years White victims are present in less than half of all homicides, but nearly in 80% of cases resulting in executions.").

43. *Policy Issues: Race*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/race> [<https://perma.cc/M643-L8L3>].

44. Scott Phillips & Justin F. Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. (forthcoming 2020), <https://ssrn.com/abstract=3440828> [<https://perma.cc/PRE7-UK63>].

45. Marvin Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS AMER. ACAD. POL. & SOC. SCI. 119 (1973).

46. As of 2015, 95% of elected district attorneys nationwide are white. See *Justice for All?*, REFLECTIVE DEMOCRACY CAMPAIGN (2015), <https://wholeads.us/justice/wp-content/themes/phase2/pdf/key-findings.pdf> [<https://perma.cc/J6AT-VNZR>].

47. A 2015 study showed that 80% of state appellate court judges are white and that over 80% of state trial court judges are white. Tracey E. George & Albert H. Yoon, *The Gavel Gap*, AM. CONST. SOC'Y 7 (2016), <https://www.acslaw.org/wp-content/uploads/2018/02/gavel-gap-report.pdf> [<https://perma.cc/R9DN-P28X>].

48. Mona Lynch & Craig Haney, *Death Qualification in Black and White: Racialized Decision-Making and Death-Qualified Juries*, 40 LAW & POL'Y 148 (2018) (finding that the death qualification process disproportionately excludes Black prospective jurors from capital jury participation).

their exercise of discretion is likely guided by their ability to more readily empathize with white victims.<sup>49</sup>

### B. Centering on Black Murder Victims

Other scholars have acknowledged the devaluation of Black victims in arguments about racial discrimination in capital punishment.<sup>50</sup> For example, in the wake of the Court's decision in *McCleskey*, Professor Randall Kennedy noted that critics of the opinion often "failed to explore the implications of the undervaluation" of Black victims of murder.<sup>51</sup> However, his critique does not stem from an abolitionist framework, but instead speaks to a broader social concern: the plight of Black communities that disproportionately experience violence.<sup>52</sup>

In the same year that Kennedy published his article, Stephen Carter explored the American legal system's response to victims of crime, arguing that the law fails to provide equal protection of the laws to Black victims.<sup>53</sup> Carter criticized the Court's holding in *McCleskey* for not only failing to address racism's role in the disproportionate execution of Black defendants, but also "for the inadequate protection of *murder victims* who happen to be black."<sup>54</sup> Carter concluded that the political and legal climate recognizes two types of people when criminal conduct is involved: victims and Black people.<sup>55</sup>

In a 1989 article, Michael Radelet analyzed cases where a white person was executed for crimes against Black people.<sup>56</sup> Radelet reviewed records from 15,978 executions beginning in 1608 and identified only 30 cases in which a white person was executed for a

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49. See generally RANDALL KENNEDY, RACE, CRIME, AND THE LAW 347–50 (1997) (discussing the role of race and empathy in the criminal justice system).

50. Although not in the context of capital punishment, Kimberlé Crenshaw notes that antiracist critiques of rape focus on the discrimination Black men accused of raping white women face, which "reflects devaluation of Black women" victims. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1271–72 (1991).

51. Kennedy, *supra* note 19, at 1391–92.

52. *Id.* at 1394.

53. Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 444–46 (1988).

54. *Id.* at 443.

55. *Id.* at 447.

56. Michael L. Radelet, *Executions of Whites for Crimes Against Blacks: Exception to the Rule?*, 30 SOC. Q. 529, 532 (1989).

crime involving a Black victim.<sup>57</sup> Given the rarity of such cases, Radelet set out to determine what non-racial factors contributed to each execution. He concluded that social status was the driving force.<sup>58</sup> For example, among white people executed, some either had lower occupational status relative to their Black victims, others were “marginal members of the white community,” and some had prior criminal records, including prior offenses against white people.<sup>59</sup> Thus, the victim’s Black race alone could not explain each perpetrator’s execution.

## II. EARLY AMERICAN CRIMINAL LAW AND THE FOURTEENTH AMENDMENT AS REDRESS TO BLACK VICTIMS OF CRIME

The lack of redress for Black victims of crime is not a recent phenomenon; its origins lie in slavery and white supremacy. These two interdependent forces shaped the early operation of America’s criminal legal system and continue to impact its operation today.<sup>60</sup>

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57. Radelet relied heavily on Watt Espy’s archive of American executions in Headland, Alabama, which has been made digitally available. See *Executions in the United States, 1608–2002: The ESPY File (ICPSR 8451)*, UNIV. MICH. INST. FOR SOC. RES., <https://www.icpsr.umich.edu/icpsrweb/NACJD/studies/8451> [<https://perma.cc/F8RD-G55Q>]. Espy believes there may be as many as 7000 additional executions for which he is unable to account. *Id.* at 531–32.

58. *Id.* at 535–36.

59. *Id.* at 534–35.

60. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2* (2010) (arguing that the “racial caste system” of Jim Crow and slavery have not been eradicated, but rather restructured into the modern criminal justice system); DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 53 (2008) (“Beginning in the late 1860s, and accelerating after the return of white political control in 1877, every southern state enacted an array of interlocking laws essentially intended to criminalize black life.”); SAIDIYA V. HARTMAN, *SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA* 10 (1997) (observing that racial slavery transformed, rather than annulled, putative free labor within the criminal justice system); DAVID M. OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* (1996) (detailing Mississippi’s transition from slavery to convict leasing to Parchman Farm, the state prison, which opened in 1901 and was modeled on a plantation); Bryan Stevenson, *Introduction* to EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (3d ed. 2016), <https://lynchinginamerica.eji.org/report/> [<https://perma.cc/XQX7-ZZHQ>] (“The administration of criminal justice in particular is tangled with the history of lynching in profound and important ways that continue to contaminate the integrity and fairness of the justice system.”); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 *UCLA L. REV.* 1156, 1185–86, 1193

### A. Early American Criminal Law

The seeds of white supremacy were planted in 1619, when white settlers first brought enslaved Africans to the shores of colonial America.<sup>61</sup> “It took only a few decades after the arrival of enslaved Africans in Virginia before white settlers demanded a new world defined by racial caste.”<sup>62</sup> The law of slavery was a uniquely American invention because the common law that the colonies inherited from England did not provide for master-enslaved person relationships.<sup>63</sup> During the colonial period, the common law was not intended to protect enslaved people; instead, slave codes enabled white people to punish Black people with impunity to maintain power and dominance. “The most salient distinction between the master-slave relationship and other human interactions was the unlimited violence and oppression that the slave master could legitimately inflict upon his bondsman.”<sup>64</sup> Given the inherent inequality in the relationship, whereby an enslaved person was wholly owned by another person by virtue of race, enslaved individuals “were powerless in the face of their masters’ unlimited power.”<sup>65</sup>

Each colony had a set of slave codes. These laws dictated, with specificity, the property rights of those who owned enslaved people, the

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(2015) (acknowledging “the history of slavery and Jim Crow's afterlife in criminal punishment practices,” specifically uses of “criminal law administration as a central means of resisting the abolition of slavery, Reconstruction, and desegregation, continue to inform criminal processes and institutions to this day by enabling forms of brutality and disregard that would be unimaginable had they originated in other, more democratic, egalitarian, and racially integrated contexts.”).

61. See, e.g., Brief for NAACP et al. as Amici Curiae Supporting Petitioners in *Furman v. Georgia*, 408 U.S. 238 (1972) (No. 69-5003), 1971 WL 134376, at \*9 (Aug. 31, 1971) (tracing racism and capital punishment to when enslaved Africans were brought to the colonies: “The most brutal and inhumane forms of punishment—crucifixion, burning and starvation—were legal under the slave codes in the early colonies and were used extensively because imprisonment would have been a reward, giving the slave time to rest, and fines could not be collected from unpaid laborers.”).

62. Bryan Stevenson, *Why American Prisons Owe Their Cruelty to Slavery*, N.Y. TIMES MAG. (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/prison-industrial-complex-slavery-racism.html> (on file with the *Columbia Human Rights Law Review*).

63. Andrew Fede, *Legitimized Violent Slave Abuse in the American South, 1619–1865: A Case Study of Law and Social Change in Six Southern States*, 29 AM. J. LEGAL HIST. 93, 94 (1985).

64. *Id.*

65. *Id.*

rights these owners had to discipline their property, and protections against rebellions led by enslaved people.<sup>66</sup> Slave owners relied heavily on the slave codes to assert and maintain control because the state lacked power to stop a collective slave uprising.<sup>67</sup> As a result, legislators explicitly deprived enslaved people of the equal protection of “the common law of crimes” when whites “violently abused” them.<sup>68</sup> Legislators “pass[ed] exculpatory acts that granted both slave masters and whites who were strangers to the slave legal rights to beat, whip, and kill bondsmen.”<sup>69</sup> The only type of redress the slave laws provided for such treatment was to the slave owner, who could be reimbursed for damages to his property or for replacement if the abuse resulted in death.<sup>70</sup> No enslaved person could testify in court against a white person to determine guilt.<sup>71</sup> According to early colonial law, enslaved people were not considered worthy of protection. However, these same laws “held slaves . . . morally responsible and punishable for misdemeanors and felonies.”<sup>72</sup> Thus, early colonial law intentionally did not provide redress for Black people; it provided only punishment.

Following the formation of the United States, the law’s emphasis on punishing Black bodies continued. Antebellum era criminal codes often explicitly mentioned both the race of the victim and the defendant, making certain acts felonies *only when* committed by Black people. For example, in Alabama, an enslaved person could receive “up to one hundred stripes on the bare back . . . [for] forg[ing] a pass or engag[ing] in ‘riots, routs, unlawful, assemblies, trespasses, and seditious speeches.’”<sup>73</sup> Similarly, “[i]n Louisiana, a slave who struck his master, a member of the master’s family, or the overseer, ‘so as to cause a contusion, or effusion or shedding of blood,’ was to suffer death . . . .”<sup>74</sup>

Whereas certain crimes specifically targeted enslaved people, equally troubling was the fact that the social, political, and legal norms of the South also failed to hold white people accountable where the victim of the crime was Black. For example, the criminal codes

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66. See KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 206 (Vintage Books 1989) (1956).

67. *Fede*, *supra* note 63, at 95.

68. *Id.*

69. *Id.*

70. *Id.* at 96.

71. A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND AMERICAN LEGAL PROCESS—THE COLONIAL PERIOD* 58 (1978).

72. STAMPP, *supra* note 66, at 206.

73. *Id.* at 210.

74. *Id.* at 210–11.



assigned harsher punishments to enslaved and free Black people for committing the same offense as a white person.<sup>75</sup> In Georgia, “rape committed by a white man was never regarded as sufficiently serious to warrant a penalty greater than 20 years imprisonment. Rape committed by a slave or a free person of color upon a white woman was punishable by death.”<sup>76</sup> Early American criminal law laid the foundation for the racial disparities we continue to observe in contemporary capital punishment.

## B. Adoption of the Fourteenth Amendment

The Civil War transformed the United States politically, economically, and legally. During Reconstruction, from approximately 1863 to 1877, some of these changes briefly touched the lives of formerly enslaved and free Black people.<sup>77</sup> It was during this period that Congress passed the Fourteenth Amendment. The context, key political figures, and legislative history leading up to the Amendment’s passage shed light on the framers’ intent to extend the equal protection of the laws to Black people, specifically those victimized by crime.

In the aftermath of Emancipation, most Southern whites, regardless of whether they had been slaveholders, were not prepared to recognize the rights of Black people.<sup>78</sup> Accordingly, Southern lawmakers, many of whom had owned slaves or were from slaveholding families, passed a series of laws to maintain the subjugation of Black people.<sup>79</sup> These laws became known as black codes.<sup>80</sup> For instance, “[b]lack convicted of raping white women were required by law to be castrated or killed. White men convicted of raping white women, however, could expect much less severe punishments. The rape of black women was not even recognized as a crime.”<sup>81</sup>

Meanwhile, Congress had to quickly determine how to address post-war Southern resistance and reunify the splintered nation. On January 12, 1866, a Joint Committee of members of the 39th Congress convened “to inquire into the condition of the States which formed the

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75. *Id.* at 210 (“Every southern state defined a substantial number of felonies carrying capital punishment for slaves and lesser punishment for whites.”).

76. Brief for Petitioner, *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444), 1976 WL 181481, at \*54 n.62.

77. See DERRICK A. BELL, *RACE, RACISM, AND AMERICAN LAW* 51–52 (6th ed. 2008).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 282 n.106 (citing BELL HOOKS, *AIN’T I A WOMAN* 33–36 (1981)).

so-called Confederate States.”<sup>82</sup> Republican Representatives Thaddeus Stevens (PA) and John Bingham (OH) were key members of the committee, powerful political leaders, and fierce opponents of slavery and racial discrimination.<sup>83</sup>

During the Reconstruction hearing, members of Congress questioned lawyers, military officials, and businessmen residing in the South about the experiences of Black people in the aftermath of the war. Much of the testimony described violence against Black people. In Alabama, in the months immediately following the war, a Union Major General observed: “I have not known, after six months’ residence at the capital of the State, a single instance of a white man being convicted and hung or sent to the penitentiary for a crime against a negro, while many cases of crime warranting such punishment have been reported to me.”<sup>84</sup> The Major General explained that some of these crimes committed against Black people included the “most atrocious murders.”<sup>85</sup> Major General Canby described a similar situation in Louisiana: “[T]he prevailing sentiment is so adverse to the negro that acts of monstrous crime against him are winked at; and this sentiment will increase just in proportion as the privileges of the negroes are extended.”<sup>86</sup>

An attorney practicing in Norfolk, Virginia testified: “I have had more than a hundred complaints made to me with reference to the abuse of freedmen . . . . They have been beaten, wounded, and in some instances killed; and I have not yet known one white man to have been brought to justice for an outrage upon a colored man.”<sup>87</sup> Similarly, when the Joint Committee asked Major General Clinton Fisk whether a Black man in South Carolina would turn to the courts if a white man violated his wife, Fisk responded: “the negro . . . would not dream of such a thing [because of] . . . fear of personal violence to himself, and

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82. STAFF OF THE J. COMM. ON RECONSTRUCTION, 39TH CONG., REP OF THE J. COMM. ON RECONSTRUCTION, at iii (1866) [hereinafter RECONSTRUCTION REPORT].

83. See Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, 13 TEMPLE POL. & C.R. L. REV. 389, 392–94 (2004) (describing Thaddeus Stevens’ multiple decades of “uncompromising support[] of black rights and racial equality”); *id.* at 395–99 (detailing John Bingham’s efforts to expand Black rights in Ohio, including providing schools and protections against kidnapping).

84. See RECONSTRUCTION REPORT, *supra* note 82, pt. 3, at 141 (Mar. 9, 1866) (testimony of Maj. Gen. Wager Swayne).

85. *Id.*

86. *Id.* pt. 4, at 153 (1866) (testimony of Major General ED. R.S. Canby).

87. *Id.* pt. 3, at 50 (Feb. 3, 1866).

because he would think it would be utterly futile . . . .”<sup>88</sup> Earlier in his testimony, Fisk reported that he “found numerous evidences . . . that [Black women’s] chastity had been disregarded by the whites . . . .”<sup>89</sup>

The Joint Committee’s report was over 800 pages, detailing months of testimony, much of it describing violent Southern resistance to Black freedom. It was clear that, without federal legislation, Southern whites had little intention of recognizing Black people’s humanity or dignity: “The only hope the colored people have is in Uncle Sam’s bayonets; without them, they would not feel any security . . . .”<sup>90</sup> After bearing witness to this testimony, Representative Bingham drafted Section I of the Fourteenth Amendment:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the *equal protection of the laws*.<sup>91</sup>

When Senator Jacob Howard of Michigan introduced the Amendment to the Senate, he explained: “It prohibits the hanging of a black man for a crime for which the white man is not to be hanged.”<sup>92</sup> Forefront in the framers’ minds was to provide redress to Black victims of crimes, and to end the legal discrepancies that had long existed in Southern states.

### III. CHALLENGING CAPITAL PUNISHMENT UNDER THE FOURTEENTH AMENDMENT: *MCCLESKEY V. KEMP*

The death penalty challenge in *McCleskey v. Kemp* was the culmination of years of legal strategy, data collection, and analysis to push the Court to squarely consider race in capital punishment.<sup>93</sup>

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88. *Id.* at pt. 3, at 37 (Jan. 30, 1866).

89. *Id.*

90. *Id.* at pt. 2, at 59 (Feb. 3, 1866) (testimony of Thomas Bain).

91. Gerard N. Magliocca, *The Father of the 14th Amendment*, N.Y. TIMES: OPINIONATOR (Sept. 17, 2013), <https://opinionator.blogs.nytimes.com/2013/09/17/the-father-of-the-14th-amendment/> (on file with the *Columbia Human Rights Law Review*) (quoting U.S. CONST. amend. XIV) (emphasis added).

92. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

93. See JACK GREENBERG, *CRUSADERS IN THE COURTS: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT* 440 (1st ed. 1994) (describing the development of “a full-scale attack on capital punishment, as arbitrary, cruel and unusual, and racist”); *id.* at 444 (concluding that “the single greatest determinant of whether a defendant will be sentenced to death is the race of the victim”).

Justice Powell foreshadowed the challenge in his dissent in *Furman*, musing: “If a Negro defendant . . . could demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense, a constitutional violation might be established.”<sup>94</sup> Embracing Justice Powell’s invitation, counsel for Mr. McCleskey argued that Georgia’s death sentencing scheme racially discriminated against Warren McCleskey, a Black man sentenced to death for killing a white man, in violation of both the Eighth and Fourteenth Amendments.<sup>95</sup> In support, they relied on David Baldus’s complex statistical study showing that Georgia’s death sentencing scheme resulted in “persistent racial disparities in capital sentencing—disparities by race of the victim and by race of the defendant—that are highly statistically significant and cannot be explained by any of the hundreds of [other] sentencing factors . . . .”<sup>96</sup> Baldus’s analysis showed that defendants charged with killing a white victim received the death penalty at a rate nearly eleven times higher than defendants charged with killing a Black victim.<sup>97</sup> Yet despite the clear conclusions from the data, the Supreme Court was unconvinced.<sup>98</sup>

In evaluating the Fourteenth Amendment claim, the Court seemed fearful of the vast implications of Mr. McCleskey’s request.<sup>99</sup> Namely, finding an equal protection violation would have required the Court to acknowledge deeply entrenched, systemic racism in the administration of the death penalty. It was unwilling to concede that racism, bias, and prejudice played a role in police investigations, prosecutor charging decisions, and jury and judge decision-making.<sup>100</sup> Nor did the Court accept the statistical evidence as sufficient proof of *purposeful* racism in Mr. McCleskey’s case. Instead, for Mr. McCleskey to prevail on an inference of discrimination, the Court “demand[ed]

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94. *Furman v. Georgia*, 408 U.S. 238, 449 (1972) (Powell, J., dissenting) (explaining that the evidence submitted in *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968), showing that Black men in certain Arkansas counties were disproportionately sentenced to death for the rape of white women, was insufficient).

95. Brief for Petitioner at 27–28, *McCleskey v. Kemp*, 481 U.S. 279 (1987) (No. 84-6811), 1985 U.S. S. Ct. Briefs LEXIS 1538; *see also id.* at 10–27 (detailing history of racial disparities in criminal sentencing, particularly capital punishment).

96. *Id.* at 32.

97. *McCleskey v. Kemp*, 481 U.S. 279, 353 (1987) (Blackmun, J., dissenting).

98. *Id.* at 291.

99. The dissent characterized this as “a fear of too much justice.” *Id.* at 339 (Brennan, J., dissenting).

100. *Id.* at 292.

exceptionally clear proof,”<sup>101</sup> despite the fact that the Court routinely relied on statistical evidence in other areas of the law to infer discrimination, particularly where “smoking gun” evidence is unlikely.<sup>102</sup> The Court also dismissed Mr. McCleskey’s historical evidence, claiming that history from the Civil War era had “little probative value” and that “actions taken long ago” did not reveal “current intent.”<sup>103</sup> The Court therefore created a regime where the most relevant and probative evidence—i.e., historical discrimination and deliberate disproportionate punishment—could not be used to establish a Fourteenth Amendment equal protection violation. This undermined the intent to extend redressability to Black people inherent in the Fourteenth Amendment.<sup>104</sup>

Ultimately, in rejecting Mr. McCleskey’s Eighth Amendment arguments, the Court invited him to take his case and statistical proof to the legislature, a body better suited to address his concerns.<sup>105</sup>

#### IV. CHALLENGING THE DEATH PENALTY BASED ON THE UNDERVALUATION OF BLACK LIVES

The Fourteenth Amendment forbids public officials from intentional discrimination based on race absent a compelling government interest. This prohibition extends to investigating police officers and prosecutors exercising discretion. No compelling state interest can justify the government’s failure to seek the death penalty in aggravated murders involving Black victims at similar rates as in cases involving white victims. The distinguishing factor in the government’s failure to seek death is not the aggravation of the crime, but rather the race of the victim. As the Court recognized in *McCleskey*, “[i]t would violate the Equal Protection Clause for a State to base enforcement of its criminal laws on ‘an unjustifiable standard such as race.’”<sup>106</sup>

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101. *Id.* at 297.

102. Courts have long allowed plaintiffs in employment cases to rely on statistics because direct evidence of discrimination is rare. *See, e.g., Bazemore v. Friday*, 478 U.S. 385, 387 (1986) (relying on several statistical regressions of pay to show Black employees were paid less than white colleagues).

103. *McCleskey*, 481 U.S. at 289; *id.* n.20.

104. *See supra* Section II.B.

105. *McCleskey*, 481 U.S. at 319.

106. *Id.* at 291 n.8 (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

### A. Standing and Selection of Parties to Raise the Claim

A threshold determination in mounting a Fourteenth Amendment equal protection challenge is determining who should raise it: the estate of a Black victim, a defendant who murdered a Black victim and against whom the government did not seek death, or a defendant who murdered a white victim and against whom the government did seek death? No lawyer acting in her client's best interest would challenge the government's failure to seek death against her client. Instead, the question becomes whether a capitally-charged defendant who murdered a white victim has third-party standing to raise the issue on behalf of a murdered Black victim from a non-capital case.

Third-party standing determinations require the person pursuing the claim to have an interest in the outcome of the dispute, to be closely related to the third party, and for the third party to be unlikely to assert their own right.<sup>107</sup> Beginning with *Craig v. Boren*<sup>108</sup> and continuing with *Batson v. Kentucky*<sup>109</sup>, the Court began to relax standing principles to address equal protection violations. In *Batson*, the defendant challenged the government's unlawful removal of a prospective juror based on the juror's race. In allowing a defendant to pursue a jury selection discrimination claim, the Court implicitly recognized that the unlawfully excluded juror was unlikely to assert their own right. Similarly, there is little likelihood that a Black murder victim's estate would assert the victim's right to equal protection of a criminal prosecution. Moreover, there is an additional harm in need of redress: the harm to the community where selective capital prosecution based on race undermines "public confidence in the fairness of our justice system."<sup>110</sup> Like *Batson*, the prosecutor's discriminatory action "causes a criminal defendant cognizable injury . . . because it 'casts doubt on the integrity of the judicial process' and places the fairness of a criminal proceeding in doubt."<sup>111</sup>

The most appropriate actor to bring the challenge is a Black defendant whom the state is seeking death against for allegedly murdering a white victim. To avoid procedural default, the ideal

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107. See *Powers v. Ohio*, 499 U.S. 400, 414 (1991).

108. 429 U.S. 190 (1976) (granting standing to beer vendors challenging Oklahoma's statute prohibiting the sale of certain beer to males (but not females) between ages 18–21).

109. 476 U.S. 79 (1986).

110. *Batson*, 476 U.S. at 87.

111. *Id.* at 411 (quoting *Rose v. Mitchell*, 433 U.S. 545, 556 (1979)).

procedural mechanism to raise the claim is a pretrial motion after the prosecution has filed its death notice. To raise the claim, the lawyers must find a factually similar case from the same prosecuting jurisdiction involving a white or Black defendant prosecuted for murdering a Black victim and where the state declined to seek death. The two crimes should share identical possible aggravating circumstances and should have occurred during roughly the same timeframe. These similarities—aggravating facts, prosecutor’s office, and timing—will help isolate the victim’s race as the distinguishing characteristic between a death-noticed case and a non-capital prosecution.

### B. Purposeful Discrimination

The central takeaway from *McCleskey* was that any subsequent challenge to the death penalty on equal protection grounds must include evidence of *purposeful* racial discrimination.<sup>112</sup> Thus, when raising the claim from the perspective of a Black murder victim, such evidence must support an inference that the decisionmakers acted with discriminatory purpose when they declined to seek death. Existing statistics illustrate the stark race-of-victim disparities in law enforcement murder investigations, prosecutor charging decisions, jury sentencing, and executions. However, *McCleskey* tells us we need more.

As Anthony Amsterdam explained in his 2007 remarks reflecting on *McCleskey*, we must collect information about racism in the community where the cases are being prosecuted, in the prosecuting attorney’s office, and in the investigating police department.<sup>113</sup> We must also gather evidence of racial discrimination from the specific prosecutors involved in the charging decisions—their record of *Batson* violations, their personnel files, and any public statements they have made.<sup>114</sup> The NAACP Legal Defense and Educational Fund’s amicus brief in *Flowers v. Mississippi* is an excellent example of how to identify racism in a specific community, in a prosecutor’s office, and in the practices of an individual prosecutor.<sup>115</sup>

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112. *McCleskey v. Kemp*, 481 U.S. 279, 351 (1987).

113. *See* Amsterdam, *supra* note 18, at 53–54.

114. *Id.*

115. *See* Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Petitioner, *Flowers v. Mississippi*, 136 S. Ct. 2228 (2019) (No. 17-9572), 2018 WL 6921334, at \*17–36 (detailing Winona, Mississippi and the Fifth Judicial District’s long history of denying African-Americans equal rights and

A successful test case in a single jurisdiction could pave the way for subsequent challenges in other states that continue to seek the death penalty, eventually culminating in a national end to capital punishment.

### C. Remedy

In response to the racially disproportionate data in *McCleskey*, one of the Justices mused: “It’s such a curious case, because what’s the remedy? Is it to execute more people?”<sup>116</sup> Of course not. At the time, Jack Boger demurred, offering that the Court need not make a facial holding on the constitutionality of the death penalty akin to the Court’s decision in *Furman*.<sup>117</sup> However, today the only appropriate remedy is to abolish the death penalty. States still operating a capital punishment system are incapable of administering the death penalty free from racial discrimination and arbitrariness. Legally irrelevant factors continue to drive death sentencing including the quality of defense counsel, the location of the crime, and the race of the victim (and often the defendant).<sup>118</sup> Expanding the death penalty’s reach to include defendants in Black victim cases serves only to perpetuate the undervaluation of Black lives because the perpetrators of Black victim cases are often also Black.<sup>119</sup>

To ensure that Black victims receive equal protection of the laws, the government must end the discriminatory imposition of capital punishment. A natural extension of valuing the lives of Black victims is to value the lives of all defendants, particularly Black defendants charged with aggravated murders.<sup>120</sup>

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District Attorney Doug Evans’ record of discriminating against African-American jurors).

116. See Transcript of Oral Argument at 12, *McCleskey v. Kemp*, 481 U.S. 279 (1987) (No. 84-6811).

117. *Id.* at 12–13.

118. See *Glossip v. Gross*, 135 S. Ct. 2726, 2760 (2015) (Breyer, J., dissenting) (recognizing that factors “that ought *not* to affect application of the death penalty, such as race, gender, or geography, often do.”) (emphasis in original); *id.* at 2761 (explaining that “the availability of resources for defense counsel (or lack thereof)” also affects death sentencing (citing, *inter alia*, Bright, *Counsel for the Poor*, *supra* note 14)).

119. See *Kennedy*, *supra* note 19, at 1392.

120. See BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 17–18 (2014).



## CONCLUSION

At its founding, the nation's criminal legal system distinguished between races to determine what behavior was criminal and who to punish. The Fourteenth Amendment, in part, was ratified to eradicate these distinctions. Placing equal value on Black lives—perpetrators and victims—relative to white lives, would compel the criminal legal system to address longstanding racial discrimination in the operation of the death penalty. Rather than expand or even reform capital punishment, the only solution is abolition. Borrowing from Allegra McLeod's prison abolition framework, abolition of the death penalty forces the law to confront the dehumanization, violence, and racial degradation inherent in death sentencing.<sup>121</sup> Empirical evidence gathered since *Furman* illustrates that our nation is incapable of administering the death penalty free from racial discrimination. It is time for this nation to cease tinkering with the machinery of death and to abolish capital punishment.

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121. McLeod, *supra* note 60, at 1207.