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## The Inequality of America's Death Penalty: A Crossroads for Capital Punishment at the Intersection of the Eighth and Fourteenth Amendments

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# The Inequality of America's Death Penalty: A Crossroads for Capital Punishment at the Intersection of the Eighth and Fourteenth Amendments

John D. Bessler\*

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## *I. Introduction*

We live in a divided society, from gated communities to cell blocks congested with disproportionate numbers of young African-American men.<sup>1</sup> There are rich and poor, privileged and

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1. See F. MICHAEL HIGGINBOTHAM, *GHOSTS OF JIM CROW: ENDING RACISM IN POST-RACIAL AMERICA* 14, 18, 29, 39, 157–58, 161–62, 212 (2013) (noting that the victimization and unequal treatment of blacks persists in present-day society).

homeless, Democrats and Republicans, wealthy zip codes and stubbornly impoverished ones. There are committed “Black Lives Matter” protestors, and there are those who—invoking “Blue Lives Matter”—demonstrate in support of America’s hard-working police officers.<sup>2</sup> In her new article, “Matters of Strata: Race, Gender, and Class Structures in Capital Cases,” George Washington University law professor Phyllis Goldfarb highlights the stratification of our society and offers a compelling critique of America’s death penalty regime—one, she notes, that is “deeply affected by structures of race, gender, and class.”<sup>3</sup> With the number of death sentences and executions declining,<sup>4</sup> Professor Goldfarb’s article exposes the grim realities—miscarriages of justice, runaway arbitrariness, and persistent discrimination—that may ultimately lead to a judicial declaration that America’s

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2. See 31 EX AUDITU: AN INTERNATIONAL JOURNAL FOR THE THEOLOGICAL INTERPRETATION OF SCRIPTURE ix (2015) (the journal’s “Race and Racism” issue). The recent U.S. presidential election—one in which Donald Trump won the *Electoral College* vote but in which Hillary Clinton won the *popular* vote—illustrates the current ideological divisions in American life. Zachary Roth, *Electoral College Lesson: More Voters Chose Clinton, But Trump Will Be President*, NBC NEWS (Nov. 10, 2016), <http://www.nbcnews.com/storyline/2016-election-day/electoral-college-lesson-more-voters-chose-hillary-clinton-trump-will-n681701> (last visited Dec. 19, 2016) (on file with the Washington and Lee Law Review); see also Byron Tau, *With Clinton Far Ahead in Popular Vote, Hill Democrats Explore Electoral College Overhaul*, WALL STREET J. (Dec. 6, 2016), <http://blogs.wsj.com/washwire/2016/12/06/with-clinton-far-ahead-in-popular-vote-hill-democrats-explore-electoral-college-overhaul/> (last visited Dec. 19, 2016) (on file with the Washington and Lee Law Review) (“A number of Capitol Hill Democrats have revived proposals to reform or abolish the Electoral College, in reaction to Democratic presidential candidate Hillary Clinton’s popular vote lead of more than 2.6 million over Republican President-elect Donald Trump.”). The Electoral College is itself rooted in the institution of southern slavery. Akhil Reed Amar, *The Troubling Reason the Electoral College Exists*, TIME (Nov. 8, 2016), <http://time.com/4558510/electoral-college-history-slavery/> (last visited Dec. 19, 2016) (describing the origins of the Electoral College) (on file with the Washington and Lee Law Review).

3. See Phyllis Goldfarb, *Matters of Strata: Race, Gender, and Class Structures in Capital Cases*, 73 WASH. & LEE L. REV. 1, 2 (2016) (finding that the American criminal justice system exemplifies institutions that are deeply affected by race, gender, and class).

4. See *Facts about the Death Penalty*, DEATH PENALTY INFO. CTR. 1, 3 (Oct. 6, 2016), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (showing the declining number of death sentences and executions); see also *Texas Executions Drop to Lowest Level in 20 Years*, DEATH PENALTY INFO. CTR. (Oct. 13, 2016), <http://www.deathpenaltyinfo.org/node/6577> (showing the statistics behind the death penalty’s decline in Texas).

death penalty violates the U.S. Constitution's Eighth and Fourteenth Amendments.<sup>5</sup>

The self-described goal of Goldfarb's essay: "to cultivate a deeper understanding of the more hidden ways that race, gender, and class can affect the death penalty system, including the ways it can threaten the accuracy of fact-finding on which the legitimacy of the capital sanction depends."<sup>6</sup> Capital punishment is, let there be no doubt, meted out erratically and often errantly,<sup>7</sup> in a racially discriminatory manner,<sup>8</sup> and in a way that condemns more men than women.<sup>9</sup> And it is—and long has been—closely

5. See Goldfarb, *supra* note 3, at 3. The Eighth Amendment prohibits "cruel and unusual punishments," and the Fourteenth Amendment made the Eighth Amendment applicable to the states. U.S. CONST. amends. VIII & XIV. The Eighth Amendment was first held applicable to the states in *Robinson v. California*, 370 U.S. 660 (1962). See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 238 (2002). The U.S. Supreme Court's long, tortured relationship with capital punishment is chronicled in an important new book. See generally CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* (2016). As that book notes: "The American death penalty has come full circle over the past fifty years. Capital punishment was the subject of a concerted constitutional litigation campaign in the 1960s that led to the Supreme Court's bold abolition in 1972, followed by its chastened reauthorization of the death penalty four years later." *Id.* at 3.

6. Goldfarb, *supra* note 3, at 2.

7. See Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 BOSTON UNIV. L. REV. 227 (2012) (discussing the death penalty's arbitrary administration); JAMES S. LIEBMAN, JEFFREY FAGAN & VALERIE WEST, *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995* (2000) (providing statistics illustrating the American death penalty's arbitrariness).

8. See Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383 (2006) (finding that the more stereotypically "black" a defendant is perceived to be, the more likely that person is to be sentenced to death); Lincoln Caplan, *Racial Discrimination and Capital Punishment: The Indefensible Death Sentence of Duane Buck*, NEW YORKER, Apr. 20, 2016 (discussing a prime example of racial discrimination in death penalty litigation); Robert J. Smith, *There's No Separating the Death Penalty and Race*, SLATE (May 5, 2016), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2016/05/foster\\_v\\_chatman\\_race\\_infects\\_death\\_penalty\\_to\\_the\\_core.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2016/05/foster_v_chatman_race_infects_death_penalty_to_the_core.html) (last visited Dec. 19, 2016) (concluding that the only way to do away with racial bias in death penalty cases is to outlaw the death penalty altogether) (on file with the Washington and Lee Law Review).

9. See Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 LAW & SOC. REV. 367 (1991); Victor L. Streib, *Death Penalty for Female Offenders, Jan. 1, 1973, through Dec. 31, 2012*, DEATH PENALTY INFO. CTR.

associated with race and poverty and invidious stereotypes and bad lawyering.<sup>10</sup> “Were it not for the distortions introduced by race, gender, and class ideologies,” Goldfarb concludes of the tragic story of one former Virginia death row inmate, Joseph Giarratano, “his life might have been altered, and his treatment by the criminal justice system might have been more attentive and accurate.”<sup>11</sup>

A victim of child abuse who fell into substance abuse and who may have falsely confessed to a horrific rape and double murder, Joe Giarratano is still imprisoned for a crime committed in 1979 in Norfolk, Virginia. In February 1979, Giarratano awoke to find the lifeless bodies of two women with whom he shared an apartment. Michelle Kline—a fifteen-year-old girl—had been raped and strangled in her bed, and the body of her mother, Toni, was found in the bathroom, her carotid artery severed. A suicidal alcoholic who frequently had blackouts and hallucinations, Giarratano had no memory of what had happened and thus assumed he was responsible. After confessing to the horrific crime, giving five inconsistent confessions to police over two days, he waived his right to a jury trial, asked to be put to death, and was sent to death row. Only later was exculpatory forensic evidence, including unidentified bloody bootprints, fingerprints and hair samples, examined more closely, calling into question the validity of Giarratano’s admission of guilt.<sup>12</sup>

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(2013), <http://www.deathpenaltyinfo.org/documents/FemDeathDec2012.pdf> (citing statistics showing the disproportionate number of men who are sentenced to death and executed in comparison to women).

10. See JAMES R. ACKER, QUESTIONING CAPITAL PUNISHMENT: LAW, POLICY, AND PRACTICE 197–223 (2014) (discussing racial discrimination and arbitrariness in the death penalty’s application); MACHINERY OF DEATH: THE REALITY OF AMERICA’S DEATH PENALTY REGIME 20 (David R. Dow & Mark Dow eds. 2002) (“[C]lose to 100 percent of capital murder defendants are indigent.”); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836 (1994) (discussing how poor people accused of capital crimes are often defended by lawyers who lack the skills, resources, and commitment to handle such serious matters); Stephen B. Bright, *The Role of Race, Poverty, Intellectual Disability, and Mental Illness in the Decline of the Death Penalty*, 49 U. RICH. L. REV. 671, 671–75 (2015) (describing the role played by race, poverty, intellectual disabilities and mental illness in the death penalty’s administration).

11. See Goldfarb, *supra* note 3, at 49–50 & n.177 (noting the costs and effects on lives in death penalty cases and the gravity of the sentence).

12. See HERBERT H. HAINES, AGAINST CAPITAL PUNISHMENT: THE ANTI-

In prison, Giarratano—a ninth-grade dropout who, behind bars, transformed his life through reading literature, philosophy and law—later advocated successfully to save the life of *another* death row inmate, Earl Washington Jr. Working as a “jailhouse” lawyer, Giarratano filed a section 1983 action on Washington’s behalf that set in motion a series of events that led to a stay of execution for Washington and his subsequent exoneration in 2000. A black, intellectually disabled man, Washington had been convicted of raping and murdering a young white woman, Rebecca Williams, in her Culpeper, Virginia apartment—and he spent seventeen years in prison before DNA evidence confirmed his innocence.<sup>13</sup> Giarratano was not afraid to challenge the

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DEATH PENALTY MOVEMENT IN AMERICA, 1972-1994, at 129 (1996); Goldfarb, *supra* note 3, at 24 (discussing Joseph Giarratano’s case); *Joseph Giarratano, WRONGFULLY CONVICTED GROUP WEBSITE*, <https://wronglyconvictedgroup.wordpress.com/category/4-main-cause-of-wrongful-conviction/false-confession/> (last visited Dec. 19, 2016) (on file with the Washington and Lee Law Review); *see also* Richard A. Leo & Richard J. Ofshe, *Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. & CRIMINOLOGY 429, 489–90 (1988):

In 1979, Norfolk, Virginia police extracted five contradictory confessions from Joseph Giarratano to the rape and murder of fifteen-year-old Michelle Kline and her forty-four-year-old mother, Toni Kline. Sperm, hair samples, and bloody shoeprints found at the crime scene did not link Giarratano to the crime. In addition, Giarratano’s confessions were demonstrably inaccurate on significant points: One of the victims died from a severed artery and bled profusely, but police found no blood on Giarratano’s clothing; the victims were strangled and stabbed by someone who is right-handed, but Giarratano is left-handed and has only limited use of his right hand due to neurological damage from childhood; Giarratano confessed to strangling one of his victims with his hands, but an independent pathologist testified that the hallmarks of manual strangulation were not present; Giarratano stated that he threw the knife he used into the Kline’s backyard, but no weapon was ever found.

13. *See generally* MARGARET EDDS, AN EXPENDABLE MAN: THE NEAR-EXECUTION OF EARL WASHINGTON JR. 83–95 (2003); WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES 65 (2006); FRANK R. BAUMGARTNER, SUZANNA L. DE BOEF & AMBER E. BOYDSTUN, THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE 87 (2008); PUNISHMENT AND SOCIAL CONTROL 335 (Thomas G. Bloomberg & Stanley Cohen eds., 2d ed. 2003). Washington had given a false confession that was written up by police detectives and signed by Washington. Washington had once come within nine days of being executed, and he was only exonerated long after the crime through DNA testing done by a Virginia laboratory. ROBERT P. BURNS, KAFKA’S LAW: THE TRIAL AND AMERICAN CRIMINAL JUSTICE 104 (2014); JON B. GOULD, THE

system even though it might have consequences for him. “Giarratano’s lawsuits regarding prisoners’ rights,” two authors have observed, “so infuriated Virginia prison officials that they transferred Giarratano to prisons in Utah and Illinois, until his hunger strike forced his return to Virginia.”<sup>14</sup>

Sentenced to death after being convicted of murdering Toni Kline and raping and murdering her 15-year-old daughter, Joe Giarratano—a white inmate prosecuted for murdering two white victims—spent more than ten years on the state’s death row. He came within a few days of execution in the electric chair before then-Virginia Governor Douglas Wilder, in a conditional pardon, took him off death row in 1991 amid concerns about his innocence. “The governor had received 5,978 telephone calls and letters urging him to spare Giarratano,” one newspaper reported of the conditional pardon, which imposed a life sentence but allowed for the possibility of parole after Giarratano served 25 years behind bars.<sup>15</sup> Among those supporting his clemency request: actor Mike Farrell, conservative columnist James J. Kilpatrick, singer Joan Baez, and members of Congress. Denied a retrial by the prosecutor though one had been urged by Governor Wilder,<sup>16</sup> Giarratano was later stabbed in prison but survived,<sup>17</sup>

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INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 29 (2008); CHRISTOPHER S. KUDLAC, PUBLIC EXECUTIONS: THE DEATH PENALTY AND THE MEDIA 121 (2007).

14. See TODD C. PEPPERS & LAURA TREVVETT ANDERSON, ANATOMY OF AN EXECUTION: THE LIFE AND DEATH OF DOUGLAS CHRISTOPHER THOMAS 146 (2009) (discussing the Giarratano case in the context of another death penalty case).

15. *Id.*; *Loses New Trial Bid for Haunting Crime*, BRYAN TIMES (Bryan, OH), Feb. 21, 1991, at 4; compare Jean McNair, *Giarratano Studies Fine Print of Wilder Pardon*, FREE LANCE-STAR, Feb. 20, 1991, at 1 (discussing the possibility of a pardon in the Giarratano case), with HAINES, *supra* note 12, at 129:

Eighty-two hours before Joe Giarratano was to be executed, Governor Wilder offered him a deal that canceled his execution on condition that he accept a life sentence. Should he successfully seek a retrial, he could be sentenced to death. Giarratano accepted the offer and appealed to the state attorney general, Mary Sue Terry, for a new trial. That request was denied . . .

16. In 1990, Governor L. Douglas Wilder—a man who grew up in a then-segregated Richmond—became the first black elected governor. JESSIE CARNEY SMITH, *BLACK FIRSTS: 4,000 GROUND-BREAKING AND PIONEERING HISTORICAL EVENTS* 271 (3d ed. 2013); WILLIAM P. HUSTWIT, *JAMES J. KILPATRICK: SALESMAN FOR SEGREGATION* 215 (2013).

became the named plaintiff in a well-known U.S. Supreme Court case<sup>18</sup> arguing for the constitutional right to counsel in habeas corpus cases, and continues, to this day, to maintain his innocence and to seek a new trial.<sup>19</sup>

In her essay, Professor Goldfarb speaks of “the pervasive racial influences on the contours of our contemporary justice systems.”<sup>20</sup> In discussing the confluence of capital punishment and race, she reminds readers of the U.S. Supreme Court’s notorious decision in *McCleskey v. Kemp*.<sup>21</sup> In that case, a 5-4 decision, the Supreme Court—in an opinion authored by Justice

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17. See MIKE FARRELL, *JUST CALL ME MIKE: A JOURNEY TO ACTOR AND ACTIVIST* 214, 305 (2008) (describing Giarratano’s imprisonment).

18. See *Murray v. Giarratano*, 492 U.S. 1 (1989).

19. See JEFFREY L. KIRCHMEIER, *IMPRISONED BY THE PAST: WARREN McCLESKEY AND THE AMERICAN DEATH PENALTY* 177 (2015); MIKE FARRELL, *OF MULE AND MAN* 112 (2009); *Former Death Row Inmate Giarratano Hurt in Stabbing*, FREE LANCE-STAR, July 8, 1996, at C8; *The Status of Joe’s Case*, FREE JOE GIARRATANO, <http://freejoeg.com/case-status/> (last visited Dec. 19, 2016) (on file with the Washington and Lee Law Review). In 1987, the U.S. Supreme Court held that there is no constitutional right to counsel in state post-conviction proceedings—a holding it later affirmed, in the capital context, two years later. See *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989).

20. Goldfarb, *supra* note 3, at 14.

21. 481 U.S. 279 (1987). The Supreme Court in *McCleskey* considered the case of Warren McCleskey, a black man sentenced to death in 1978 in Georgia for killing a white police officer. McCleskey’s lawyers argued that their client’s death sentence was part of a pattern of racial discrimination that violated the Eighth and Fourteenth Amendments. DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION* 282 (2010). After the Supreme Court rejected McCleskey’s Eighth Amendment and Equal Protection Clause claims, several members of Congress pushed for the passage of the Racial Justice Act, which would have allowed capital defendants to make a statistical showing of racial disparity in the administration of their jurisdiction’s capital punishment scheme. See Vada Berger, Nicole Walthour, Angela Dorn, Dan Lindsey, Pamela Thompson & Gretchen von Helms, *Too Much Justice: A Legislative Response to McCleskey v. Kemp*, 24 HARV. C.R.-C.L. L. REV. 437, 438 (1989); see also THE INTERNATIONAL SOURCEBOOK ON CAPITAL PUNISHMENT 19 (William A. Schabas ed., 1997) (“The Racial Justice Act was a modest proposal that would have required courts to have hearings on racial disparities in infliction of the death penalty and to look behind the disparities to determine whether they are related to race or some other factor.”). That legislation, however, never passed. *Id.* (“Despite the pronounced racial disparities in the infliction of the death penalty in both state and federal capital cases, Congress refused to include the Racial Justice Act as part of the crime bill in 1994, just as it has refused to enact the act in previous years.”).



Lewis Powell—upheld Warren McCleskey’s death sentence in the face of compelling, never-refuted statistical evidence showing that a victim’s race plays a major role in deciding who lives or dies.<sup>22</sup> That decision—one Justice Powell later told his biographer he regretted—turned a blind eye to racial bias in the death penalty’s administration instead of forthrightly acknowledging that discrimination.<sup>23</sup> “Apparent discrepancies in sentencing are an inevitable part of our criminal justice system,” Powell wrote in *McCleskey*, asserting that “if we accept McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.”<sup>24</sup> “*McCleskey* is the *Dred Scott* decision of our time,” death penalty opponent Anthony Amsterdam—the famed Supreme Court advocate and NYU law professor—once observed of Justice Powell’s 1987 majority opinion.<sup>25</sup>

America’s death penalty—as Phyllis Goldfarb points out—is closely “intertwined” with issues of race, gender and class.<sup>26</sup> “Our

22. See Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Study*, 34 CARDOZO L. REV. 1127, 1236 (2013) (discussing the findings of the Baldus study).

23. See *Justice Powell’s New Wisdom*, N.Y. TIMES (June 11, 1994), <http://www.nytimes.com/1994/06/11/opinion/justice-powell-s-new-wisdom.html> (last visited Dec. 15, 2016) (“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.”) (on file with the Washington and Lee Law Review).

24. See MARTIN GARBUS, *COURTING DISASTER: THE SUPREME COURT AND THE UNMAKING OF AMERICAN LAW* 53 (2002).

25. See Adam Liptak, *New Look at Death Sentences and Race*, N.Y. TIMES (Apr. 29, 2008), <http://www.nytimes.com/2008/04/29/us/29bar.html> (last visited Dec. 15, 2016) (highlighting the case’s lasting impact) (on file with the Washington and Lee Law Review).

26. See Goldfarb, *supra* note 3, at 6. The Central Park jogger case, in which a 28-year-old investment banker was brutally assaulted, raped and sodomized on April 19, 1989, leaving her in a coma for twelve days, became “one of the most widely publicized crimes of the 1980’s.” TRISHA MEILI, *I AM THE CENTRAL PARK JOGGER* (2004); M. A. Farber, ‘Smart, Driven’ Woman Overcomes Reluctance, N.Y. TIMES (July 17, 1990), <http://www.nytimes.com/1990/07/17/nyregion/smart-driven-woman-overcomes-reluctance.html> (last visited Dec. 19, 2016) (on file with the Washington and Lee Law Review). “As the case proceeded,” one source notes, “it became a symbolic battleground for race, class, and gender issues in the late 1980s and early 1990s.” ENCYCLOPEDIA OF RACE AND CRIME 98 (Helen Taylor Greene & Shaun L. Gabbidon eds., 2009). Notoriously, less than two weeks after the attack, then-

criminal justice system,” she aptly notes after examining early American history, the scourge of lynchings, and the institution of slavery, “was forged in America’s racial cauldron and would not look as it does but for our racial history.”<sup>27</sup> At one time, slaves and free blacks were barred by law from testifying in court against whites,<sup>28</sup> slaves were hanged, gibbeted, or burned to death for rebelling against their masters,<sup>29</sup> and black men—even boys—were sadistically lynched, whether for sexually assaulting whites or for other actions, even perceived slights.<sup>30</sup> “Any negro or

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real estate mogul Donald Trump took out full-page advertisements in New York City newspapers that, in large capital letters, blared: “BRING BACK THE DEATH PENALTY.” SARAH BURNS, *THE CENTRAL PARK FIVE: THE UNTOLD STORY BEHIND ONE OF NEW YORK CITY’S MOST INFAMOUS CRIMES* 72 (2012); Goldie Taylor, *Donald Trump Keeps Smearing the Long-Since Exonerated Central Park Five*, *DAILY BEAST* (Oct. 7, 2016), <http://www.thedailybeast.com/articles/2016/10/07/donald-trump-keeps-smearing-the-long-since-exonerated-central-park-five.html> (last visited Dec. 19, 2016) (“In 1989, as five boys—four black and one Latino—stood accused of gang-raping and brutally beating a white female jogger in Central Park, Trump could not help but snatch some of the spotlight for himself at a time when tabloids screamed about ‘wolfpacks.’”) (on file with the Washington and Lee Law Review). During the 2016 presidential campaign, then-candidate Trump inexplicably continued to insist on the guilt of the Central Park Five despite their exoneration more than a decade earlier. “They admitted they were guilty,” Trump said to CNN in a statement even though DNA evidence had cleared them and another man had separately confessed to the crime in 2002. *Ken Burns Blasts Trump for Insisting the Central Park 5 Are Guilty*, *HUFFINGTON POST* (Oct. 7, 2016), [http://www.huffingtonpost.com/entry/ken-burns-trump-central-park-five\\_us\\_57f7ebf9e4b0e655eab3f20b](http://www.huffingtonpost.com/entry/ken-burns-trump-central-park-five_us_57f7ebf9e4b0e655eab3f20b) (last visited Dec. 19, 2016) (on file with the Washington and Lee Law Review); Benjy Sarlin, *Donald Trump Says Central Park Five Are Guilty, Despite DNA Evidence*, *NBC NEWS* (Oct. 7, 2016), <http://www.nbcnews.com/politics/2016-election/donald-trump-says-central-park-five-are-guilty-despite-dna-n661941> (last visited Dec. 19, 2016) (on file with the Washington and Lee Law Review).

27. See Goldfarb, *supra* note 3, at 14.

28. See STANLEY W. CAMPBELL, *SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860*, at 11 (1970).

29. See “PRETENDS TO BE FREE”: RUNAWAY SLAVE ADVERTISEMENTS FROM COLONIAL AND REVOLUTIONARY NEW YORK AND NEW JERSEY xx (Graham Russell Hodges & Alan Edward Brown eds., 1994); see also DOUGLAS R. EGERTON, *GABRIEL’S REBELLION: THE VIRGINIA SLAVE CONSPIRACIES OF 1800 AND 1802* (2000).

30. See, e.g., CLIFFORD R. CALDWELL & RON DELORD, *ETERNITY AT THE END OF A ROPE: EXECUTIONS, LYNCHINGS AND VIGILANTE JUSTICE IN TEXAS 1819–1912*, at 362 (2015) (describing the torturing and burning to death of Henry Smith, a black man lynched in Texas in 1893); ANITA PRICE DAVIS, *THE MARGARET MITCHELL ENCYCLOPEDIA* 119 (2013) (“Between 1882 and 1968 there were 4,742

mulatto, bond or free,” read one Virginia law from 1819, “shall be a good witness in pleas of the Commonwealth for or against negroes or mulattoes, bond or free, or in civil pleas where free negroes or mulattoes shall alone be parties, and in no other cases whatever.”<sup>31</sup> As the Montgomery, Alabama-based Equal Justice Initiative emphasizes of America’s past:

Racial terror lynchings during the period from 1877 to 1950 killed thousands of black people, marginalized people of color politically, economically, and socially, and fueled a massive migration of black refugees out of the South. In addition, lynching and the era of racial terror inflicted deep trauma and psychic wounds on survivors, families, and entire communities.<sup>32</sup>

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black lynchings in the nation. Congressman John Lewis calls the period ‘one of the darkest and sickest periods in American history.’”); CHRISTOPHER METRESS, *THE LYNCHING OF EMMETT TILL: A DOCUMENTARY NARRATIVE 3* (2002) (discussing the societal impact of the lynching of Emmett Till); *see also* ROBERT W. THURSTON, *LYNCHING: AMERICAN MOB MURDER IN GLOBAL PERSPECTIVE* (2011); AMY LOUISE WOOD, *LYNCHING AND SPECTACLE: WITNESSING RACIAL VIOLENCE IN AMERICA, 1890-1940* (2009); CHRISTOPHER WALDREP, *AFRICAN AMERICANS CONFRONT LYNCHING: STRATEGIES OF RESISTANCE FROM THE CIVIL WAR TO THE CIVIL RIGHTS ERA* (2009). After some lynchings, lynch mob participants actually posed for photographs with the bodies of the lynching victims and then mailed those photographs out as postcards. WITHOUT SANCTUARY: *LYNCHING PHOTOGRAPHY IN AMERICA* (James Allen ed., 2000); DORA APEL, *IMAGERY OF LYNCHING: BLACK MEN, WHITE WOMEN, AND THE MOB* (2004).

31. *See* CIVIL RIGHTS AND AFRICAN AMERICANS: A DOCUMENTARY HISTORY 60, 62 (Albert P. Blaustein & Robert L. Zangrando eds., 1968) (reprinting the text of the Virginia law, “An act reducing into one, the several acts concerning slaves, free Negroes, and mulattoes”). This was the law in both Virginia and Maryland and similar provisions were put in place in states such as Alabama, Mississippi, Missouri, North Carolina and Tennessee. CHARLES M. CHRISTIAN, *BLACK SAGA: THE AFRICAN AMERICAN EXPERIENCE: A CHRONOLOGY* 31 (1995).

32. *See History of Racial Injustice: Racial Terror Lynchings*, EQUAL JUST. INITIATIVE, <https://eji.org/history-racial-injustice-racial-terror-lynchings> (last visited Dec. 16, 2016) (discussing the lasting impacts and effects on the lives of those witnessing lynchings in the South) (on file with the Washington and Lee Law Review); *Lynching in America: Confronting the Legacy of Racial Terror*, EQUAL JUST. INITIATIVE, <http://eji.org/reports/lynching-in-america> (last visited Dec. 19, 2016) (describing how the Equal Justice Initiative documented 4,075 cases of “racial terror lynchings” of African Americans in Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia between 1877 and 1950) (on file with the Washington and Lee Law Review). “The death penalty is a direct descendent of lynching,” observes Christina Swarns of the NAACP Legal Defense Fund.

Although the Declaration of Independence set lofty aspirations for the nation, early American political rhetoric did not line up with state practice. At its founding in 1776, the United States of America—through its Continental Congress—promulgated the Declaration of Independence, which famously reads: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”<sup>33</sup> Yet, when a Richmond, Virginia-area slave named Gabriel—born in 1776—plotted to gain his freedom, vowing “Death or Liberty,” he and his co-conspirators were sent to the gallows.<sup>34</sup> In Gabriel’s Rebellion, its leader—a blacksmith who had recruited compatriots in rural areas and at black churches—became one of more than twenty slaves who were put to death.<sup>35</sup> Ironically, though the country was founded on the principle of equality and the basis of natural rights,<sup>36</sup> Native Americans and African Americans—as well as women, not granted the right to vote until 1920<sup>37</sup>—were, for many decades, systematically excluded from the nation’s social compact.<sup>38</sup>

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“The states with the highest number of lynchings also have the highest numbers of death-penalty executions,” she notes. Lonnae O’Neal Parker, WASH. POST (Jan. 31, 2012), [https://www.washingtonpost.com/lifestyle/style/2012/01/31/gIQAiKEPgQ\\_story.html?utm\\_term=.2358d1dac6d1](https://www.washingtonpost.com/lifestyle/style/2012/01/31/gIQAiKEPgQ_story.html?utm_term=.2358d1dac6d1) (last visited Dec. 19, 2016) (on file with the Washington and Lee Law Review).

33. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

34. See Henry Louis Gates, Jr., *Did African-American Slaves Rebel?*, PBS, <http://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/did-african-american-slaves-rebel/> (last visited Dec. 19, 2016) (characterizing Gabriel’s Rebellion as a quest for freedom and noting that, after “the state captured Gabriel and several co-conspirators,” “[t]wenty-five African Americans, worth about \$9,000 or so—money that cash-strapped Virginia surely thought it could ill afford—were hanged together before Gabriel went to the gallows and was executed”) (on file with the Washington and Lee Law Review).

35. See 1 MARY BETH NORTON, CAROL SHERIFF, DAVID M. KATZMAN, DAVID W. BLIGHT, HOWARD P. CHUDACOFF, FREDRIK LOGEVALL, BETH BAILEY & DEBRA MICHALS, *A PEOPLE AND A NATION: A HISTORY OF THE UNITED STATES* 197 (8th ed. 2010) (taking note of the punishment of the rebelling slaves).

36. See MICHAEL P. ZUCKERT, *NATURAL RIGHTS AND THE NEW REPUBLICANISM* 8 (1994).

37. See U.S. CONST. amend. XIX (guaranteeing women the right to vote).

38. See JANE A. GRANT, *THE NEW AMERICAN SOCIAL COMPACT: RIGHTS AND RESPONSIBILITIES IN THE TWENTY-FIRST CENTURY* 2 (2008) (noting that “African Americans, women, Native Americans, and newly arrived immigrants” were not

Phyllis Goldfarb's "Matters of Strata" is a welcome addition to the sizeable, growing body of literature on capital punishment and inequality.<sup>39</sup> In examining what she calls "the interactive role of race, gender, and class in capital cases in general and the *Giarratano* case in particular,"<sup>40</sup> she sheds light and insight on the reality that race, gender stereotypes, and poverty have long shaped—and continue to shape—America's death penalty system. For example, she notes that "abundant evidence reveals" that race and the death penalty are "powerfully intertwined."<sup>41</sup> That

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included in the country's social compact).

39. See, e.g., FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 1 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) [hereinafter FROM LYNCH MOBS TO THE KILLING STATE] ("By now the connection between race and the killings of African-Americans, in particular through lynchings and the death penalty, is widely recognized among scholars, activists, and legal officials."); HOWARD W. ALLEN & JEROME M. CLUBB, RACE, CLASS, AND THE DEATH PENALTY: CAPITAL PUNISHMENT IN AMERICAN HISTORY 12 (2008) ("It is clear that over the long sweep of American history, racial and ethnic disparity in the use of the death penalty has been of substantial magnitude."); see also PETER IADICOLA & ANSON SHUPE, VIOLENCE, INEQUALITY, AND HUMAN FREEDOM 311 (3d ed. 2013) (citations omitted):

In looking at the population of those executed by the U.S. government, the majority have been members of ethnic populations and generally from the poorer strata of society. Of the 211 federal death penalty prosecutions authorized by the attorney general since 1988, 75 percent have been against minorities. The U.S. General Accounting Office issued a report in 1990 which found that in 82 percent of the studies reviewed, race of the victim was found to influence the likelihood of being charged with capital murder or being sentenced to execution.

40. See Goldfarb, *supra* note 3, at 3.

41. See *id.* at 6. The subject of women and capital punishment has been written about by a number of scholars. See, e.g., KATHLEEN A. O'SHEA, WOMEN AND THE DEATH PENALTY IN THE UNITED STATES, 1900–1998 (1999); Harry Greenlee & Shelia P. Greenlee, *Women and the Death Penalty: Racial Disparities and Differences*, 14 WM. & MARY J. WOMEN & L. 319 (2008); Victor L. Streib, *Rare and Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L.J. 609 (2006); Elizabeth Rapaport, *Staying Alive: Executive Clemency, Equal Protection, and the Politics of Gender in Women's Capital Cases*, 4 BUFF. CRIM. L. REV. 967 (2001); Andrea Shapiro, *Unequal Before the Law: Men, Women and the Death Penalty*, 8 AM. U. J. GENDER SOC. POL'Y & L. 427 (2000). The stories of individual women sentenced to death are especially revealing of how female offenders are often portrayed by the media. See, e.g., KATHLEEN A. CAIRNS, THE ENIGMA WOMAN: THE DEATH SENTENCE OF NELLIE MAY MADISON (2007); KATHLEEN A. CAIRNS, PROOF OF GUILT: BARBARA GRAHAM AND THE POLITICS OF EXECUTING WOMEN IN AMERICA (2013); LINDA STROM, KARLA FAYE TUCKER SET FREE: LIFE AND FAITH ON DEATH ROW (2011).

the histories of capital punishment and lynching are inextricably linked with racial prejudice and oppression, in fact, is amply shown through Professor Goldfarb's observations about the Scottsboro cases<sup>42</sup> and the Southern lynch mobs that took so many African-American lives.<sup>43</sup> The death penalty has frequently targeted the illiterate, the poor, the intellectually disabled, and racial minorities, and often in not-so-subtle ways.<sup>44</sup> And the

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42. See generally LITA SORENSEN, *THE SCOTTSBORO BOYS TRIAL: A PRIMARY SOURCE ACCOUNT* (2004) (discussing the case of nine young blacks accused in Alabama of raping two white women in 1931).

43. See Goldfarb, *supra* note 3, at 12, 15 & n.57. Such lynchings—as Ta-Nehisi Coates, a national correspondent for *The Atlantic*, writes—served to “dominate and control” blacks, not only in the South but throughout the United States. And the lack of accountability for such crimes was a despicable part of the terror associated with them. As Ta-Nehisi Coates writes in his book, *Between the World and Me*: “In the era of mass lynching, it was so difficult to find who, specifically, served as executioner that such deaths were often reported by the press as having happened ‘at the hands of persons unknown.’” TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 42, 97–98 (2015). Lynchings took place not just in the South, in states such as Alabama, Mississippi and Texas, but in northern states like Illinois and Minnesota. See, e.g., AMY LOUISE WOOD, *LYNCHING AND SPECTACLE: WITNESSING RACIAL VIOLENCE IN AMERICA, 1890–1940* (2011); JOHN D. BESSLER, *LEGACY OF VIOLENCE: LYNCH MOBS AND EXECUTIONS IN MINNESOTA* (2003) [hereinafter BESSLER, *LEGACY OF VIOLENCE*]; PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* (2003).

44. At America's last public execution, that of a twenty-two-year-old black man, Rainey Bethea, on August 14, 1936, in Owensboro, Kentucky, approximately 10,000 to 20,000 people were in attendance. Bethea was hanged for killing a 70-year-old white woman, and the scaffold was erected in a field so that thousands could witness it. “So many people invaded Owensboro for the spectacle,” one commentator writes, “that terrified local blacks fled the town, especially after receiving lynching threats from drunken white revelers.” Ray Moses, *Persuading the Sentencing Body Not to Return a Death Verdict*, 20 CHAMPION 52, 54 (1996); John P. Rutledge, *The Definitive Inhumanity of Capital Punishment*, 20 WHITTIER L. REV. 283, 290–91 (1998); Dane A. Drobný, *Death TV: Media Access to Executions Under the First Amendment*, 70 WASH. U. L.Q. 1179, 1187–88 (1992); Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 447 n.820 (1997); see also *id.* (noting that under a 1920 Kentucky law providing for public hangings for the crime of rape, “[n]ine men, eight of them black, were punished under this law between 1920 and 1938, when the law was repealed”). As Stephen Bright—a Supreme Court litigator and the president of the Southern Center for Human Rights—puts it of those confined to death row:

Those awaiting their deaths are no different from those selected for execution in the past: virtually all are poor; about half are members of racial minorities; and the overwhelming majority were sentenced to death for crimes against white victims. Many suffer from severe

punishment of death—initially rooted in the Old Testament<sup>45</sup> and fertilized in prior centuries by then-prevailing religious orthodoxy<sup>46</sup> and superstition<sup>47</sup>—has long been used mainly (almost exclusively) against men.<sup>48</sup>

This response to Professor Goldfarb’s essay explores the implications of her analysis for the U.S. Supreme Court’s Eighth and Fourteenth Amendment jurisprudence and the constitutionality of capital punishment. In the twenty-first century, Americans have a growing awareness and understanding that their criminal justice system—frequently

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mental impairments or limitations, and many others were the victims of the most brutal physical, sexual, and psychological abuse during their childhoods.

Stephen B. Bright, “Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty,” *in* FROM LYNCH MOBS TO THE KILLING STATE, *supra* note 39, at 211.

45. ROLANDO V. DEL CARMEN, *THE DEATH PENALTY: CONSTITUTIONAL ISSUES, COMMENTARIES, AND CASE BRIEFS* 2 (2d ed. 2008) (noting that the crimes listed in the 1641 Body of Liberties—the penal code for the Massachusetts Bay Colony—prescribed the death penalty for twelve offenses, including idolatry, witchcraft and blasphemy, and cited Old Testament verses as authority for proscribed acts).

46. *See, e.g.*, WALTER STAHR, *JOHN JAY: FOUNDING FATHER* (2012) (describing the life of John Jay, the first Chief Justice of the U.S. Supreme Court, and noting that he believed capital punishment “was required by the Bible in cases of murder”).

47. In early America, executions were often conducted on Fridays. JOHN D. BESSLER, *CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS’ EIGHTH AMENDMENT* 266 (2012) [hereinafter BESSLER, *CRUEL AND UNUSUAL*]. It was during the Enlightenment—as legal historian Stuart Banner explains—that a more “utilitarian calculus” made the gallows seem like “a product of ignorance and superstition.” BANNER, *THE DEATH PENALTY*, *supra* note 5, at 107.

48. *E.g.*, Matthew B. Robinson, *Assessing Scholarly Opinion of Capital Punishment: The Experts Speak*, *in* THE DEATH PENALTY TODAY 143 (Robert M. Bohm ed., 2008) (“Perhaps the clearest evidence of gender/sex bias offered by a death penalty expert was this response: ‘We just don’t execute many women (they represent 1.5% of those on death row and about 1% of those executed since 1977), even though they account for a significant proportion of murderers.’”). Before Ann Bilansky—convicted of poisoning her husband, and the only woman ever executed by the State of Minnesota—was put to death on Friday, March 23, 1860, lawmakers actually took up a bill providing, “No woman or girl convicted of murder in the first degree, shall suffer the penalty of death, but that punishment in such cases shall be imprisonment in the State prison for life.” BESSLER, *LEGACY OF VIOLENCE*, *supra* note 43, at 83–92. Had that bill become law, it would have made only men eligible for the death penalty in the state.

described as one of “mass incarceration” and as “overly punitive”—is badly in need of reform.<sup>49</sup> There are lots of non-violent offenders living in American prisons,<sup>50</sup> with the rise of private prisons perversely *incentivizing* incarceration and profit-taking at the expense of people’s lives.<sup>51</sup> The American people now know that the capital punishment “system” (if it can even be called that) is riddled with arbitrariness, error, geographic and racial disparities, and wrongful convictions.<sup>52</sup> After examining the

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49. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 4, 11–12, 188, 209 (2013); *ADVANCING CRIMINOLOGY AND CRIMINAL JUSTICE POLICY* 8 (Thomas G. Blomberg, Julie Mestre Brancale, Kevin M. Beaver & William D. Bales eds., 2016).

50. MICHAEL TONRY, *SENTENCING FRAGMENTS: PENAL REFORM IN AMERICA, 1975–2025*, at 206 (2016).

51. See MICHAEL A. HALLETT, *PRIVATE PRISONS IN AMERICA: A CRITICAL RACE PERSPECTIVE* 18 (2006) (“[T]he incentive structure associated with for-profit imprisonment dramatically readjusts the crime control formula from attentiveness to crime-reduction strategies to acceptance and dependence upon high crime and harsh punishment for economic viability.”); *PUNISHMENT IN POPULAR CULTURE* (Charles J. Ogletree, Jr. & Austin Sarat eds., 2015) (“In the United States, where the state has outsourced the burden of providing incarceration services to the lowest bidder—a company that has a fiduciary duty to keep the beds full and maximize profit—there is no incentive to not lock up or reduce recidivism.”). In 2016, the U.S. Government announced that it would be gradually phasing out the use of private prisons, a development that the multi-billion dollar private prison industry is actively fighting. Charlie Savage, *U.S. to Phase Out Use of Private Prisons for Federal Inmates*, N.Y. TIMES (Aug. 18, 2016), [http://www.nytimes.com/2016/08/19/us/us-to-phase-out-use-of-private-prisons-for-federal-inmates.html?\\_r=0](http://www.nytimes.com/2016/08/19/us/us-to-phase-out-use-of-private-prisons-for-federal-inmates.html?_r=0) (last visited Dec. 19, 2016) (“The Obama administration said on Thursday that it would begin to phase out the use of private for-profit prisons to house federal inmates.”) (on file with the Washington and Lee Law Review); Matt Zapotosky, *DOJ Directive Riles Private Prisons*, WASH. POST, Oct. 15, 2016, at A5 (“The private prison industry, which generates billions of dollars in revenue, has become a powerful lobbying force on Capitol Hill, and officials say they have tried since the Justice Department announcement to rally legislators to their side.”). The election of billionaire businessman Donald Trump in November 2016 sent shares of Corrections Corporation of America (“CCA”), the country’s largest private prison company, soaring. James Surowiecki, *Trump Sets Private Prisons Free*, NEW YORKER, Dec. 5, 2016, at 26 (noting that CCA’s stock jumped forty-seven percent in the wake of Trump’s election).

52. See STEPHEN BREYER, *AGAINST THE DEATH PENALTY* 72–80 (John D. Bessler ed. 2016) (discussing arbitrariness and wrongful convictions in his 2015 dissent in *Glossip v. Gross*); *National Polls Show Historic Declines in Support for Death Penalty*, DEATH PENALTY INFO. CTR. (Apr. 2015), <http://deathpenaltyinfo.org/national-polls-and-studies#Pew;CBS> (last visited Dec. 19, 2016) (“Polls released this week by Pew Research Center and CBS News show that public support for the death penalty has declined to near



evidence, Goldfarb is right to conclude that “the entanglement of race, gender, and class structures” in the capital decision-making process can no longer be overlooked—and, in fact, “hang like a shadow over America’s death penalty.”<sup>53</sup> Indeed, in the face of miscarriages of justice, a series of high-profile botched executions, and the long delays between death sentences and executions that inflict severe psychological torment on death row inmates, U.N. officials, academics and jurists, as well as members of the general public, are starting to talk about executions not just as *cruel and unusual* but through the lens of *torture*.<sup>54</sup> Though the U.S. Constitution’s Fourteenth Amendment, as recounted below, was intended in part to *equalize* the punishment of blacks and whites, America’s death penalty has never separated itself from its terrifying, discriminatory past.

## *II. The Legacy of Slavery and Discrimination: Race, Gender and Class in Early America*

The United States of America was forged on the anvil of liberty. The motto of the American Revolution, “No taxation without representation,” became a rallying cry for colonists angered by taxes on stamps, sugar and tea.<sup>55</sup> “Those who are taxed without consent expressed by themselves or our representatives are slaves,” John Dickinson wrote in 1768,<sup>56</sup>

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historic lows. Both polls reported that 56% of Americans support the death penalty.”) (on file with the Washington and Lee Law Review); Besty Cooper, Rachel Lienesch & Robert P. Jones, *Anxiety, Nostalgia, and Mistrust: Findings from the 2015 American Values Survey*, PRRI (Nov. 17, 2015), <http://www.prii.org/research/survey-anxiety-nostalgia-and-mistrust-findings-from-the-2015-american-values-survey/#.VIR1qN-rR7N> (last visited Dec. 19, 2016) (“Americans are also closely divided over whether there are racial disparities in death penalty sentencing. A majority (53%) of Americans agree that a black person is more likely than a white person to receive the death penalty for the same crime, while 45% of Americans disagree.”) (on file with the Washington and Lee Law Review).

53. Goldfarb, *supra* note 3, at 5.

54. See generally JOHN D. BESSLER, *THE DEATH PENALTY AS TORTURE: FROM THE DARK AGES TO ABOLITION* (forthcoming 2017).

55. RORY RAVEN, *BURNING THE GASPEE: REVOLUTION IN RHODE ISLAND* 20–25 (2012).

56. HENRY M. GLADNEY, *NO TAXATION WITHOUT REPRESENTATION: 1768*

conveying the heart-felt sentiments of North America's colonists in the wake of the Stamp Act riots of 1765 and in the lead up to the Boston Massacre (1770) and the Boston Tea Party (1773).<sup>57</sup> "Give me liberty or give me death!" Patrick Henry is said to have forcefully declared in 1775 at St. John's Church in Richmond, Virginia.<sup>58</sup> After Paul Revere's midnight ride and the first shots were fired at Concord and Lexington, Massachusetts, the Revolutionary War (1775–1783) led to America's creation and the severing of political ties with England, the mother country.<sup>59</sup> "The history of the present King of Great Britain," the Declaration of Independence audaciously proclaimed, "is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States."<sup>60</sup>

Yet, despite all the rhetoric about liberty and equality, the American Revolution did not lead to freedom and equality *for all*. As one source reports: "Early America was governed primarily by English common law, which extended the vote only to men who possessed substantial property. Although there are no reliable statistics for what percentage of the population met the property qualifications in England, the number was roughly 10 percent of adult males."<sup>61</sup> It took a tumultuous and bloody Civil War before the U.S. Constitution was amended to abolish slavery, to guarantee "equal protection of the laws," and—in 1870—to give African-Americans the franchise, though it took the passage of the Voting Rights Act of 1965 to end the scourge of poll taxes and literacy tests.<sup>62</sup> And even though Abigail Adams had insisted in a

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PETITION, MEMORIAL, AND REMONSTRANCE 139 (2014).

57. JACK TAGER, BOSTON RIOTS: THREE CENTURIES OF SOCIAL VIOLENCE 15, 50 (2001).

58. AMERICAN RHETORIC: CONTEXT AND CRITICISM 19 (Thomas W. Benson ed., 1989); ARTHUR G. SHARP, NOT YOUR FATHER'S FOUNDERS: AN "AMENDED" LOOK AT AMERICA'S FIRST PATRIOTS 113 (2012).

59. DAVID F. MARLEY, WARS OF THE AMERICAS: A CHRONOLOGY OF ARMED CONFLICT IN THE NEW WORLD, 1492 TO THE PRESENT 304 (1998); JOEL J. MILLER, THE REVOLUTIONARY PAUL REVERE 190, 192–93 (2010).

60. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

61. DOROTHY A. MAYS, WOMEN IN EARLY AMERICA: STRUGGLE, SURVIVAL, AND FREEDOM IN A NEW WORLD 382 (2004).

62. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 145 (2000); MARSHA J. TYSON DARLING, CONTROVERSIES IN CONSTITUTIONAL LAW: COLLECTIONS OF DOCUMENTS AND ARTICLES ON MAJOR QUESTIONS OF AMERICAN LAW xiv (2001). The battle for civil

March 1776 letter to her husband, John, that he and his fellow legislators “Remember the Ladies” and “be more generous and favourable to them” than their ancestors had been, the women’s suffrage movement had to struggle into the *twentieth* century before women got the right to vote.<sup>63</sup> Even today, residents of the District of Columbia, where roughly half the population is black, scandalously have no voting representation in Congress.<sup>64</sup>

Discrimination has deep roots, dating all the way back to the era of slavery and the race-based oppression and violence directed at indigenous peoples.<sup>65</sup> America’s founders viewed blacks as inferior,<sup>66</sup> saw Indians as “savages,”<sup>67</sup> and confined women

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rights played out on the streets of Selma, Alabama, in front of schools in Little Rock, Arkansas, through the Montgomery bus boycott, on the Edmund Pettus Bridge, at a Woolworth lunch counter in Greensboro, North Carolina, and in the halls of Congress. *E.g.*, JOHN LEWIS (WITH MICHAEL D’ORSO), *WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT* (1998); THOMAS F. JACKSON, *FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR., AND THE STRUGGLE FOR ECONOMIC JUSTICE* (2007); TODD S. PURDUM, *AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964* (2014).

63. THE FEMINIST PAPERS: FROM ADAMS TO DE BEAUVOIR 10 (Alice S. Rossi ed., 1973); ELIZABETH FROST-KNAPPMAN & KATHRYN CULLEN-DUPONT, *WOMEN’S SUFFRAGE IN AMERICA* 425 (2005); *see also* JEFFREY D. SCHULTZ & LAURA VAN ASSENDELFT, *ENCYCLOPEDIA OF WOMEN IN POLITICS* 156 (1999) (noting that the National Woman Suffrage Association was founded in 1869 by Elizabeth Cady Stanton and Susan B. Anthony).

64. MICHAEL K. FAUNTROY, *HOME RULE OR HOUSE RULE? CONGRESS AND THE EROSION OF LOCAL GOVERNANCE IN THE DISTRICT OF COLUMBIA* 202 (2003); 2015 COUNTY AND CITY EXTRA: ANNUAL METRO, CITY, AND COUNTY DATA BOOK 9 (Deirdre A. Gaquin & Mary Meghan Ryan eds., 2015). In 1970, Congress restored the District of Columbia’s *non-voting* delegate after that position had been abolished in 1875. The delegate was given all House privileges except that of voting on the floor. BRUCE J. SCHULMAN, *STUDENT’S GUIDE TO CONGRESS* 221 (2009). To this day, the license plates of vehicles registered in the District of Columbia bear the revolutionary motto, “No taxation without representation.” TIMOTHY MASON ROBERTS, *DISTANT REVOLUTIONS: 1848 AND THE CHALLENGE TO AMERICAN EXCEPTIONALISM* 3 (2009).

65. The new National Museum of African American History and Culture in Washington, D.C., meticulously documents, through thousands of artifacts, the long history of struggle, from slavery to emancipation and from shackles to public protest. Alicia DeSantis & Josh Williams, *I, Too, Sing America: The National Museum of African American History and Culture*, N.Y. TIMES (Sept. 15, 2016), [http://www.nytimes.com/interactive/2016/09/15/arts/design/national-museum-of-african-american-history-and-culture.html?\\_r=0](http://www.nytimes.com/interactive/2016/09/15/arts/design/national-museum-of-african-american-history-and-culture.html?_r=0); (last visited Dec. 19, 2016) (on file with the Washington and Lee Law Review).

66. *See* *SLAVERY IN AMERICA: A READER AND GUIDE* 133 (Kenneth Morgan

largely to the domestic sphere of the household until the women's liberation movement of the 1960s and 1970s.<sup>68</sup> The U.S. Constitution itself explicitly protected the slave trade until 1808, contained a fugitive slave clause, and counted slaves as "three fifths" persons for purposes of apportioning representation for political institutions controlled by white men.<sup>69</sup> Thomas Jefferson—the principal drafter of the Declaration of Independence—himself believed that blacks were "much inferior" to whites in the ability to reason and were "inferior to the whites in the endowments of body and mind."<sup>70</sup> Records show Jefferson

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ed., 2005) ("The Founding Fathers of the United States were well aware of the contradiction between their espousal of political liberty at the time of the American Revolution and the continued presence of thousands of enslaved blacks throughout the new nation.").

67. See FRANK LAMBERT, *THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA* 70 (2010) ("Virginians regarded Indians, for example, as 'savages' and 'infidels.' The epithet 'savage' had a special and ignoble meaning in English political history because it was first used against another group of outsiders, the Irish.").

68. Compare COKIE ROBERTS, *FOUNDING MOTHERS: THE WOMEN WHO RAISED OUR NATION* 12 (2004) ("Though many of the marriages of the Founders, like that of Abigail and John Adams, were true partnerships, the women had no legal rights. Under a system called 'couverture,' their husbands essentially owned women."), with KATHLEEN C. BERKELEY, *THE WOMEN'S LIBERATION MOVEMENT IN AMERICA* (1999) (describing the women's liberation movement, feminism, and the history of the struggle for women's rights).

69. BESSLER, *CRUEL AND UNUSUAL*, *supra* note 47, at 307; MICHAEL STOKES PAULSEN & LUKE PAULSEN, *THE CONSTITUTION: AN INTRODUCTION* 75 (2015).

70. PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 266 (3d ed. 2014). Early U.S. presidents—among them, George Washington, Thomas Jefferson, James Madison, James Monroe, Andrew Jackson, John Tyler, James Polk and Zachary Taylor—owned slaves. Both George Washington and Thomas Jefferson, for example, owned hundreds of slaves during their lifetimes, with Jefferson's wife, Martha, bringing more than 100 slaves as part of her dowry. GRAEME DONALD, *LOOSE CANNONS: 101 MYTHS, MISHAPS AND MISADVENTURES OF MILITARY HISTORY* 241 (2011); SHANE MOUNTJOY, *CAUSES OF THE CIVIL WAR: THE DIFFERENCES BETWEEN NORTH AND SOUTH* 22 (2009); TRUDI STRAIN TRUEIT, *THOMAS JEFFERSON* 34 (2010); Robert Blair St. George, "Placing Race at Jefferson's Monticello," in *CULTURAL MEMORY AND THE CONSTRUCTION OF IDENTITY* 251 (Dan Ben-Amos & Liliane Weissberg eds., 1999). At the time of George Washington's death, 317 slaves owned by Washington himself were living at Mount Vernon. Another 153 slaves at Mount Vernon were dower slaves from the estate of Martha Washington's first husband, Daniel Parke Custis. *Ten Facts About Washington and Slavery*, George Washington's Mount Vernon, <http://www.mountvernon.org/george-washington/slavery/ten-facts-about-washington-slavery> (last visited Dec. 19, 2016) (on file with the Washington and Lee Law Review).

owned more than 600 slaves, including boys, aged 10 to 16, who worked from dawn to dusk making nails at Monticello, and who were sometimes whipped by an overseer.<sup>71</sup>

Colonial and early American slave codes, reflective of the widespread fear of slave rebellions, provided for death sentences for felonies such as insurrection, murder, rape, poisoning, arson, and assaulting a white person.<sup>72</sup> “Codes also applied to free blacks and mulattos, not just slaves,” one source recalls, emphasizing: “The specific provisions in codes frequently used inclusive language to apply laws to ‘all negroes,’ such that free blacks were affected by slave code provisions.” “Some slave codes,” *The Cambridge History of Law in America* observes, “also included penalties for whites who attempted to aid blacks in insurrection attempts or enticed slaves to run away from their masters.”<sup>73</sup> “Before the Civil War,” yet another source notes, “each Southern state had a slave code, which was a system of laws designed to safeguard property rights in slavery and to protect the white community against insurrection.”<sup>74</sup> In an 1852 speech in Rochester, New York, the great orator, newspaper

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71. NATALIE BOBER, THOMAS JEFFERSON: DRAFTSMAN OF A NATION 229 (2008); Karen Grigsby Bates, *Life at Jefferson’s Monticello, as His Slaves Saw It*, NPR (Mar. 11, 2012), <http://www.npr.org/2012/03/11/148305319/life-at-jeffersons-monticello-as-his-slaves-saw-it> (last visited Dec. 19, 2016) (on file with the Washington and Lee Law Review); *Nailery*, MONTICELLO, <https://www.monticello.org/site/plantation-and-slavery/nailery> (last visited Dec. 19, 2016) (on file with the Washington and Lee Law Review).

72. CHRISTIAN, *supra* note 31, at 28. For example, South Carolina adopted a slave code in 1712 that was revised at various points thereafter. South Carolina’s slave code, which became a model for others, made it punishable by death to entice a slave to run away or for a slave to attempt to flee the jurisdiction. *Id.* at 27. Under the code, no owner was to be punished if a slave were to die under punishment, with the administration of corporal punishments a prominent feature of the slave code. *Id.* As one source notes:

Any slave absconding or successfully evading capture for twenty days is to be publicly whipped for the first offense, branded with the letter *R* on the right cheek for the second offense, and lose one ear if absent thirty days for the third offense, and for the fourth offense, a male slave is to be castrated, a female slave is to be whipped, branded on the left cheek with the letter *R*, and lose her left ear.

*Id.*

73. 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 271 (Michael Grossberg & Christopher Tomlins eds., 2008).

74. 2 ENCYCLOPEDIA OF AFRICAN AMERICAN SOCIETY 779 (Gerald D. Jaynes ed., 2005).

editor and abolitionist Frederick Douglass pointed out that “[t]here are seventy-two crimes in the State of Virginia which, if committed by a black man (no matter how ignorant he be), subject him to the punishment of death; while only two of the same crimes will subject a white man to the like punishment.”<sup>75</sup>

In other words, the *rhetoric* of equality did not match up with the *reality* of how people were treated. In a still little-known fact, many of America’s Founding Fathers—indeed, the Continental Congress *as a whole*—embraced the writings of, and proudly quoted, the Italian philosopher and criminal-law theorist Cesare Beccaria (1738–1794), the first Enlightenment thinker to make a comprehensive case against capital punishment.<sup>76</sup> In *Dei delitti e delle pene* (1764), translated into English as *An Essay on Crimes and Punishments* (1767), Beccaria argued for proportion between crimes and punishments, opposed torture and the death penalty, and stressed that laws should be applied to all persons in an equal manner. Widely regarded as the founder of modern criminology, Beccaria believed that laws should be as clear and precise as possible, thereby reducing judicial discretion, the need for interpretation of the laws, and capricious decisions.<sup>77</sup> Beccaria favored milder, more certain punishments, calling for *certainty* over *severity* in penal codes.<sup>78</sup> As Jefferson, channeling Beccaria, once put it: “Let mercy be the character of the law-giver, but let the judge be a mere machine.”<sup>79</sup>

In early America, the rhetoric-reality disconnect was palpable and very wide. One of the Founding Fathers’ favorite quotes from Beccaria: “In every human society there is an effort

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75. AFRICAN INTELLECTUAL HERITAGE: A BOOK OF SOURCES 637–38 (Molefi Kete Asante & Abu S. Abarry eds., 1996).

76. John D. Bessler, *The Death Penalty in Decline: From Colonial America to the Present*, 50 CRIM. L. BULL. 245, 247–52 (2014); John D. Bessler, *The Economist and the Enlightenment: How Cesare Beccaria Changed Western Civilization*, 42 EUR. J. LAW & ECON. 1 (2016).

77. SHAHID M. SHAHIDULLAH, COMPARATIVE CRIMINAL JUSTICE SYSTEMS: GLOBAL AND LOCAL PERSPECTIVES 140 (2014); John D. Bessler, *Cesare Beccaria: A 26-Year-Old Who Enlightened Our Founding Fathers*, 20 ITALIAN AM. 28 (2015).

78. CRIMINOLOGICAL THEORY: AN ANALYSIS OF ITS UNDERLYING ASSUMPTIONS 60 (Werner J. Einstadter & Stuart Henry eds., 2006).

79. MERRILL D. PETERSON, THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY 126 (1970).

continually tending to confer on one part of the height of power and happiness, and to reduce the other to the extreme of weakness and misery. The intent of good laws is to oppose this effort, and to diffuse their influence universally and equally.” Yet, America’s founders—merchants, land speculators, lawyers, physicians and plantation owners—were themselves wealthy elites, some spectacularly well-to-do, who tolerated—and in many cases, profited handsomely from—human bondage.<sup>80</sup> As Phyllis Goldfarb reminds us: “slavery constructed the meaning of race in America for more than two centuries” and America’s social and political history—from colonial days through the era of Jim Crow—led to “[s]tereotypes about black people,” with prevailing gender and class ideologies also byproducts of the nation’s complex history.<sup>81</sup> In describing the legacies of slavery and lynching, the ongoing societal problem of domestic violence, and class bias, “Matters of Strata” reminds us that the past is not past—not by a long shot.<sup>82</sup>

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80. JOHN D. BESSLER, *THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION* 8, 16 (2014); PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 31, 135 (3d ed. 2014); *The Founding Fathers: A Brief Overview*, NAT’L ARCHIVES, [http://www.archives.gov/exhibits/charters/constitution\\_founding\\_fathers\\_overview.html](http://www.archives.gov/exhibits/charters/constitution_founding_fathers_overview.html) (last visited Dec. 16, 2016) (listing the occupations of the Founding Fathers) (on file with the Washington and Lee Law Review).

81. Goldfarb, *supra* note 3, at 7–8, 30–42.

82. *See id.* at 7–9, 33–34, 38 (describing the struggles of the disadvantaged). For an in-depth examination of the issue of race in American law, see F. MICHAEL HIGGINBOTHAM, *RACE LAW: CASES, COMMENTARY, AND QUESTIONS* (3d ed. 2010). The tactless invective and racially charged rhetoric of Donald Trump in his recent presidential campaign are a stark reminder that racial and gender stereotypes are still very much a part of the fabric of American life. From his presidential announcement speech on June 16, 2015, in which he spoke of Mexican migrants as drug traffickers, criminals and “rapists,” to his call for “a total and complete shutdown of Muslims entering the United States,” to the third and final presidential debate, in which Trump spoke of “bad hombres” and called Hillary Clinton “a nasty woman,” Trump’s coarse, insensitive language exemplify the kind of race and gender ideologies about which Professor Goldfarb writes. Goldfarb, *supra* note 3, at 7, 31; Michelle Ye Hee Lee, *Donald Trump’s False Comments Connecting Mexican Immigrants and Crime*, WASH. POST. (July 8, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/> (last visited Dec. 19, 2016) (discussing Donald Trump’s comments regarding Mexicans) (on file with the Washington and Lee Law Review); Jeremy Diamond, *Donald Trump: Ban All Muslim Travel to U.S.*, CNN (Dec. 8, 2015), <http://www.cnn.com/2015/12/07/politics/donald-trump-muslim->

In fact, the legal concept of “cruel and unusual punishments” that jurists still wrestle with today—one rooted linguistically in the English Bill of Rights (1689) and the Virginia Declaration of Rights (1776), out of which the U.S. Constitution’s Eighth Amendment came—itself became closely associated *with slavery*. For example, Alabama once had a law prohibiting the infliction of “cruel or unusual punishment” on any slave, making the offense punishable by a fine of fifty to one thousand dollars.<sup>83</sup> Likewise, a law from Mississippi—from 1822—also prohibited the “cruel or unusual punishment” of a slave, though the fine in that state could not exceed five hundred dollars.<sup>84</sup> While a South Carolina law from 1740 prohibited the “cruel punishment” of slaves, an early Louisiana statute set an “unusual rigor” standard for their treatment.<sup>85</sup> By the 1850s and early 1860s, the “cruel or unusual” and “cruel and unusual” terminology had become a standard usage for the prevailing legal duty to safeguard slaves—not for their own sake, but to protect the property interests of slaveholders.<sup>86</sup> White plantation owners were concerned about

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ban-immigration/ (last visited Dec. 19, 2016) (discussing Trump’s comments regarding Muslims) (on file with the Washington and Lee Law Review); Erin McCann & Johan Engel Bromwich, *‘Nasty Woman’ and ‘Bad Hombres’: The Real Debate* *Winners?*, N.Y. TIMES (Oct. 20, 2016), <http://www.nytimes.com/2016/10/21/us/politics/nasty-woman-and-bad-hombres-the-real-debate-winners.html> (last visited Dec. 19, 2016) (discussing Trump’s comments during the third presidential debate) (on file with the Washington and Lee Law Review). The concept of *the other*—whether used in law or politics to demean, disparage or dehumanize whole groups or individuals—is one that is employed to either generate fear (e.g., the Willie Horton 1988 attack ad run against presidential candidate Michael Dukakis) or to justify exploitation or mistreatment, even genocide or executions. ANTHONY SANTORO, *EXILE AND EMBRACE: CONTEMPORARY RELIGIOUS DISCOURSE ON THE DEATH PENALTY* 96 (2013); ALLAN D. COOPER, *THE GEOGRAPHY OF GENOCIDE* 28–32 (2009); *accord* LOIS PRESSER, *WHY WE HARM* 34 (2013) (noting that “victims of the 1994 Rwanda genocide were most often labeled as cockroaches, or *inyenzi*”). As the infamous “Willie Horton Ad,” connecting race and the death penalty, began: “Bush and Dukakis on crime: Bush supports the death penalty for first-degree murderers. Dukakis not only opposed the death penalty, he allowed first-degree murderers to have weekend passes from prison.” FRANK W. BAKER, *POLITICAL CAMPAIGNS AND POLITICAL ADVERTISING: A MEDIA LITERACY GUIDE* 122 (2009).

83. BESSLER, *CRUEL AND UNUSUAL*, *supra* note 47, at 216–18.

84. *Id.*

85. *Id.* at 217–18, 314.

86. *Id.* at 216–18; see also Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and “Cruel and Unusual” Punishment*, 94



their property and their profits, and injured or maimed slaves—unable to be as productive in cotton fields—were less valuable to slave owners.<sup>87</sup>

The class ideologies Professor Goldfarb identifies and discusses in “Matters of Strata” certainly find audible echoes in the historical record. Under the English common-law doctrine of “benefit of clergy,” for example, literate citizens were once spared from execution altogether. As Bryan Garner, the editor of *Black’s Law Dictionary*, notes: “By invoking the benefit of clergy—usually by reading the so-called *neck verse*—a defendant could have the case transferred from the King’s Court (which imposed the death penalty for a felony) to the Ecclesiastical Court (which dispensed far milder punishment).”<sup>88</sup> “The test for benefit of clergy,” another source points out, “came to be one of literacy, in which the court required the accused to read the text of the fifty-first Psalm.”<sup>89</sup> “In due time,” that criminology textbook adds of that neck verse, “illiterate common criminals committed the psalm to memory so that they could pretend to read it and thus avoid the punishments of the king’s courts.”<sup>90</sup> The life-saving

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N.C. L. REV. 817, 834–50 (2016) (arguing that the “cruel and unusual punishments” terminology was intertwined with pre- and post-Revolutionary War notions of permissible limits on the treatment of slaves). As Alexander Reinert, a law professor at the Benjamin N. Cardozo School of Law, emphasizes: the State of Georgia at one time also prohibited anyone from willfully murdering a slave, and from “inflict[ing] any other *cruel punishments*, other than by whipping or beating . . . or by putting irons on, or confining or imprisoning such slave.” *Id.* at 837. “By the middle of the nineteenth century,” he adds, “numerous legislative provisions protected against ‘cruel’ or ‘unusual’ punishments (or both) including laws in South Carolina, Georgia, Alabama, and the Territories of Mississippi, Texas, Louisiana, Utah, and New Mexico.” *Id.* at 838–39.

87. See TIMOTHY JAMES LOCKLEY, *LINES IN THE SAND: RACE AND CLASS IN LOWCOUNTRY GEORGIA 1750–1860*, at 99 (2001):

[W]hereas assaults by whites on whites were regarded fairly leniently by the criminal courts, violent acts that crossed the race divide were treated much more seriously. Physical violence carried out by nonslaveholding whites against bondspeople, and vice versa, merited intense scrutiny. Bondspeople were, of course, property, and injured or maimed slaves were temporarily or permanently unable to fulfill their normal duties.

88. BRYAN A. GARNER, *GARNER’S DICTIONARY OF LEGAL USAGE* 107 (2011).

89. LAWRENCE F. TRAVIS III & BRADLEY D. EDWARDS, *INTRODUCTION TO CRIMINAL JUSTICE* 389 (8th ed. 2015).

90. *Id.*

Psalm 51 read: “*Have mercy upon me, O God, / according to thy loving kindness, / According to the multitude of thy tender mercies / blot out my transgressions.*”<sup>91</sup> Although the U.S. Congress abolished the benefit of clergy privilege in 1790, it was not eliminated in England until 1827 and remained available in North Carolina until 1854.<sup>92</sup> While many elites, such as Alexander Hamilton and Aaron Burr, fought duels to settle their grievances, common, impoverished criminals often met their ends at the end of a noose.<sup>93</sup>

Racial conflict or tensions have long dominated American life. For example, the “Scottsboro boys”—nine young blacks accused of raping two white girls on a train in 1931—were notoriously put on trial in Scottsboro, Alabama, and found guilty of the crime despite the lack of any meaningful access to counsel for their defense.<sup>94</sup> The judge sentenced eight of the nine defendants to death, only sparing one of the defendants—a

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91. *Id.*

92. JAMES W. ELY, JR. & THEODORE BROWN, JR., *LEGAL PAPERS OF ANDREW JACKSON* 213 (1987).

93. JOANNE B. FREEMAN, *AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC* 159 (2002); JENNIFER GRABER, *THE FURNACE OF AFFLICTION: PRISONS AND RELIGION IN ANTEBELLUM AMERICA* 18 (2011).

94. *See Powell v. Alabama*, 287 U.S. 45, 49 (1932) (referring to the Scottsboro defendants as “negroes charged with the crime of rape, committed upon the persons of two white girls,” and noting that “no counsel had been employed”). In *Powell*, the U.S. Supreme Court observed that “the trial judge, in response to a question, said that he had appointed all the members of the bar for the purpose of arraigning the defendants, and then, of course, anticipated that the members of the bar would continue to help the defendants if no counsel appeared.” *Id.* The Court noted that “[e]ach of the three trials was completed within a single day,” and that “[t]he juries found defendants guilty and imposed the death penalty upon all.” *Id.* at 50. In considering the denial of counsel claim, the Court specifically wrote that a member of the local bar had “on the morning of the trial” offered to help a non-resident lawyer who himself had no chance to prepare a proper defense. “[U]ntil the very morning of the trial,” the Court pointed out, however, “no lawyer had been named or definitely designated to represent the defendants.” *Id.* at 56. As the Court described the scene: “The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.” *Id.* at 57–58; *see also id.* at 58 (“Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense.”).

twelve-year-old boy considered to be too young to die.<sup>95</sup> Later, the U.S. Supreme Court—in *Powell v. Alabama*<sup>96</sup>—ordered a new trial, finding that it was the state’s responsibility, under the Fourteenth Amendment’s Due Process Clause, to provide counsel for defendants in capital cases. “It was the duty of the court having their cases in charge,” the Supreme Court ruled, noting that the Scottsboro defendants were illiterate, “to see that they were denied no necessary incident of a fair trial.”<sup>97</sup> Four of the young men were released and eventually—as one source notes—“all of the Scottsboro Boys were paroled, freed, or pardoned, except for one, who was tried and convicted of rape and given the death penalty four times.”<sup>98</sup>

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95. *See id.* at 50. In other places and in different circumstances, other black youths—some not even in their teens—were also sentenced to death or executed. For example, in 1828 in New Jersey, a twelve-year-old slave, James Guild, was executed for murdering a white grandmother from a prominent family. George Stinney, a 14-year-old black youth, was also executed in South Carolina in 1944 for murdering two young white girls. *FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT* 43 (Michael L. Radelet ed., 1989).

96. 287 U.S. 45 (1932).

97. *Id.* at 52; *see also id.* at 71–72:

In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and, above all, that they stood in deadly peril of their lives . . . we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process . . . .

All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law, and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.

98. CHARLES J. SHIELDS, *MOCKINGBIRD: A PORTRAIT OF HARPER LEE* 117 (2006); *ENCYCLOPEDIA OF BLACK STUDIES* 432 (Molefi Kete Asante & Ama Mazama eds., 2005); JAMES MORTON, *JUSTICE DENIED: EXTRAORDINARY MISCARRIAGES OF JUSTICE* ch. 6 (2015). After the latter young man, Haywood

The poor have never fared particularly well in criminal justice systems. Before *Gideon v. Wainwright*,<sup>99</sup> American states didn't even afford indigent criminal defendants with counsel at trial. In *Chambers v. State of Florida*,<sup>100</sup> the U.S. Supreme Court—in writing of the origins and importance of protections for criminal suspects and defendants set forth in the Fifth and Fourteenth Amendments—had this to say in 1940 about punishment and the indigent:

The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless.<sup>101</sup>

The Supreme Court in *Chambers* went on to speak of “the basic principle” of law “that all people must stand on an equality before the bar of justice in every American court.”<sup>102</sup> The stocks, the pillory and the whipping post, of course, are most closely associated with early Anglo-American punishment of society's poor and downtrodden, be they slaves, sharecroppers or laborers.<sup>103</sup>

In assessing the death penalty, the state's ultimate sanction, experts have made these representative statements about who ends up in the criminal justice system and who actually gets

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Patterson, escaped from an Alabama prison where he was laboring on a prison farm, he fled to Atlanta, then Chattanooga, before making his way to Detroit. After his apprehension by the FBI, Michigan's governor—standing on principle—refused to allow Patterson to be extradited, however. Patterson later ended up in a barroom brawl that resulted in a stabbing death, and he died in jail of lung cancer in 1952 after being convicted of manslaughter in a third trial—the first having ended in a hung jury and the second in a mistrial. THE SCOTTSBORO BOYS IN THEIR OWN WORDS: SELECTED LETTERS, 1931–1950, at 308 (Kwando M. Kinshasa ed., 2014).

99. 372 U.S. 335 (1963).

100. 309 U.S. 227 (1940).

101. *Id.* at 235–38.

102. *Id.* at 241.

103. See, e.g., CHARLES C. BOLTON, POOR WHITES OF THE ANTEBELLUM SOUTH: TENANTS AND LABORERS IN CENTRAL NORTH CAROLINA AND MISSISSIPPI 62 (1994).

effective legal representation: “The effects of social class permeate society, from prenatal care to school to access to mental health services to the ability to hire top notch legal representation. Many of the effects of social class occur before engagement with the criminal justice system.” “A relevant aspect of social class, maybe the main one, is whether or not the individual has the money to mount an effective defense.” “The poor cannot afford good legal representation, and a good lawyer makes a great deal of difference.” “With very few exceptions, only the poor are executed.” “Those without the capital get the punishment.” “The criminal justice system knows who pays for it—and no place in the world are they the poor.”<sup>104</sup> As Professor Goldfarb sums up one of the lessons of history: “being poor in America may include being disproportionately subject to

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104. MATTHEW B. ROBINSON, *THE DEATH PENALTY TODAY* 139–40 (Robert M. Bohm ed., 2008). Often against all odds, despite the chronic shortage of counsel willing to represent death row inmates, the volunteer, post-conviction lawyers who take on these death penalty cases can achieve successes for their *pro bono* clients. See, e.g., Robin Maher, *Volunteer Lawyers and Their Extraordinary Role in the Delivery of Justice to Death Row Prisoners*, 35 U. TOL. L. REV. 519, 519 (2004) (“[I]t is something of a small miracle when we find the exceptional individuals whose belief in justice moves them past the obstacles that stop others.”); Steven M. Pincus, *“It’s Good to Be Free”: An Essay about the Exoneration of Albert Burrell*, 28 WM. MITCHELL L. REV. 27 (2001) (recounting an exoneration fight); May Lynn Smith, “Life After Death Row: The Resurrection of Damon Thibodeaux” *STARTRIBUNE* (Aug. 2, 2015), <http://www.startribune.com/life-after-death-row-damon-thibodeaux-s-resurrection/318969021/> (last visited Dec. 19, 2016) (describing the exoneration of former Louisiana death row inmate Damon Thibodeaux due to the work of a team of Minnesota lawyers, led by Minneapolis attorney Steve Kaplan, after Thibodeaux spent 16 years behind bars); Steven Z. Kaplan, *Why Death Is Different: Minnesota’s Experiment with Capital Punishment*, 30 WM. MITCHELL L. REV. 1113, 1113–14 (2004) (“[W]e now witness what has become nearly commonplace: the exoneration by DNA testing of an inmate sentenced to death or life imprisonment years ago for a capital offense that he did not commit.”). But the poor quality of trial representation in capital cases is legendary, leading the American Bar Association to call for a halt to executions and to put in place lengthy guidelines in an effort to deal with ineffective assistance of counsel. *THE STATE OF CRIMINAL JUSTICE 2007–2008*, at 156 (Victor Streib ed., 2008); *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003); Russell Stetler & Aurélie Tabuteau, *The ABA Guidelines: A Historical Perspective*, 43 HOFSTRA L. REV. 731 (2015); see also Robin M. Maher, *The ABA and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 763 (2008).

unjustified punishment, even lethal punishment.”<sup>105</sup> In that regard, the impulse behind the motto carved on the U.S. Supreme Court building—“Equal Justice Under Law”—has yet to be actualized.<sup>106</sup>

### *III. From Black Codes to Civil Rights and Constitutional Protection*

A major blow to the inequality of punishments was struck with the passage by the United States Congress of the Civil Rights Act of 1866.<sup>107</sup> Section 1 of that Act provided in part:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, . . . to full and equal benefit of the laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Section 2 of the Act, setting forth penalties for violations of it, further provided:

That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery

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105. Goldfarb, *supra* note 3, at 39.

106. LAURA LORIA, WHAT IS THE JUDICIAL BRANCH? 11 (2016).

107. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (Apr. 9, 1866), *reenacted*, Civil Rights Act of 1870, ch. 114, 16 Stat. 144 (May 31, 1870) (codified at 42 U.S.C. §§ 1981, 1982); *see also The Civil Rights Bill*, BELMONT CHRONICLE, Apr. 19, 1866, at 2 (“This law, which was passed by an imposing vote in both Houses, 38 to 15 in the Senate, and 122 to 41 in the House, unquestionably expresses the profound determination of the people of the United States. They conferred freedom, and they have now defined what they mean by freedom.”).

or involuntary servitude, except as a punishment for any crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.<sup>108</sup>

That 1866 legislation—in the words of one newspaper—was “conceded by everyone to be the most important measure brought before Congress since the passage of the constitutional

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108. Civil Rights Act of 1866, ch. 31, §§ 1–2, 14 Stat. 27, 27. The Civil Rights Act of 1866—reenacted in 1870 after the adoption of the Fourteenth Amendment—is currently codified in part at 42 U.S.C. § 1981, which states that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to *like punishment*, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.” 42 U.S.C. § 1981(a) (emphasis added); *see also* *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 722 (1989):

[T]he 41st Congress reenacted the substance of the 1866 Act in the Fourteenth Amendment statute, the Enforcement Act of 1870. 16 Stat. 144. Section 16 of the 1870 Act was modeled after § 1 of the 1866 Act. Section 17 reenacted with some modification the criminal provisions of § 2 of the earlier civil rights law, and § 18 of the 1870 Act provided that the entire 1866 Act was reenacted. We have thus recognized that present day 42 U.S.C. § 1981 is both a Thirteenth and a Fourteenth Amendment statute.

(citations omitted); *Hurd v. Hodge*, 334 U.S. 24, 30 n.7 (1948) (“The Civil Rights Act of 1866 was reenacted in § 18 of the Act of May 31, 1870, 16 Stat. 144, passed subsequent to the adoption of the Fourteenth Amendment.”); *Johnson v. Alexander*, 572 F.2d 1219, 1221 (8th Cir. 1978) (“In 1868 Congress declared that the fourteenth amendment had been validly ratified by the requisite number of states, and in 1870 Congress adopted new civil rights legislation which included a virtual reenactment of the Civil Rights Act of 1866.”). Section 1981 and section 1983 of Title 42 of the United States Code were enacted in different factual contexts. *See League of United Latin American Citizens v. City of Santa Ana*, 410 F. Supp. 873, 907 (C.D. Cal. 1976):

The scope of the two prohibitions is radically different. Section 1983 is a dragnet clause embracing constitutional violations of every type and description provided that state action is involved. Section 1981 is confined to violations involving racial discrimination independent of the existence of state action. Section 1981 is founded upon the Thirteenth Amendment; section 1983 is founded upon the Fourteenth Amendment. Section 1981 is a part of the Civil Rights Act of 1866; section 1983 is a part of the Ku Klux Klan Act of 1871.

amendment abolishing slavery.”<sup>109</sup> The U.S. Constitution’s Thirteenth Amendment, signed by President Abraham Lincoln on February 1, 1865, and ratified by the requisite number of states in December 1865, contained two sections. Section 1, drafted in the wake of Lincoln’s Emancipation Proclamation, read simply: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” And the sole sentence of section 2 of the Thirteenth Amendment provided: “Congress shall have power to enforce this article by appropriate legislation.”<sup>110</sup> “The Thirteenth Amendment,” one scholar writes, “is unusual in that it is one of the few provisions of the U.S. Constitution that regulates the power and conduct of private individuals.”<sup>111</sup>

In introducing the bill to enact the Civil Rights Act of 1866 less than three weeks after the Secretary of State certified the Thirteenth Amendment’s ratification, Senator Lyman Trumbull of Illinois—then the Chairman of the Senate Judiciary Committee—said that it would secure the “great fundamental

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109. *The Equality of Negroes and Indians—Important Legislation—Passage of Judge Trumbull’s Bill*, LOUISVILLE DAILY COURIER, Feb. 6, 1866, at 1; *see also The Protection of Civil Rights*, CLEVELAND DAILY LEADER, Feb. 6, 1866, at 1:

Not the least important of the many measures by which the good men and true of the present Congress are laboring to conserve and perpetuate, in the interest of freedom, the result of the war, is Judge Trumbull’s bill to protect the liberty and civil rights of all our citizens, and to furnish the means for the vindication of these rights.

*Protection of Civil Rights*, EBENSBURG ALLEGHENIAN, Feb. 8, 1866, at 2:

The following important bill, guaranteeing protection of civil rights to all citizens of the United States, was taken up in the Senate on Friday, and passed by a vote of 33 to 12 . . . . This bill expressly recognizes the colored natives of this county as citizens of the United States, and, as such, guarantees to them every civil right, equally with other citizens, allowing no State or other local authority to oppress or degrade them, or in any manner subject them to disabilities or indignities. In short, this bill fulfills the pledges given in President Lincoln’s two Proclamations of Freedom, and in the passage of the Constitutional Amendment of last Session.

110. U.S. CONST. amend. XIII; CHRISTIAN G. SAMITO, *LINCOLN AND THE THIRTEENTH AMENDMENT* 103 (2015) (noting President Lincoln’s signing of the Thirteenth Amendment).

111. 2 DAVID SCHULTZ, *ENCYCLOPEDIA OF THE UNITED STATES CONSTITUTION* 735 (2010).



rights.” Those rights were said to include “the right to acquire property, the right to go and come at pleasure, the right to enforce rights in court, to make contracts, and to inherit and dispose of property.” “[A]ny statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens,” Senator Trumbull told his fellow legislators, “is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited.”<sup>112</sup> Section 1 of the Act was intended to prohibit all racially motivated deprivations of the rights listed in the statute, although only those acts perpetrated “under color of law” were to be criminally punishable under section 2. Senator Trumbull described section 2 as “the valuable section of the bill so far as protecting the rights of freedmen is concerned.” The legislative history of the 1866 Act—as courts have made clear—manifested the intent of Congress “to abolish all the remaining badges and vestiges of the slavery system,” “to provide for equality of rights between persons of different races,” and “to prevent racial discrimination by both public and private parties.”<sup>113</sup>

The passage of that legislation over President Andrew Johnson’s veto<sup>114</sup> was seen in the South as the death-knell of

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112. *Spiess v. C. Itoh & Co. (America), Inc.*, 408 F. Supp. 916, 920 (S.D. Tex. 1976).

113. *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 715–16 (1989); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426, 431–32 (1968); *Mahone v. Waddle*, 564 F.2d 1018, 1030 (3d Cir. 1977); *Perry v. Gold & Laine, P.C.*, 371 F. Supp.2d 622, 628 (D. N.J. 2005); *Keller v. City of Portland*, No. CV-98-263-ST, 1998 WL 1060222 at \*12 (D. Ore. Nov. 13, 1998); *Dartmouth Review v. Dartmouth College*, 709 F. Supp. 32, 35 (D. N.H. 1989); *Mosher v. City of Lakewood*, 807 P.2d 1235, 1238 (Colo. Ct. App. 1991); *White v. A D M Milling Co.*, 93 F.R.D. 872, 874 (W.D. Mo. 1982); *Heff T Haul v. Sanitary Dist.*, No. 88 C 8990, 1989 WL 135209 at \*3 (N.D. Ill. Oct. 26, 1989).

114. See KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* 137 (2014) (“On March 27, President Johnson’s veto of the Civil Rights Bill exploded across newspaper headlines throughout the United States, with many papers printing his accompanying message in full.”); *Spiess*, 408 F. Supp. at 923–24:

President Andrew Johnson vetoed the bill and sent a message to Congress stating his reasons on March 27, 1866. . . . Upon return of the bill to the Senate, Senator Trumbull replied to the veto message on April 4. The veto was overridden on April 6 in the Senate by a margin of 33 to 15, and on April 9 in the House by a margin of 122 to 41. One year after the Civil War had ended, the 1866 Civil Rights Act was enacted into law on April 9, 1866.

state sovereignty.<sup>115</sup> *The Intelligencer*, a pro-slavery newspaper in Anderson, South Carolina, described the bill's final passage this way: "The House of Representatives, as intimated in our last issue, passed the Civil Rights bill over the President's veto, and by an overwhelming vote. Yeas, 122—nays 41. Upon the announcement of the vote there was great excitement, and the cheering lasted several minutes." As that southern newspaper, which called the law "unconstitutional and disgraceful to Anglo-Saxon blood," described the scene: "The galleries were crowded, and the floor of the House was filled with privileged persons. The number of Senators attracted thither was so large as to have left that body almost without a quorum." "The first section of the Bill, as it passed," *The Intelligencer* emphasized, "contains the most important feature, embodying the 'Rights' conferred."<sup>116</sup>

The intent behind the Civil Rights Act of 1866 was to prohibit discrimination; to put blacks on equal footing in the courts and as regard property rights; and to equalize punishments for whites and minorities.<sup>117</sup> As the *Chicago*

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115. *The Civil Rights Bill*, WILMINGTON DAILY DISPATCH, Mar. 21, 1866, at 2 ("The Civil Rights Bill having passed both Houses of Congress by decided majorities, may be considered a law of the land, there being scarcely a shadow of a doubt that the President will give it a signature."); *id.* ("The passage of this bill is a death-blow to State sovereignty, and annuls all acts of our State Legislature in relation to the blacks except the one prohibiting negro suffrage."); *id.* ("This bill, except in the matter of suffrage, places the negro on an equality with the white man in every State of the Union . . ."); *Proceedings of Congress Yesterday*, BALTIMORE SUN, Apr. 10, 1866, at 2 ("The civil rights bill, which last week passed the Senate over the President's veto, was called up in the House, and also passed that body by the required two-thirds vote—yeas 122, nays 41. It is, therefore, a law, and takes effect at once.").

116. *Runyon v. McCrary*, 427 U.S. 160, 168–69 (1976); *Passage of the Civil Rights Bill*, INTELLIGENCER, Apr. 19, 1866, at 2. *The Intelligencer*—located in a former Confederate state and opposing the racial equality promised by the legislation—had this to say about the law's passage: "How the heart sickens at the sight of an American Congress,—in a land of boasted enlightenment and intelligence,—placing the wooly-headed negroes of the South upon an equal footing with the white race!" *Id.* The publisher of *The Intelligencer* served in the Confederate Army during the Civil War, rising to the rank of colonel. AMERICAN LEGISLATIVE LEADERS IN THE SOUTH, 1911–1994, at 136 (James Roger Sharp & Nancy Weatherly Sharp eds., 1999).

117. *Civil Rights and Citizenship*, NATIONAL REPUBLICAN, Mar. 8, 1866, at 2:

The act is drawn with masterly skill, and is calculated to accomplish the noble object for which it was originated. Now, as heretofore, we give our unqualified assent to this necessary measure. It is demanded by the circumstances which the war entailed upon us, and the

*Tribune*, writing more than a century later, described the law's purpose: "In 1866 Congress passed the first civil rights act. Specifically designed to wipe out the hardships imposed by the 'black codes,' it provided that Negroes should have the same right as white men 'to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, . . . and shall be subject to like punishment, pains, and penalties, and to none other, any law, statutes, ordinance, regulations, or custom to the contrary notwithstanding."<sup>118</sup> The principal problem addressed by the Civil Rights Act of 1866, the U.S. Court of Appeals for the District of Columbia later emphasized, "was the refusal of the recently defeated southern states to accord equal legal protection to blacks."<sup>119</sup>

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immortal act of emancipation would be incomplete without it.

118. CHICAGO TRIB., May 19, 1968, at 7; *see also* GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION (2016):

In order to neutralize the "Black Codes" by guaranteeing African Americans equal protection of the law, Republican leaders of the 39th Congress proposed and led the victorious enactment of the Civil Rights Act of 1866, overriding President Johnson's veto. The Act was an effective legislative repeal of the Supreme Court's *Dred Scott* decision . . . .

119. *Banks v. Chesapeake and Potomac Telephone Co.*, 802 F.2d 1416, 1438 (D.C. Cir. 1986) (Buckley, J., concurring); *cf. id.* at 1437:

Section 1983 was enacted as part of the Civil Rights Act of 1871, also known as the Ku Klux Klan Act. As the Supreme Court observed in *Garcia*, "[t]he specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights." The legislative history of this statute establishes that Congress wanted to stop the murders, lynchings, and whippings perpetrated by lawless elements in the South, as well as eliminate "the refuge that local authorities extended to the authors of these outrageous incidents."

(citing *Wilson v. Garcia*, 471 U.S. 261, 276 (1985) & Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1334 (1952)); *United States v. Price*, 383 U.S. 787, 802 (1966) ("Between 1866 and 1870 there was much agitated criticism in the Congress and in the Nation because of the continued denial of rights to Negroes, sometimes accompanied by violent assaults. In response to the demands for more stringent legislation Congress enacted the Enforcement Act of 1870."). The Ku Klux Klan Act of 1871, "as indicated by the name, was directed at the Ku Klux Klan." ENCYCLOPEDIA OF RACE AND CRIME 437 (Helen Taylor Greene & Shaun L. Gabbidon eds., 2009). As one source notes:

As another newspaper put it more contemporaneously, in the same year as the passage of the Civil Rights Act of 1866:

There has been urged against it a single objection, puerile in itself, if anything infamous could be regarded as frivolous. It is charged that in certain States there are crimes which, when committed by black men, are punished with more severity than when they are committed by white persons. And this bill, it is said, will interfere with the right of a State to inflict its own degree of punishment for offences.<sup>120</sup>

As that newspaper, Washington, D.C.'s *National Republican*, concluded:

We are aware that it does this, and commend it on this account. It deals with guilt as the great God deals with it, without "respect of persons." Civilization and Christianity alike require that the penalty for wrong-doing shall be meted out in accordance to the weight and nature of the crime rather than depend for its severity upon the color of the criminal. That perfidy finds no sanction in this measure.<sup>121</sup>

The so-called "Black Codes" were a series of laws put in place by state legislatures in the South between 1865 and 1866.<sup>122</sup>

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The Ku Klux Klan was a series of loosely affiliated gangs who used violence to impose their agenda on the state governments established following the Civil War by killing freed slaves and those supporting them. The act, aiming particularly at conspiracies, made it a federal offense to deny a person his or her civil rights.

*Id.*; see also *Tennessee v. Lane*, 541 U.S. 509, 559 (Scalia, J., dissenting) (2004):

Section 5 [of the Fourteenth Amendment] authorizes Congress to create a cause of action through which the citizen may vindicate his Fourteenth Amendment rights. One of the first pieces of legislation passed under Congress's § 5 power was the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13, entitled "*An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes*."

*Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 610 n.25 (1979) ("The Act of 1871, known as the Ku Klux Klan Act, was directed at the organized terrorism in the Reconstruction South led by the Klan, and the unwillingness or inability of state officials to control the widespread violence.").

120. *Civil Rights and Citizenship*, NATIONAL REPUBLICAN, Mar. 8, 1866, at 2.

121. *Id.*

122. ENCYCLOPEDIA OF BLACK STUDIES 120 (Molefi Kete Asante & Ama Mazama eds., 2005). As one source describes them: "[T]he Black Codes enacted during the presidency of Andrew Johnson prevented blacks from sitting on juries, prohibited blacks from voting, limited blacks' testimony against whites, denied blacks the right to work in certain occupations, and legislated against

In the 1860s, infamous “black codes” were being repealed in northern states,<sup>123</sup> yet persisted—or were being enacted and embraced with great fervor—in southern states in the post-Civil War period, thus necessitating federal legislation to quash their overt discriminatory animus.<sup>124</sup> As the *New York Times* described

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blacks carrying weapons.” *Id.*; *see also id.* (“[I]n April of 1866, President Johnson vetoed the civil rights bill, telling Governor Thomas C. Fletcher of Missouri, ‘This is a country for white men, and by God, as long as I am President, it shall be a government for white men.’”); JERROLD M. PACKARD, *AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW* 42 (2002) (noting that southern states in the post-Civil War period “intended to return to virtually the same social relationship between whites and now-freed blacks as that which had existed before the Confederacy’s defeat” and that, “[t]o achieve it, the Black Codes were deliberately designed to be restrictive and harsh in their application”).

123. *See The Black Code of Illinois*, PITTSBURGH GAZETTE, Jan. 31, 1865, at 2 (“It is a matter of profound satisfaction that Illinois has repealed the infamous black code, which for so many years has disgraced its statute book, and dishonored its claim to freedom.”); *see also A Black Code Annulled*, ST. CLOUD DEMOCRAT, Dec. 28, 1865, at 2:

We are glad to learn *via* Memphis that by orders from Washington to Gen. Thomas, commanding the department which includes the State of Mississippi, the latter officer is instructed to disregard the “Black Code” of Mississippi, as passed by the late Legislature, under the title of “An Act to confer civil rights upon freedmen.”

124. *Who Are the Murderers?*, LIBERATOR, June 23, 1865, at 1 (“When the Federal Government first ordered the enlistment of colored soldiers, he who is now a fugitive [Jefferson Davis] issued a proclamation announcing that the captured officers of negro troops would be tried by the murderous Black Codes of the Slave States.”); *Misrepresentation*, NORFOLK POST, July 29, 1865, at 2 (“They . . . proceeded to put in force the obsolete black code of Virginia, oppressive to the negro race.”); *South Carolina Slave Code*, PITTSBURGH GAZETTE, Nov. 16, 1865, at 2:

The Black Code of South Carolina, to which we have referred, which has been framed by a commission for the present legislature of that State, is the most infamous scheme yet begotten of Southern ingenuity. It is a special code for the freed blacks, thus making them a degraded caste, which concedes them nothing and exacts everything from them.

*Tennessee Black Code*, DAILY OHIO STATESMAN, May 18, 1865, at 2:

A bill has passed the Lower House of the Tennessee Legislature to enact a black code, which looks very much like a measure to retain slavery under another name, or as if it was designed to vent the spite of the masters against the freedmen. . . . [I]n most of the regulations of society it makes a separate caste of the free blacks, providing various exclusions and disabilities, and a different criminal code for their punishment.

*Political News and Gossip*, WHEELING INTELLIGENCER, Oct. 19, 1865, at 1 (noting that a general from South Carolina, then a candidate for Congress, demanded

those discriminatory laws: “The black codes adopted by the unreconstructed Southern Legislatures, after the close of the war, were adopted because they would give the whites the same power over the blacks which slavery had secured for them hitherto.”<sup>125</sup> The codes were designed to ensure a subservient and stable labor force by, for example, imposing penalties on black laborers who “jumped” their labor contracts. Those contracts usually committed newly emancipated slaves to one-year work commitments, and they generally provided for very low wages. As one history puts it:

These oppressive laws mocked the ideal of freedom, so recently purchased by buckets of blood. The Black Codes imposed terrible burdens on the unfettered blacks, struggling against mistreatment and poverty to make their way as free people. Thousands of impoverished former slaves slipped into virtual peonage as sharecropper farmers, as did many landless whites.<sup>126</sup>

The authority of Congress to pass the Civil Rights Acts of 1866, however, was questioned by many people, southerners and northerners alike. For example, one Pennsylvania newspaper

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“the enactment of a new and most stringent black code” to “keep the freedmen in subjection”).

125. *Status of the Southern Freedmen*, N.Y. TIMES, Aug. 22, 1868, at 4.

126. 2 DAVID M. KENNEDY, LIZABETH COHEN & MEL PIEHL, *THE BRIEF AMERICAN PAGEANT: A HISTORY OF THE REPUBLIC* 353 (9th ed. 2017). The horrendous treatment of blacks in the Reconstruction Era is well documented. See, e.g., Charles J. Ogletree, Jr., *Making Race Matter in Death Matters*, in *FROM LYNCH MOBS TO THE KILLING STATE*, *supra* note 39, at 57–58:

During Reconstruction, once the era of slavery had formally ended, both black and white Southerners attempted to discern their roles in the new social system. While the South was under federal control, black men won the right to vote and some had been elected to Congress. Many whites resented the newfound rights of the freedmen and reacted violently, continuing in the trend devaluing black life that had begun during slavery. Federal workers stationed in the South observed these intentional killings that occurred over slight “offenses” by blacks. One black man was killed in 1866 for failing to take off his hat in the presence of a white man. Another report describes a black soldier killed at the hands of an identified (and unpunished) white man; fellow citizens justified the murder, describing the victim as “a damned nigger.” To solidify their continued domination, white Southerners enacted Black Codes to allow them to maintain some of the control of blacks they had during slavery.

observed that “the second section” of the bill “exposes State judges and other officers to fine and imprisonment for construing or enforcing any law or regulation which may be held to conflict with the provisions of the act.” “The idea of punishing a judge by a criminal prosecution for a mis-judgment or wrong judgment upon a question of law,” that newspaper editorialized, “is monstrous.” “But the most important question which is to be examined,” that paper stressed, “is the question of *power* in Congress, under the Constitution, to enact the bill into a law, and particularly to enact the first section.” “From whence is derived the authority to enact this section?” the paper queried.<sup>127</sup> Black codes were seen as vestiges of slavery,<sup>128</sup> but there was disagreement as to whether there needed to be a new constitutional amendment to wipe out such oppressive codes following the Thirteenth Amendment’s adoption and ratification.<sup>129</sup>

That Pennsylvania newspaper, in mulling over its rhetorical question about congressional authority, continued: “It cannot be from the naturalization clause of the Constitution.” “The argument then,” the paper added, “must turn upon the

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127. See *The Civil Rights Bill*, COLUMBIAN, May 12, 1866, at 2.

128. *Senator Wilson on Negro Suffrage*, CLEVELAND DAILY LEADER, July 13, 1865, at 2 (“I want the South to understand that their black code and their black laws, and all they have done to hold men in slavery, were abolished for ever with slavery itself . . . .”); *Yale College*, N.Y. TIMES, July 27, 1865, at 1 (“[W]e owe it to the memory of our dead to extirpate and sweep away every vestige of slavery . . . . The whole black code must go.”).

129. In an hour and a half speech, Massachusetts Senator Charles Sumner emphasized: “Slavery has been abolished in name; but that is all.” “The work of liberation,” he stressed, “is not yet completed.” “Nor can it be completed,” he observed, “until the equal rights of every person, once claimed as a slave, are placed under the safeguard of irreversible guarantees.” “It is not enough to strike down the master; you must also lift up the slave,” he said, adding: “It is not enough to declare that slavery is abolished. The whole black code, which is the supplement of slavery, must give place to that equality before the law which is the very essence of liberty.” *The Massachusetts Republican Convention*, N.Y. TIMES, Sept. 15, 1865, at 1; *accord Speech of Hon. Charles Sumner, at the Republican State Convention, in Worcester, Sept. 14, 1865*, LIBERATOR, Sept. 22, 1865, at 1 (“The whole Black Code, which is the supplement of Slavery, must give place to that Equality before the law which is the very essence of Liberty.”). In 1856, Congressman Preston Brooks of South Carolina—a fierce proponent of slavery—had infamously beaten Sumner in the U.S. Senate chamber. STEPHEN PULEO, *THE CANING: THE ASSAULT THAT DROVE AMERICA TO CIVIL WAR* (2012).

amendment to the Constitution abolishing slavery.” As the newspaper argued as regards the Thirteenth Amendment:

By that amendment Congress was authorized to enforce emancipation ‘by appropriate legislation.’ Now appropriate legislation must mean here such laws as are necessary to execute and maintain the abolition of slavery decreed by the previous clause of the amendment. The relation of master and slave was to be broken, and never to be renewed. Whatever is necessary to this end, and appropriate to its accomplishment, Congress may do in its legislative capacity; but it can do nothing else by virtue of this power. Testing the above section by this rule, it stands unsupported by any arguments or reason which can be accepted by a just and reasonable mind.

“The power to enforce the abolition of slavery of negroes,” the paper continued, “does not then extend to endowing them with all the privileges of citizenship in a State, or to conferring upon them all such civil or political rights as Congress may think useful or convenient to them.” The paper thus called the Civil Rights Bill of 1866 “both injudicious and unconstitutional; a measure not to be praised, but condemned.”<sup>130</sup>

To ward off legal challenges to the law’s constitutionality, Congress incorporated its key features in the first section of the U.S. Constitution’s Fourteenth Amendment, which got ratified in 1868.<sup>131</sup> That section of the Fourteenth Amendment—intended to

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130. *The Civil Rights Bill*, COLUMBIAN, May 12, 1866, at 2.

131. CHICAGO TRIB., May 19, 1968, at 7; see also David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 TEX. L. REV. 781, 788 (1998) (“Congress passed the Fourteenth Amendment to ensure the constitutionality of the 1866 Civil Rights Act.”). After “black codes,” in effect, “substantially restored slavery,” Americans moved to bar racial discrimination and, eventually, toward universal suffrage for blacks. *A Retrospect*, MARSHALL COUNTY REPUBLICAN, Jan. 2, 1868, at 1 (“Not until the evils resulting from the plan began to develop, in black codes that substantially restored slavery, did the people and politicians begin to move forward to universal suffrage.”); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1121 (1997):

When southern states adopted Black Codes constricting land ownership and employment of freedmen in such a way as to tie the emancipated slaves to their former owners, Congress passed the 1866 Civil Rights Act . . . . Because there was dispute about whether the Thirteenth Amendment’s prohibition of slavery vested Congress with the power to define and protect civil rights in this fashion, Congress began work on the drafting and ratification of



constitutionalize the Civil Rights Act of 1866<sup>132</sup>—began: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.” Section 1 then continued: “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>133</sup> Section 5 of the Fourteenth Amendment then gave the U.S. Congress (as had the Thirteenth Amendment) express implementing authority, reading as follows: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”<sup>134</sup> Not only did the Civil

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the Fourteenth Amendment,—and soon thereafter re[e]nacted the substance of the 1866 statute in the Civil Rights Act of 1870. When similar disputes arose over scope of rights protected by the Fourteenth Amendment, Congress vested the emancipated slaves with the political right of voting through the Fifteenth Amendment.

132. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 957–58 (1995):

Any analysis of the Fourteenth Amendment must begin with its statutory precursor, the Civil Rights Act of 1866. . . . The bill was passed pursuant to Congress’s authority to enforce the provisions of the Thirteenth Amendment, and was designed to counter the so-called “Black Codes” passed by the Southern states, denying fundamental civil rights to the freedmen. From its inception, however, the 1866 Act was plagued with doubts as to its constitutionality. President Andrew Johnson vetoed the Act for that reason, and although his veto was overridden, constitutional concerns were sufficiently serious that supporters of the Act set to work on a constitutional amendment to cure them.

See also *id.* at 958:

The principal draftsman of the Fourteenth Amendment, Representative John A. Bingham of Ohio, was among those who believed the principles of the 1866 Act to be desirable, but Congress’s power to be lacking. The principal purpose of Section 1 of the Fourteenth Amendment, as virtually all students of the subject agree, was to provide a firm constitutional basis for the 1866 Act and to ensure that future Congresses would not be able to repeal it.

133. U.S. CONST. amend. XIV, sec. 1.

134. U.S. CONST. amend. XIV, sec. 5; see also *Buckey v. County of Los Angeles*, 968 F.2d 791, 795 (9th Cir. 1992) (noting that “a denial of equal protection of the laws” was “a wrong quite familiar to those in Congress who in 1866 enacted the first civil rights act and promulgated the Fourteenth Amendment”); Ray Sebastian Pantle, *Blacker Than Death Row: How Current*

Rights Act of 1866 demand “like punishments, pains and penalties,” but so too did the Fourteenth Amendment’s implementing legislation, the 1870 Enforcement Act, which re-enacted the 1866 Civil Rights Act.<sup>135</sup>

The Fourteenth Amendment was thus intended to equalize punishments as between black and white offenders—something that Professor Goldfarb and others point out has never been achieved in the death penalty context despite all the efforts of the courts to do so.<sup>136</sup> As one West Virginia newspaper observed in 1879:

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*Equal Protection Analysis Fails Minorities Facing Capital Punishment*, 35 CAP. U. L. REV. 811, 813 (2007):

Those who ratified the Fourteenth Amendment specifically wished to overrule the laws passed after the Civil War, known as the Black Codes, which legislators implemented to maintain white supremacy. Many of these codes mandated more severe treatment for black defendants charged with a crime. Through the Equal Protection Clause, our nation “constitutionalize[d]” the Civil Rights Act of 1866, by guaranteeing that “inhabitants of every race and color . . . shall be subject to like punishment, pains and penalties, and no other.”

(quoting Civil Rights Act of 1866, ch. 31, 14, Stat. 27 (1866)).

135. WILLIAM B. GLIDDEN, CONGRESS AND THE FOURTEENTH AMENDMENT: ENFORCING LIBERTY AND EQUALITY IN THE STATES 45 (2013). Section 16 of the 1870 Enforcement Act provided in part as follows: “That all persons within the jurisdiction of the United States . . . shall be subject to *like punishment*, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.” An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes, 41st Cong., 2d Sess., ch. 114 (May 31, 1870) (emphasis added). Section 18 of the Enforcement Act of 1870, also known as the Civil Rights Act of 1870, provided: “*And be it further enacted*, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.” *Id.* § 18.

136. In their new book, Carol Steiker and Jordan Steiker—a sister and brother writing team—point to these damning statistics:

In modern-era Louisiana, killers of whites are six times more likely to get a death sentence than killers of blacks, and fourteen times more likely to be executed; black men who kill white women are thirty times more likely to get a death sentence than black men who kill other black men. No white person has been executed in Louisiana for a crime against a black victim since 1752.

STEIKER & STEIKER, *COURTING DEATH*, *supra* note 5, at 110.

We need not explain that the Fourteenth A[mendment] of the Constitution of the United States was manifestly intended to equalize and protect fully and fairly all the legal rights of citizens of the United States, be they white or black. The a[mendment] was not adopted to equalize and better protect the rights of white citizens, but to prevent any State of the Union from drawing a color or race line against any citizen of the United States whereby his full and equal citizenship could be impaired.<sup>137</sup>

In 1989, the U.S. Supreme Court itself emphasized that “[m]any of the Members of the 39th Congress viewed § 1 of the Fourteenth Amendment as ‘constitutionalizing’ and expanding the protections of the 1866 Act and viewed what became § 5 of the Amendment as laying to rest doubts shared by both sides of the aisle concerning the constitutionality of that measure.”<sup>138</sup>

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137. *The Case of Taylor Strauder*, INTELLIGENCER, Oct. 30, 1879, at 2; see also *Important Decision*, NASHVILLE UNION & AM., Sept. 13, 1871, at 3 (“The civil rights bill was . . . passed a short time before the fourteenth amendment received the sanction of the people of the United States. In May, 1870, Congress passed an act to carry into effect the fourteenth and fifteenth amendments, and by section 18 reenacted the civil rights bill. 16 Stat. at L. 140.”); FORT SCOTT WEEKLY MONITOR, June 18, 1885, at 2:

Section 1,977 [of the U.S. Code provided:] “All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and inforce contracts, to sue, be parties to, and give evidence to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment . . . .”

138. *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 721–72 (1989) (citing Cong. Globe, 39th Cong., 1st Sess., 2465 (1866) (Rep. Thayer) (“As I understand it, it is but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become a law.”); *id.* at 2498 (Rep. Broomall); *id.* at 2459 (Rep. Stevens); *id.* at 2461 (Rep. Finck); *id.* at 2467 (Rep. Boyer)); see also *Hurd v. Hodge*, 334 U.S. 24, 32 (1948):

Both the Civil Rights Act of 1866 and the joint resolution which was later adopted as the Fourteenth Amendment were passed in the first session of the Thirty-Ninth Congress. Frequent references to the Civil Rights Act are to be found in the record of the legislative debates on the adoption of the Amendment. It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy.

*Martinsen v. Mullaney*, 85 F. Supp. 76, 79 (D. Alaska Terr. 1949) (“The rights protected in the first Civil Rights Act of 1866 were incorporated into the Fourteenth Amendment which was adopted in 1868 in order to remove doubts as to the constitutionality of the Act . . . .”); Ryan D. Walters, *The Thirteenth Amendment “Exception” to the State Action Doctrine: An Originalist*

The legislative debate over the Fourteenth Amendment is revealing, with many legal scholars explicitly noting how the Fourteenth Amendment “constitutionalized” the Civil Rights Act of 1866.<sup>139</sup> At the time, Republican Congressman Martin Russell Thayer of Pennsylvania—a respected lawyer<sup>140</sup>—asserted that the amendment “incorporat[ed] in the Constitution of the United States the principle of the civil rights bill which has lately become a law . . . in order . . . that that provision so necessary for the equal administration of the law, so just in its operation, so necessary for the protection of the fundamental rights of citizenship, shall be forever incorporated in the Constitution of

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*Reappraisal*, 23 GEO. MASON U. CIV. RTS. L.J. 283, 323 (2013):

The continuing doubts about Congress’s power under the Thirteenth Amendment to enact the Civil Rights Act led to the drafting of Fourteenth Amendment to the Constitution that had two purposes: to authorize, without doubt, Congress’s authority to pass the Civil Rights Act of 1866, and further, to prevent its repeal by a future Congress by embedding its terms into the Constitution itself.

139. See Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 B.Y.U. L. REV. 1393, 1414 (2012) (“We know at a bare minimum that Section 1 of the Fourteenth Amendment constitutionalized the Civil Rights Act of 1866.”); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 111 (1984):

The language of the fourteenth amendment itself, prohibiting the denial of ‘equal protection of the law,’ speaks, if anything, more clearly of victims than of defendants. The sponsors of the fourteenth amendment unquestionably intended this language to prohibit unequal punishments for defendants of different races—indeed one of their major aims was to ‘constitutionalize’ the provisions of the Civil Rights Act of 1866 . . . .

Stan Robin Gregory, *Capital Punishment and Equal Protection: Constitutional Problems, Race and the Death Penalty*, 5 ST. THOMAS L. REV. 257, 268–69 (1992):

The framers of the Fourteenth Amendment intended to prohibit unequal punishments for defendants of all races. As the legislative history of the Fourteenth Amendment clearly illuminates, one of their main goals was to “constitutionalize” the provision of the Civil Rights Act of 1866, to embrace the requirement that in every state “inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall be subject to like punishment, pains, and penalties, and no other.”

(quoting Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (Apr. 9, 1866)).

140. 2 THE PROGRESSIVE MEN OF THE COMMONWEALTH OF PENNSYLVANIA 786–87 (1900).

the United States.”<sup>141</sup> In *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights*, scholar Michael Kent Curtis observes of the post-Civil War legislative debate: “Several congressmen observed that the amendment would eliminate any question about the power of Congress to pass the Civil Rights bill. Others considered the amendment a reiteration of the Civil Rights bill.”<sup>142</sup> In a speech delivered on August 7, 1866, Speaker of the House Schuyler Colfax made this observation:

We passed a bill on the ninth of April last year, over the President’s veto, known as the Civil Rights Bill, that specifically and directly declares what the rights of a citizen of the United States are—that they may make and enforce contracts, sue and be parties, give evidence, purchase, lease, and sell property, and be subject to like punishments. That is the last law upon the subject.”<sup>143</sup>

The words of Republican Senator Jacob Howard of Michigan—a member of the Joint Committee on Reconstruction—are especially revealing. “I look upon the first section, taken in connection with the fifth, as very important,” Senator Howard said in introducing the Fourteenth Amendment in 1866. “It will, if adopted by the States,” Howard pointed out, “forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons within their jurisdiction.” As Senator Howard, addressing the presiding officer, told his fellow lawmakers: “It establishes equality before the law, and it gives to the humblest, the poorest, and the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just Government.” In concluding, Howard made this plea: “Without a principle of equal justice to all men and equal protection under the shield of the

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141. MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 86 (1986).

142. *Id.*

143. CHRISTOPHER R. GREEN, *EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE* 46 (2015).

law, there is no republican government and none that is really worth maintaining.”<sup>144</sup>

The historical context is critical to understanding the Fourteenth Amendment's purpose. Southern “Black Codes” were notorious for punishing African Americans more harshly than whites, and southern intransigence was palpable. As *The Liberator*, the anti-slavery Boston newspaper, put it in November 1865:

We are constantly hearing of the punishment of negroes in various States, under the old black code, or the introduction of new sets of laws on a basis similar to that, marking out the blacks as the subjects of special legislation, defining acts as criminal in them which are freely allowed to others, allotting heavier punishments to them for the same offence, denying them equal opportunities for education and employment, and in various ways undertaking to restrict them to a position of acknowledged inferiority.<sup>145</sup>

Just one month after the Fourteenth Amendment's ratification, *The Pittsburgh Commercial* took note of a speech by a prominent Pittsburgh attorney, Robert B. Carnahan, the local U.S. District Attorney under Presidents Lincoln, Johnson and Grant. “Mr. Carnahan,” the paper observed, “referred to the ‘black’ codes of the South adopted in 1865 and 1866” that “demonstrated that the negro remained practically a slave until the adoption of the fourteenth amendment.” “Acts were made crimes as respected the negro which were not crimes as respected the white man,” it was noted.<sup>146</sup>

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144. *Id.* at 159.

145. *Schemes and Opportunities*, LIBERATOR, Nov. 17, 1865, at 2; see also *Black Codes*, CHICAGO TRIB., Nov. 29, 1865, at 2:

At the commencement of the present effort to reconstruct the South on the rebel basis alone, we predicted that the cloven foot would appear when the State Legislatures should come to frame their “Black Codes.” It matters not to the late rebels whether their constitution reads “slavery is abolished” or “slavery is restored,” so long as the masters are at liberty to govern the servants by their own “Black Code.” . . . We lay down the fundamental proposition that the whites of a State have no more right to frame Black Code of any kind than to restore slavery in all its enormity. All laws made for blacks must apply to whites and *vice versa*.

146. *Steubenville*, PITTSBURGH COMMERCIAL, Aug. 29, 1868, at 1.

In some places, the abandonment of “black codes” was accompanied by an end to the use of whipping.<sup>147</sup> But in other places, the attempt to enforce “black codes” or their equivalents echoed with the reverberations of slavery, with southern lawmakers seeking to resort to the lash through vagrancy laws. For example, in early 1866, *The Weekly Standard* in Raleigh, North Carolina, reported that while “United States authorities” had “disallowed” the Mississippi Legislature’s “Black Code,” a vagrancy scheme called for an offender to receive “thirty-nine lashes on his or her bare back” or to receive a fifty dollar fine.<sup>148</sup> Under that scheme, the judge also had the discretion to “hire out such vagrant for not exceeding six months, instead of committing him to the jail or house of correction.”<sup>149</sup> As that newspaper noted of the supposedly race-neutral scheme: “This law made no distinction between white vagrants and black ones. It is a stringent and summary law, well calculated to meet the exigencies of the times. There can be no question that severe measures must be resorted to to put down the evil of laziness among the negroes.”<sup>150</sup> Southern obstinacy made the need for federal intervention—and the need for the U.S. Constitution’s Fourteenth Amendment and its Equal Protection Clause—crystal clear.<sup>151</sup>

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147. See *Letter from Rev. E. M. Wheelock*, LIBERATOR, Mar. 3, 1865, at 2 (“[T]he mere presence of the army had strangled the infernal force of slavery, and arrested the action of its black code . . . [t]he use of the whip, and all cruel and unusual punishments, were forbidden.”).

148. *Alabama*, WEEKLY STANDARD, Jan. 3, 1866, at 4.

149. *Id.*

150. *Id.*; see also *Negro Justice*, PITTSBURGH DAILY POST, Mar. 21, 1868, at 3 (reprinting a story from a Mississippi newspaper about a case involving the theft of a cow “on a large plantation”). According to the *Pittsburgh Daily Post* story, the theft of the cow “illustrates the negro’s idea of justice and his own views of the utility of the ‘black code.’” *Id.* That story further reported that where “[o]ne negro stole a cow from another and was detected,” the tribunal’s judgment was that the culprit “be taken thence to a convenient place, and there staked out on the ground by hands and feet, and receive one hundred and fifty stripes on his naked back, well laid on.” *Id.*

151. See *House of Representatives*, PITTSBURGH COMMERCIAL, Feb. 2, 1866, at 1 (“Mr. Donnelly concluded by giving abstracts of the black codes of the South, showing that the freedman would be speedily re-enslaved if the government did not interfere.”); *Telegraphic News*, COURIER-J., Feb. 2, 1866, at 3 (discussing the speech of “Mr. Donnelly, of Minnesota”); compare BURLINGTON WEEKLY FREE PRESS, Apr. 6, 1866, at 1 (“What we want is the Black Code expunged from our

The death penalty's inequitable use against blacks in the nineteenth century was part and parcel of the "black codes"—and very much in line with how slaves had been treated in the past. In an "Address of the Negroes to the Native Whites," the "colored citizens" of Charleston, South Carolina, made this appeal to their "FELLOW-CITIZENS":

[Y]ou derided the idea of granting us the right to vote; when your Legislature met in 1865-66, you passed that infamous Black Code which is a disgrace to civilization; in that you denied us all rights in common with other people in the State; you, by these acts, denied our children the school-house; you imposed penalties on us, which were not imposed on white men; there were crimes which, if committed by a white man, he was imprisoned, but if committed by a black man, he was hung.<sup>152</sup>

In September 1868, an article in the *New York Times* about Georgia's "old slave code," specifically took note of the Fourteenth Amendment's abrogation of statutes "bearing on color." That article spoke of the denial to "colored people" of "equal protection

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Southern statute books, and these people put upon the same platform as other people, to work for whom they may elect to work, and to have the same rights in our courts as white people have . . . .") *with Constitutionality of the Reconstruction Acts*, N.Y. TIMES, Aug. 17, 1868, at 4:

The Southern revolutionists, while acknowledging their defeat, the loss of their cause, and the death of slavery, by their black codes and their rejection of the Fourteenth Amendment, distinctly refused the guarantee insisted upon by the loyal people—insisted upon a majority equal to that demanded by the continuation of the war in opposition to the disgraceful peace-at-any-price platform of the Democratic Party in 1864.

152. *South Carolina: Address of the Negroes to the Native Whites*, N.Y. TIMES, Sept. 8, 1868, at 1; see also *A Frank Abandonment*, CHARLESTON ADVOCATE, Nov. 21, 1868, at 3:

Mr. John Quincy Adams made a little speech at his home after his return from his late Southern visit, in which he said that the ex-rebels said to him that "they had frankly abandoned what they fought for." . . . . The first act of the same Legislatures [of the rebel States] was to pass infamous black codes in which the whole spirit of slavery was maintained, and under which orderly and tolerable society was impossible. The black codes re-established all of slavery but the name. The freedmen were made a pariah class; . . . the criminal laws discriminated wickedly against them; the black code virtually compelled them to be vagrants, and the vagrant laws sold them to service. (from *Harper's Weekly*).



in the administration of the laws,” with the article emphasizing that “black codes were enacted as cruel, as unjust, and in all respects as infamous as those which disgraced the days before the war.” It was not until “the authority of Congress was exerted,” the article observed, “that an end was put to black codes and the outrages perpetrated under them.”<sup>153</sup>

The decisions of the U.S. Supreme Court that predate *McCleskey* also make clear the Fourteenth Amendment’s purpose to end racial discrimination and to equalize punishments. In its 1883 decision in *United States v. Harris*,<sup>154</sup> the Supreme Court declared:

Congress has, by virtue of this amendment, enacted that all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment . . . .<sup>155</sup>

In its 1948 decision in *Hurd v. Hodge*,<sup>156</sup> the Court emphasized of the 39th Congress, the one that debated the Fourteenth Amendment:

Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land. Others supported the adoption of the Amendment in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States.”<sup>157</sup>

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153. *Promises and Performances*, N.Y. TIMES, Sept. 22, 1868, at 4.

154. 106 U.S. 629 (1883).

155. *Id.* at 640.

156. 334 U.S. 24 (1948).

157. *Id.* at 32–33:

Both the Civil Rights Act of 1866 and the joint resolution which was later adopted as the Fourteenth Amendment were passed in the first session of the Thirty-Ninth Congress. Frequent references to the Civil Rights Act are to be found in the record of the legislative debates on the adoption of the Amendment. It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy.

*See also id.* at 33:

And in its 1964 decision in *McLaughlin v. State of Florida*,<sup>158</sup> the Supreme Court made a similar statement as regards the origins of the Fourteenth Amendment's Equal Protection Clause.<sup>159</sup>

An 1880 U.S. Supreme Court decision also makes the point. In that case, *Strauder v. West Virginia*,<sup>160</sup> the Supreme Court held that the Fourteenth Amendment prohibited a state from

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The close relationship between § 1 of the Civil Rights Act and the Fourteenth Amendment was given specific recognition by this Court in *Buchanan v. Warley*, [245 U.S. 60, 79 (1917).] There, the Court observed that, not only through the operation of the Fourteenth Amendment, but also by virtue of the 'statutes enacted in furtherance of its purpose,' including the provisions here considered, a colored man is granted the right to acquire property free from interference by discriminatory state legislation.

The Civil Rights Act of 1866 was inspired in part by unequal punishments in the South and the urgent need to remedy that disparity. *See Delenda est Carthago—The Only Remedy for Southern Tyranny*, "EVENING TELEGRAPH", Jan. 5, 1866, at 4:

At the very moment that the fact of the passage of this black code is received, comes the intelligence that Senator TRUMBULL will move a bill in the Senate, [o]ne object of which is to enlarge the powers of the Freedman's Bureau, and the other to protect all persons in the United States in their civil rights, and furnish the means of their vindication. The first provides that in insurrectionary districts where, by State law or custom, any of the civil rights belonging to white persons are denied to negroes or mulattoes, or where they are subjected to different punishment than is prescribed for whites, the officers and agents of the Freedmen's Bureau shall, so long as such discrimination continues, have jurisdiction of all such cases affecting such negroes or mulattoes. It also provides for punishing by fine and imprisonment, through the courts of the Freedman's Bureau, any person who shall subject a negro or mulatto, in consequence of his race or color, to any other or different punishment than is prescribed for white persons, or shall deny any civil rights which belong to the white race.

158. 379 U.S. 184 (1964).

159. *Id.* at 192:

We deal here with a racial classification embodied in a criminal statute. In this context, where the power of the State weighs most heavily upon the individual or the group, we must be especially sensitive to the policies of the Equal Protection Clause which, as reflected in congressional enactments dating from 1870, were intended to secure "the full and equal benefit of all laws and proceedings for the security of persons and property" and to subject all persons "to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

(citation omitted).

160. 100 U.S. 303 (1880).

denying “colored” citizens the right to participate in the administration of the laws as jurors. The language of that landmark decision, laden with racism but finding West Virginia’s exclusion of blacks from juries to violate the Equal Protection Clause, shows how black citizens were viewed in the post-Civil War era by a wide swath of society. In writing about the Fourteenth Amendment, the Supreme Court made this late nineteenth-century observation: “This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy.”<sup>161</sup> When the Fourteenth Amendment was “incorporated into the Constitution,” the Court noted,

it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed.<sup>162</sup>

As the Supreme Court further emphasized in *Strauder*:

Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise

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161. *Id.* at 306.

162. *Id.*; see also THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA 1721 (Wilbur R. Miller ed., 2012):

The 1880 U.S. Supreme Court decision in *Strauder v. West Virginia* looked to the equal protection clause of the Fourteenth Amendment to invalidate a West Virginia policy excluding individuals from serving on juries because of their race. The policy was carried out in a statute limiting jury service to “all white male persons.” The case was argued before the Supreme Court on October 21, 1879. It was decided on March 1, 1880. The decision struck down jury exclusion practices common among southern states, which sought to empanel white-only juries despite the provisions of the Civil Rights Act of 1875 that made it a crime to violate the principle that all citizens had a right to serve on both state and federal juries.

government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident.<sup>163</sup>

“It was in view of these considerations,” the Court stressed, “the Fourteenth Amendment was framed and adopted.” “It was designed,” the Court pointed out, “to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States.”<sup>164</sup> The *Strauder* ruling was the first time in American history that the Supreme Court recognized the right of blacks to participate in the jury system.<sup>165</sup>

In its 1966 decision in *Baines v. City of Danville, Virginia*,<sup>166</sup> the U.S. Court of Appeals for the Fourth Circuit—in speaking of the Civil Rights Act of 1866 and its relation to the Fourteenth Amendment—emphasized its importance this way:

Both supporters and opponents of the measure understood that the civil rights granted in section 1 were to be given the broadest possible scope, and it was only to dispel any doubts concerning the authority of Congress to grant such sweeping rights to the Negro that the Fourteenth Amendment was proposed and submitted to the states by the same Congress that enacted section 1 of the Civil Rights Act.<sup>167</sup>

“The enactment of the Equal Protection Clause, in language closely paralleling section 1 of the 1866 statute,” the Fourth Circuit wrote, “legitimated beyond question Congress’ attempt to protect the type of rights granted in the statute, and there is no reason to think that the rights contemplated by section 1 are of less breadth than those contemplated by the Equal Protection Clause.”<sup>168</sup> The Equal Protection Clause, American courts have

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163. *Strauder*, 100 U.S. at 306.

164. *Id.*

165. HIROSHI FUKURAI, EDGAR W. BUTLER & RICHARD KROOTH, RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 88 (1993).

166. 357 F.2d 756 (4th Cir. 1966).

167. *Id.* at 775.

168. *Id.*; see also *id.* at 775–76 (“Contemporary legislators and the Supreme Court have consistently read the two provisions together.”); *Martinsen v. Mullaney*, 85 F. Supp. 76, 79 (Alaska Terr. Dist. Ct. 1949) (“The rights protected in the first Civil Rights Act of 1866 were incorporated into the Fourteenth Amendment which was adopted in 1868 in order to remove doubts as to the

held, “requires that all persons who are similarly situated should be treated alike.”<sup>169</sup>

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constitutionality of the Act.”); *United States v. Wong Kim Ark*, 169 U.S. 649, 675 (1898):

The same congress, shortly afterwards, evidently thinking it unwise, and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent congress, framed the fourteenth amendment of the constitution, and on June 16, 1866, by joint resolution, proposed it to the legislatures of the several states; and on July 28, 1868, the secretary of state issued a proclamation showing it to have been ratified by the legislatures of the requisite number of states.

(*citing* Civil Rights Act of 1866, 14 Stat. 27 (Apr. 9, 1866); 14 Stat. 358; 15 Stat. 708); *State v. Gibson*, 36 Ind. 389, 395 (1871) (“This act took effect on the 9th day of April, 1866, which was prior to the ratification of the fourteenth amendment. This amendment seems to have been mainly copied from, or modelled after the section above quoted from the civil rights bill.”) (*citing* Civil Rights Act of 1866).

169. *Jackson v. California*, No. 1:13-cv-01055-LJO-SA, 2015 WL 2414938 at \*11 (E.D. Cal. May 20, 2015) (citations omitted); *see also* *State v. Maniscalco*, Nos. 98-S-482-485, 98-S-591-594, 2001 WL 34012424 at \*2 (N.H. Super. Ct. May 14, 2001) (“The first question in an equal protection analysis is whether the State action in question treats similarly situated persons differently.”) (citation omitted); *H.B. Rowe Co., Inc. v. Tippett*, No. 5:03-CV-278-BO, 2007 WL 7766702 at \*5 n.6 (E.D. N.C. Mar. 30, 2007) (“The prohibition of discrimination contained in Section 1981 is co-extensive with the Equal Protection Clause.”) (citation omitted); *Jones v. State Bd. of Ed. of and for State of Tennessee*, 279 F. Supp. 190, 203 (M.D. Tenn. 1968) (“Equal protection of the law guarantees against invidious discrimination between persons in similar circumstances. The law may not lay an unequal hand on those who have committed intrinsically the same quality of offense.”); *cf. Pruitt v. Howard County Sheriff’s Department*, 623 A.2d 696, 703–704 (Md. Ct. Spec. App. 1993) (“Appellants cannot succeed on their equal protection claim unless they can show that other, similarly situated individuals did not receive the same treatment, *i.e.*, they were not subject to like punishment for like behavior.”); *People v. Finley*, 94 P. 248, 249 (Cal. 1908) (“we cannot perceive that appellant was denied the equal protection of the laws, for every other person in like cases with him, and convicted as he has been, would be subjected to like punishment”); *In re Boggs*, 45 F. 475, 475–76 (Cir. Ct., D. Ky. 1891):

It is also contended that this statute is class legislation, as it punishes ex-convicts more severely for the same offenses than it does those not theretofore convicted of a felony, and is within the prohibition of the fourteenth amendment to the federal constitution, which declares no state shall “deny to any person the equal protection of the laws.” . . . This statu[t]e does not deny the petitioner the equal protection of the laws, within the meaning of this amendment. Every other person convicted as he has been would be subject to like punishment as that he has received. This is all the amendment means.

In the mid-nineteenth century, the right to be free from “cruel and unusual punishments” was—among many other rights—often described as one of the “privileges and immunities” of citizenship.<sup>170</sup> As adopted, the Fourteenth Amendment provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” and that no state shall “deprive” any person of “life, liberty, or property, without due process of law.”<sup>171</sup> When, in 1866, Representative John Bingham of Ohio referred to privileges and immunities as “the inborn rights of every person,” he cited the Eighth Amendment prohibition on cruel and unusual punishments as an example. Bingham—a drafter of the Fourteenth Amendment—did not support the Civil Rights Act of 1866 because of his belief that Congress lacked constitutional authority, but on the subject of the privileges and immunities of U.S. citizens, he passionately observed: “[M]any instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guaranteed privileges of citizens of the United States, for which the national Government furnished, and could furnish by law no remedy whatsoever.” “Contrary to the express letter of your Constitution,” Bingham emphasized, “cruel and unusual punishment’ have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none.”<sup>172</sup>

In that era, a distinction was made between *natural* rights and *political* rights. In an 1859 debate about the meaning of due process, Bingham had spoken of “natural or inherent rights” as those that “belong to all men irrespective of all conventional regulations” and as “sacred rights which are as universal and

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170. BESSLER, CRUEL AND UNUSUAL, *supra* note 47, at 204; *see also* ST. LOUIS POST-DISPATCH, May 20, 1874, at 5 (“The following are most if not all the privileges and immunities of a citizen of the United States: The right to the writ of habeas corpus; . . . from excessive bail; from excessive fines; from cruel and unusual punishment; from the condition of slavery or involuntary servitude, except as a punishment . . .”)

171. U.S. CONST. amend. XIV.

172. LASH, *supra* note 114, at 151–52.

indestructible as the human race.” By contrast, Bingham viewed “political rights” as “conventional not natural; limited, not universal.” Yet, Bingham asserted then that “[a]ll free persons, then, born and domiciled in any State of the Union, are citizens of the United States; and, although not equal in respect of political rights, are equal in respect of natural rights.”<sup>173</sup> In the debate over the Fourteenth Amendment itself, Congressman Frederick E. Woodbridge described its purpose as empowering Congress to pass “those laws which will give to a citizen of the United States the natural rights which necessarily pertain to citizenship” and “those privileges and immunities which are guarantied to him under the Constitution of the United States.”<sup>174</sup>

The concept of “privileges and immunities” had long been associated with “fundamental” rights, those “which belong, of right, to the citizens of all free governments.” James Madison had described the freedom of the press and the right of conscience as the “choicest *privileges* of the people” and as “invaluable *privileges*.”<sup>175</sup> And for nineteenth-century abolitionists, the rights set forth in the first eight amendments to the U.S. Constitution were expressly viewed as falling within the scope of “privileges and immunities.” Likewise, in 1866, Republican Senator Jacob Howard of Michigan spoke of “the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution.”<sup>176</sup>

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173. BERNARD H. SIEGAN, *THE SUPREME COURT’S CONSTITUTION: AN INQUIRY INTO JUDICIAL REVIEW AND ITS IMPACT ON SOCIETY* 56–61 (1993).

174. FRANK J. SCATURRO, *THE SUPREME COURT’S RETREAT FROM RECONSTRUCTION: A DISTORTION OF CONSTITUTIONAL JURISPRUDENCE* 32 (2000); *see also id.*:

The amendment in its final version was given a broad interpretation by Senator Andrew J. Rogers, a Democratic opponent of the amendment who tried to alarm his colleagues by defining “all the rights we have under the laws of the country” as “privileges and immunities.” The Privileges and Immunities Clause would “prevent any State from refusing to allow anything to anybody embraced under this term of privileges and immunities,” including the rights to vote, marry, contract, be a juror, or be a judge or president.

175. *SLAVERY AND THE LAW* 192 (Paul Finkelman ed., 2002).

176. U.S. CONST. art. IV, sec. 2 (“The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 88 (1986) (quoting Senator Howard).

To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; . . . and also the right to be secure against excessive bail and against cruel and unusual punishments.<sup>177</sup>

In an 1849 description of the “privileges” and “immunities” of U.S. citizens, abolitionist Joel Tiffany had also listed among them “the right to be exempt from excessive bail, or fines, &c., from cruel and unusual punishments.” “The paradigmatic example of protected privileges or immunities,” constitutional law scholar Kurt Lash has written, “would be those rights listed in the first eight amendments to the Constitution.”<sup>178</sup>

In his speech introducing the Fourteenth Amendment, Senator Jacob Howard emphasized that it “abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to the other.”<sup>179</sup> As Senator Howard observed:

It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, that we extend to the black man, I had almost called it the poor privilege of the equal protection of the law?<sup>180</sup>

After asking that rhetorical question, Howard posed yet another:

Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same Government, and both equally responsible to justice and to God for the deeds done in the body?<sup>181</sup>

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177. CURTIS, NO STATE SHALL ABRIDGE, *supra* note 176, at 88.

178. LASH, *supra* note 114, at 76–77, 157, 289.

179. GREEN, *supra* note 143, at 158–59.

180. *Id.*

181. *Id.*



The Fourteenth Amendment played a transformative role in shaping America's criminal law. "For almost a century after the beginning of the United States," one source notes, various provisions of the Bill of Rights "applied *only* to actions by the federal government." But as that criminology text emphasizes: "The Fourteenth Amendment, passed in 1868 after the Civil War, began to change this legal thinking. Designed to protect the rights of the newly freed slaves, this amendment declared that no *state* could deprive anyone 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>182</sup> In accordance with that "spacious language," the U.S. Supreme Court stressed in *Duncan v. Louisiana*,<sup>183</sup> "many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment."<sup>184</sup> As the Court held in that specific case in the late 1960s:

Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.<sup>185</sup>

#### *IV. The Geography of Arbitrariness and Discrimination: The Eighth and Fourteenth Amendment Implications of the Death Penalty's Inequality*

In modern constitutional litigation, the Eighth Amendment's Cruel and Unusual Punishments Clause,<sup>186</sup> made applicable to the states by the Fourteenth Amendment,<sup>187</sup> still plays a central

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182. STEVEN E. BARKAN & GEORGE J. BRYJAK, FUNDAMENTALS OF CRIMINAL JUSTICE: A SOCIOLOGICAL VIEW 135 (2d ed. 2011).

183. 391 U.S. 145 (1968).

184. *Id.* at 148.

185. *Id.* at 149.

186. See U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

187. See U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

role in criminal cases. The Eighth Amendment has already been read to bar *non-lethal* corporal punishments—punishments that have long been abandoned in the American penal system.<sup>188</sup> In *Weems v. United States*,<sup>189</sup> the U.S. Supreme Court struck down a corporal punishment known as *cadena temporal* that was imposed in the Philippine Islands.<sup>190</sup> That punishment consisted of more than a decade of “hard and painful labor,” with prisoners required to “always carry a chain at the ankle, hanging from the wrists.”<sup>191</sup> In *Hope v. Pelzer*,<sup>192</sup> the Supreme Court held that Alabama prison officials violated the Eighth Amendment by handcuffing a shirtless inmate to a hitching post for seven hours, leading to the prisoner’s prolonged thirst, heat exposure and sunburning.<sup>193</sup> “[T]he Eighth Amendment violation,” the Court ruled of that inmate’s legal claim, “is obvious.”<sup>194</sup> And in *Jackson v. Bishop*,<sup>195</sup> the late Justice Harry Blackmun—then writing for the U.S. Court of Appeals for the Eighth Circuit—held in 1968 that whipping Arkansas prisoners to discipline them constituted an Eighth Amendment violation.<sup>196</sup> “Corporal punishment,”

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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.”); see also Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L. REV. 101, 128 (2013) (“Before the Fourteenth Amendment, African-Americans could not be regarded as citizens, whether slave or free. . . . [T]he Supreme Court itself determined in *Dred Scott v. Sandford* that even when free, black Americans could not be considered citizens.”) (citing *Dred Scott v. Sandford*, 60 U.S. 393, 430 (1856)); GARRETT EPPS, *AMERICAN EPIC: READING THE U.S. CONSTITUTION* 171 (2013) (discussing the Equal Protection Clause and noting that “[t]his is the first time in the Constitution that the word ‘equal’ is used to apply to human beings”).

188. See John D. Bessler, *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century*, 2 BRIT. J. AM. LEGAL STUDIES 297, 430–34 (2013) (explaining the abandonment of non-lethal corporal punishments in the U.S. penal system).

189. 217 U.S. 349 (1910).

190. *Id.* at 364.

191. *Id.*

192. 536 U.S. 730 (2002).

193. *Id.* at 734–35.

194. *Id.* at 738.

195. 404 F.2d 571 (8th Cir. 1968).

196. *Id.* at 579.

Blackmun wrote, “is degrading to the punisher and to the punished alike.”<sup>197</sup>

In her essay, “Matters of Strata,” Professor Goldfarb writes that “race, gender, and class structures” raise the prospect of “inequality and unfairness in the selection of defendants for death.”<sup>198</sup> In the context of taking on death sentences, those *lethal* punishments, she notes that the Eighth Amendment’s Cruel and Unusual Punishments Clause prohibits arbitrary<sup>199</sup> and discriminatory punishments.<sup>200</sup> She also observes that ideologies of race, gender and class “create a complex hierarchy that separates the classes of those who decide others’ fate from those whose fates are decided.”<sup>201</sup> In fact, death penalty adjudications are still tied up tightly with discrimination because the U.S. Supreme Court still allows “death-qualified” juries.<sup>202</sup> That line of

197. *Id.* at 580.

198. Goldfarb, *supra* note 3, at 3.

199. *See id.* at 3–4. The U.S. Supreme Court has long expressed concerns about arbitrariness in capital sentencing. *California v. Brown*, 479 U.S. 538, 541 (1987) (“The Constitution . . . requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion.”).

200. *See* Goldfarb, *supra* note 3, at 3–4. In striking down Connecticut’s death penalty as unconstitutional in 2015, the Supreme Court of Connecticut put it this way:

It goes without saying, moreover, that the eighth amendment is offended not only by the random or arbitrary imposition of the death penalty, but also by the greater evils of racial discrimination and other forms of pernicious bias in the selection of who will be executed. The eighth amendment, then, requires that any capital sentencing scheme determine which defendants will be *eligible* for the death penalty on the basis of legitimate, rational, nondiscriminatory factors.

*State v. Santiago*, 122 A.3d 1, 19 (Conn. 2015) (citations omitted).

201. Goldfarb, *supra* note 3, at 6.

202. *See* CRAIG HANEY, *DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM* 106 (2005) (“Death qualification significantly skews the composition of the jury panel in ways that make it less balanced and fair, and the process itself has a biasing effect on the jurors who pass through it.”); *id.* at 106–07 (“[A] process that selects eligible jurors on the basis of death penalty support will exclude disproportionately greater numbers of women and blacks . . . because blacks are already underrepresented on the jury lists in many parts of the country, death qualification may act to compound a preexisting problem.”); *id.* at 121 (“By requiring the attorneys and judge to dwell on penalty at the very start of the trial, the death-qualification process implies a heightened level of belief in the guilt of the defendant on the part of these major trial participants.”).

cases, which traces back to the Supreme Court's 1968 decision in *Witherspoon v. Illinois*,<sup>203</sup> has the highly disturbing, perverse effect of systematically excluding a disproportionate number of minorities, women, Catholics, young people, and other groups from sitting in judgment in capital cases.<sup>204</sup>

In southern "Death Belt" states, judicial factfinders—be they judges or capital juries stripped of large numbers of minorities<sup>205</sup>—have been, and still are, subject to enormous political pressure<sup>206</sup> and what Professor Goldfarb calls the

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203. 391 U.S. 510 (1968); *see also* SCOTT VOLLUM, ROLANDO V. DEL CARMEN, DURANT FRANTZEN, CLAUDIA SAN MIGUEL & KELLY CHEESEMAN, *THE DEATH PENALTY: CONSTITUTIONAL ISSUES, COMMENTARIES, AND CASE BRIEFS* 139 (2014).

204. *See* Goldfarb, *supra* note 3, at 20–23 (explaining that minorities, including African-Americans, are underrepresented on juries in capital trials because of jury selection practices and the use by prosecutors of peremptory challenges to strike prospective African-American jurors); Baxter Oliphant, *Support for Death Penalty Lowest in More Than Four Decades*, PEW RES.CTR. (Sept. 29, 2016), <http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/> (last visited Dec. 19, 2016) (examining surveys which show that women and minorities view the death penalty less favorably than white men) (on file with the Washington and Lee Law Review).

205. Only in recent years has the bench and bar become more diverse. *See, e.g.*, DAVID W. NEUBAUER & STEPHEN S. MEINHOLD, *JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES* 169 (7th ed. 2016):

The United States is experiencing a revolutionary change in composition of the bench. The dominant profile of judges as white male Protestants has begun to change, but, to some, change has not come fast enough. Women and racial minorities historically have faced tremendous obstacles to becoming lawyers and judges. . . . Until the twentieth century, the number of women judges in America was so small it could be counted on one hand. . . . Today, an estimated 27 percent of the American bench is staffed by women lawyers.

The book goes on to note that—per the American Bar Association—only about four percent of all state court judges are African American. *Id.*

206. State court judges in southern states, where the death penalty is more popular than it is elsewhere in the country, are subject to elections and electoral politics and, thus, political pressure. A report of the Brennan Center for Justice at New York University School of Law, *see* KATE BERRY, *HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES* 7 (2015), notes:

[O]ne study found that trial judges in Alabama—who have a uniquely powerful role in determining death sentences due to the state's system of judicial override, by which a judge can override a jury's sentence in a capital case—are more likely to impose death over jury verdicts of life imprisonment during election years.

*See also id.* at 11 (“[S]tates with appointed justices reversed death penalty

“[r]acial dynamics” of “states of the old Confederacy.”<sup>207</sup> The “Death Belt”—as Professor Charles Ogletree has explained—includes the nine southern states that account for the vast number of executions carried out since 1976. Those states: Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas and Virginia.<sup>208</sup> The use of highly discretionary “peremptory” challenges injects still more racial bias into capital prosecutions, with the U.S. Supreme Court in recent cases finding that prospective black jurors were in fact systematically stricken on the basis of race.<sup>209</sup> Though defense lawyers are entitled to challenge prosecutors’ peremptory strikes under *Batson v. Kentucky*,<sup>210</sup> it is often extremely difficult to prove that prosecutors’ actions were racially motivated. Only occasionally, when “smoking gun” evidence emerges, are racist attitudes or race-based peremptory strikes exposed and censured.<sup>211</sup>

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sentences at the highest rate—26 percent. States with judicial elections had substantially lower reversal rates: 15 percent in states with appointed justices who must face retention elections and 11 percent in states where justices are elected in contested elections.”).

207. Goldfarb, *supra* note 3, at 25–28.

208. Matthew C. Heise, *The Geography of Mercy: An Empirical Analysis of Clemency for Death Row Inmates*, 39 T. MARSHALL L. REV. 3, 10–11 (2013); see also Andrew E. Taslitz, *Daredevil and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 699, 706 (2004) (“The states of the Old Confederacy accounted for the vast majority of lynchings in the twentieth century, while there was no such vigilante system at work in the American Northeast.”); Hugo Adam Bedau, *Causes and Consequences of Wrongful Convictions: An Essay-Review*, 86 JUDICATURE 115, 118 (2002) (“[J]ust as the paradigm lynchings in American history were carried out by white mobs on helpless black men as a populist method of ruthless social control, so the death penalty is to a troubling extent a socially approved practice of white-on-black violence, especially where the crimes involved are black-on-white.”).

209. *Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016); *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005).

210. 476 U.S. 79 (1986).

211. Sadly, racial discrimination in jury selection is still a modern reality. See, e.g., DAVID K. SHIPLER, *THE RIGHTS OF THE PEOPLE: HOW OUR SEARCH FOR SAFETY INVADES OUR LIBERTIES* 123 (2012):

Methods of weaving race into the selection process were outlined by a senior prosecutor in the Philadelphia district attorney’s office, Jack McMahon, in a training video for fellow prosecutors. “In selecting blacks, you don’t want the real educated ones,” he declared. “Avoid selecting older black women when the defendant is a young black man,” he advised. “If you get, like, a white teacher teaching in a black

In *Foster v. Chatman*,<sup>212</sup> the U.S. Supreme Court recently weighed in on an especially disturbing case where, at trial, the prosecution invidiously used peremptory strikes against all four black prospective jurors qualified to serve.<sup>213</sup> In an opinion written by Chief Justice John Roberts, the Supreme Court noted that in the prosecution's jury venire list—one that listed "B" for "Blacks" in a legend in the upper right hand corner—the names of the black prospective jurors were highlighted in bright green.<sup>214</sup> The Court further emphasized that, under one of the names of black prospective jurors, Clayton Lundy—an investigator who helped the prosecution during jury selection—wrote: "If it comes down to having to pick one of the black jurors, [this one] might be okay."<sup>215</sup> Prospective black jurors were identified by "B#1," "B#2," and "B#3," and, on questionnaires, juror responses about their race had been circled.<sup>216</sup> After noting that "[t]he 'Constitution forbids striking even a single prospective juror for a discriminatory purpose,'"<sup>217</sup> and that "[t]he first five names" on the prosecution's "definite NO's' list" were black,<sup>218</sup> the Supreme Court observed that there was a "persistent focus on race in the prosecution's file."<sup>219</sup> "[W]e are left with the firm conviction," the Supreme Court concluded, that the prosecution's peremptory strikes "were 'motivated in substantial part by discriminatory intent.'"<sup>220</sup>

In the post-*Furman* era, American courts have routinely rejected challenges to death sentences based on race, gender and

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school that's sick of these guys maybe, that may be one you accept," he said. "The only way you're going to do your best is to get jurors that are unfair." The tape, made public as McMahon campaigned for district attorney, contributed to his defeat.

212. 136 S. Ct. 1737 (2016).

213. *Id.* at 1742–43.

214. *Id.* at 1744.

215. *Id.*

216. *Id.*

217. *Id.* at 1747 (*quoting* *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)).

218. *Id.* at 1749–50.

219. *Id.* at 1754.

220. *Id.* (*quoting* *Snyder*, 552 U.S. at 478, 485). As the Supreme Court ruled: "[T]he focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury." *Id.* at 1755.

geography.<sup>221</sup> “As long as *McCleskey* remains good law,” two scholars emphasize, “a statistical showing of disparities in the application of the death penalty—whether the disparities shown are by race, gender, geography, or all three, and whether proved on a statewide or county-level basis—will not prove an Eighth Amendment violation.”<sup>222</sup> While the Eighth Amendment forbids “cruel and unusual punishments,” the Fourteenth Amendment was put in place in part to end the nineteenth-century scourge of unequal punishments based on race. As one scholar writes:

The framers of the Fourteenth Amendment intended to prohibit unequal punishments for defendants of all races. As the legislative history of the Fourteenth Amendment clearly illuminates, one of their main goals was to “constitutionalize” the provision of the Civil Rights Act of 1866, to embrace the requirement that in every state “inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall be subject to like punishment, pains and penalties, and no other.”<sup>223</sup>

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221. See *United States v. Fell*, 944 F. Supp.2d 297, 349–51 (D. Vt. 2013) (rejecting claim that then-U.S. Attorney General John Ashcroft decided to seek the death penalty “on the basis of race, gender and geography, in violation of the Fifth, Sixth and Eighth Amendments”); see also *United States v. Williams*, No. 4:08-cr-00070, 2013 WL 1335599 at \*7 (M.D. Pa. 2013) (refusing to hold evidentiary hearing on defendant’s claim that he had “the right to not be subjected to an arbitrary and capricious system of capital punishment directly impacted by race, geography, and gender”); *Jackson v. United States*, 638 F. Supp.2d 514, 616 (W.D. N.C. 2009) (holding that claim asserting that he was subjected to death penalty on the basis of race or gender of the victim was procedurally defaulted); *Brown v. United States*, 583 F. Supp.2d 1330, 1349 (S.D. Ga. 2008) (discrimination-based claims found to be meritless “as they have been addressed elsewhere”).

222. Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 CARDOZO L. REV. 1227, 1277 (2013).

223. Stan Robin Gregory, *Capital Punishment and Equal Protection: Constitutional Problems, Race and the Death Penalty*, 5 ST. THOMAS L. REV. 257, 268–69 (1992). Interestingly, the Ku Klux Klan Act—passed by Congress in 1871, and intended (as reflected in its very title) “to enforce the Provisions of the Fourteenth Amendment,” included a provision that prohibited conspiracies aimed at, among other things, “depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws.” An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes,

As Professor Goldfarb demonstrates, context and history matter, though the law—as it inevitably does—evolves and sometimes even changes radically over time.<sup>224</sup> In 2016, for example, the U.S. Supreme Court held in *Hurst v. Florida*<sup>225</sup> that the Sixth Amendment requires a jury to find the aggravating factors necessary for imposing the death penalty.<sup>226</sup> But while that decision struck down Florida's capital sentencing scheme, juries—due to the death-qualification process—will continue to be less diverse than the populations from which they are drawn

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42nd Cong., Sess. I, ch. 22, § 2 (Apr. 20, 1871) (italics in original in the title of the Act; italics added to the text of the Act). The Act itself sought to protect not just individuals but “any portion or class of the people.” See *id.* § 3:

That *in all cases where* insurrection, domestic violence, unlawful combinations, or *conspiracies in any State shall so obstruct or hinder the execution of the laws thereof*, and of the United States, *as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by this act, and the constituted authorities of such State shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States . . . .*

(emphasis added). Today, federal law still prohibits conspiracies “for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.” 42 U.S.C. § 1985(3) (emphasis added). The original purpose of section 1985(3), derived from the Ku Klux Klan Act of 1871, was “to enforce the rights of African Americans and their supporters.” *Huling v. City of Los Banos*, 869 F. Supp.2d 1139 (E.D. Cal. Apr. 19, 2012) (citation omitted); see also *United Broth. of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 836 (1983) (“The predominate purpose of § 1985(3) was to combat the prevalent animus against Negroes and their supporters.”). In 1971, the U.S. Supreme Court held that 1985(3) covers “private conspiracies.” *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971). In that case, the Supreme Court emphasized: “The conspiracy . . . must aim at a deprivation of the equal enjoyment of rights by the law to all.” *Id.* at 102.

224. A couple of cases in point: the prohibitions on the execution of juvenile offenders and the intellectually disabled. Both of the U.S. Supreme Court rulings putting those bars in place—ones grounded in the U.S. Constitution—came about only after earlier precedents were overruled. See *Roper v. Simmons*, 543 U.S. 551 (2005), *overruling* *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Atkins v. Virginia*, 536 U.S. 304 (2002), *overruling* *Penry v. Lynaugh*, 492 U.S. 302 (1989).

225. 136 S. Ct. 616 (2016).

226. *Id.* at 619.



unless the Supreme Court jettisons the “death-qualification” scheme altogether.<sup>227</sup> A 2010 report by the Equal Justice Initiative—the non-profit founded by lawyer Bryan Stevenson, a Harvard Law School graduate and the *New York Times* best-selling author of *Just Mercy* who has helped exonerate black death row inmates<sup>228</sup>—specifically found a pattern of “jury bleaching.” That odious practice, the striking of black jurors using “peremptory strikes,” has led to all-white or predominantly white juries even in places where the majority of the population is black. “All-white juries,” the evidence shows, “are significantly more likely to sentence black defendants to death, particularly in cases involving a white victim.”<sup>229</sup> Because the function of juries is “to maintain a link between contemporary community values

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227. 1 JURY PSYCHOLOGY: SOCIAL ASPECTS OF TRIAL PROCESSES 163 (Joel D. Lieberman & Daniel A. Krauss eds., 2016) (“The death qualification process has been more extensively studied, and the existing research suggests that the process itself contributes to some notable biases in shaping the capital jury as a decision-making body.”); Stephen B. Bright, *Discrimination, Death, and Denial: Race and the Death Penalty*, in MACHINERY OF DEATH: THE REALITY OF AMERICA’S DEATH PENALTY REGIME 54 (David R. Dow & Mark Dow eds., 2002) (noting that the “death qualification” process “often results in the removal of more prospective jurors who are members of minority groups than those who are white” and that “[o]ften the death qualification process reduces the number of minority jurors to few enough that those remaining can be eliminated by the prosecutor with peremptory strikes”).

228. See BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (2014); see also *One Lawyer’s Fight for Young Blacks and ‘Just Mercy’*, NPR (Oct. 20, 2014), <http://www.npr.org/2014/10/20/356964925/one-lawyers-fight-for-young-blacks-and-just-mercy> (last visited Dec. 19, 2016) (providing an interview with Bryan Stevenson on his book) (on file with the Washington and Lee Law Review); *Anthony Ray Hinton, U.S. Death Row Inmate, Freed After 30 Years*, ASSOCIATED PRESS (Apr. 2, 2015), <http://www.cbc.ca/news/world/anthony-ray-hinton-u-s-death-row-inmate-freed-after-30-years-1.3020464> (last visited Dec. 19, 2016) (highlighting a death row inmate Stevenson argued was innocent and who was exonerated) (on file with the Washington and Lee Law Review). African Americans make up a disproportionate percentage of America’s death row inmates. ALAN W. CLARKE & LAURELYN WHITT, *THE BITTER FRUIT OF AMERICAN JUSTICE: INTERNATIONAL AND DOMESTIC RESISTANCE TO THE DEATH PENALTY* 88 (2007) (“[B]lack, who are about 12.3 percent of the population, constitute nearly 42 percent of people on death row, and 34 percent (350) of all modern executions have been carried out on African Americans, thus generating numbers large enough for statistical comparison.”).

229. 1 RACE AND RACISM IN THE UNITED STATES: AN ENCYCLOPEDIA OF THE AMERICAN MOSAIC 999 (Charles Gallagher & Cameron D. Lippard eds., 2014).

and the penal system,”<sup>230</sup> and because the U.S. Supreme Court looks to jury verdicts to evaluate the “evolving standards of decency that mark the progress of a maturing society,”<sup>231</sup> juries that do not reflect an *entire* community cannot possibly reflect the conscience of that community.<sup>232</sup>

Provisions of the U.S. Constitution cannot be read in isolation. The Eighth and Fourteenth Amendments must be read together,<sup>233</sup> though the Eighth Amendment was adopted decades earlier than the latter amendment. The Eighth Amendment prohibits “cruel and unusual punishments” as well as “excessive” bail and fines.<sup>234</sup> At the time of its ratification in 1791, however, that prohibition only applied to the *federal* government.<sup>235</sup> It was not until the post-Civil War period—and after the Fourteenth Amendment, ratified in 1868, was held to apply the Bill of Rights against the states—that states were found to be constrained by the U.S. Constitution’s Cruel and Unusual Punishments Clause and the U.S. Supreme Court’s interpretation of it.<sup>236</sup> As Professor Goldfarb explains:

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230. *Witherspoon v. Illinois*, 391 U.S. 510, 542 n.15 (1968).

231. This is the test that the U.S. Supreme Court has employed since 1958 to evaluate Cruel and Unusual Punishments Clause claims. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

232. See JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* 159–60 (1997) [hereinafter BESSLER, *DEATH IN THE DARK*]. By allowing death-qualified juries, the Supreme Court is skewing the data it gets about the public’s views on capital cases as jurors who oppose the death penalty are not allowed to serve. JOHN D. BESSLER, *KISS OF DEATH: AMERICA’S LOVE AFFAIR WITH THE DEATH PENALTY* 81–83 (2003). This is especially troubling because the Supreme Court uses jury verdicts, along with legislation, to assess the “evolving standards of decency.” The Court treats jury verdicts as “a significant and reliable objective index of contemporary values” because jurors are “so directly involved.” *Gregg v. Georgia*, 428 U.S. 153, 181 (1976); *Coker v. Georgia*, 433 U.S. 584, 595 (1977).

233. See BESSLER, *CRUEL AND UNUSUAL*, *supra* note 47, at 215 (“The Eighth and Fourteenth Amendments, however interpreted, operate together to prohibit arbitrary and discriminatory punishments and set a constitutional floor beneath which neither federal nor state officials can traverse.”).

234. U.S. CONST. amend. VIII.

235. BESSLER, *CRUEL AND UNUSUAL*, *supra* note 47, at 28–29.

236. U.S. CONST. amend. XIV. The first time the U.S. Supreme Court held that the U.S. Constitution’s Eighth Amendment was applicable to the states by virtue of the Fourteenth Amendment was in 1962. See *Robinson v. California*, 370 U.S. 660 (1962). Initially, the Supreme Court did not utilize the Fourteenth Amendment to stop discriminatory actions. See RICHARD S. CONLEY, *HISTORICAL*

The Fourteenth Amendment, part of the package of Reconstruction Amendments that followed soon after the end of the Civil War, imposed the first explicit constitutional limits on the power of states, because one outgrowth of the Civil War was an awareness that tyranny could come not just from a centralized federal power but also from decentralized state authorities.<sup>237</sup>

The Fourteenth Amendment is so important that it has been called a “Second Bill of Rights” or a “Second Constitution.”<sup>238</sup>

As I have argued elsewhere, the adoption and ratification of the Fourteenth Amendment necessarily changed the Eighth Amendment calculus. In addition to making the Eighth Amendment applicable to the states, the Fourteenth Amendment enshrined the concept of “equal protection of the laws” into U.S. law.<sup>239</sup> Whereas punishments in the pre-Fourteenth Amendment era did not need to be imposed in a non-discriminatory fashion, it is now unconstitutional for jurors to be stricken on the grounds of race or gender<sup>240</sup> or for punishments to be imposed arbitrarily<sup>241</sup>

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DICTIONARY OF THE U.S. CONSTITUTION 96–97 (2016):

In the *Slaughterhouse Cases* (1873) the Supreme Court took a narrow view of equal protection of the law and ruled that the Fourteenth Amendment did *not* apply to state actions. In the *Civil Rights Cases* (1883), a consolidation of five cases, the high court struck down the 1875 Civil Rights Act, which set out to prohibit segregation, as unconstitutional. In 1896 the Supreme Court affirmed “separate but equal” facilities for the races in the *Plessy v. Ferguson* decision. That doctrine remained in place for 58 years until the Supreme Court overturned it in the landmark case of *Brown v. Board of Education* (1954).

*See also id.* at 97 (“It was not until the early 20th century that the Supreme Court selectively incorporated the Bill of Rights to state actions through the Fourteenth Amendment’s provisions for privileges and immunities, due process, and equal protection of the laws.”).

237. Goldfarb, *supra* note 3, at 12.

238. DAVID L. HUDSON, *THE FOURTEENTH AMENDMENT: EQUAL PROTECTION UNDER THE LAW* 3–4 (2002); *see also* GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* (2007).

239. BESSLER, *CRUEL AND UNUSUAL*, *supra* note 47, at 306, 308.

240. *See* *Batson v. Kentucky*, 476 U.S. 79, 100 (1986) (“If the trial court decides that the facts establish . . . purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner’s conviction be reversed.”); *J.E.B. v. Alabama*, 511 U.S. 127, 143 (1994) (concluding that jurors cannot be struck on the basis of gender); *Foster v. Chatman*, 136 S. Ct. 1737 (2016) (reaffirming that jurors cannot be

or on the invidious bases of race<sup>242</sup> or gender.<sup>243</sup> When the Eighth and Fourteenth Amendments are read together, punishments

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struck based on race).

241. See *United States v. Booker*, 543 U.S. 220, 238–39 (2005) (“The Framers of the Constitution understood the threat of ‘judicial despotism’ that could arise from ‘arbitrary punishments upon arbitrary convictions’ without the benefit of a jury in criminal cases.”); LINDA E. CARTER, ELLEN S. KREITZBERG & SCOTT HOWE, *UNDERSTANDING CAPITAL PUNISHMENT* 346 (3d ed. 2012) (“In 1972, in *Furman v. Georgia*, the Supreme Court declared the death penalty unconstitutional due, in part, to the arbitrary and capricious manner in which it was imposed.”) (citing *Furman v. Georgia*, 408 U.S. 238 (1972)); *Furman*, 408 U.S. at 274 (Brennan, J., concurring) (noting that “the English history of the Clause reveals a particular concern with the establishment of a safeguard against arbitrary punishments”) (citing Anthony F. Granucci, ‘*Nor Cruel and Unusual Punishments Inflicted*’: *The Original Meaning*, 57 CALIF. L. REV. 839, 857–60 (1969)); see also *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (“The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.”); *Phillip Morris USA v. Williams*, 549 U.S. 346, 352 (2007):

[W]e have emphasized the need to avoid an arbitrary determination of an award’s amount. Unless a State insists upon proper standards that will cabin the jury’s discretionary authority, its punitive damage system . . . may threaten “arbitrary punishments,” *i.e.*, punishments that reflect not an “application of law” but “a decisionmaker’s caprice.

*Sandlin v. Conner*, 515 U.S. 472, 485 (1995) (“[A]rbitrary corporal punishment represents an invasion of personal security . . .”); *Barenblatt v. United States*, 360 U.S. 109, 162 (1959) (Black, J., dissenting):

It is the protection from arbitrary punishments through the right to a judicial trial with all these safeguards which over the years has distinguished America from lands where drumhead courts and other similar “tribunals” deprive the weak and the unorthodox of life, liberty and property without due process of law.

*Glossip v. Gross*, 135 S. Ct. 2726, 2759 (2015) (Breyer, J., dissenting) (“The arbitrary imposition of punishment is the antithesis of the rule of law.”).

242. See Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 110–11 (1984):

A long line of cases holds that the equal protection clause prohibits discrimination in criminal sentencing by the race of the defendant, but no cases to date discuss its implications for discrimination by the race of the victim. The language of the fourteenth amendment itself, prohibiting the denial of ‘equal protection of the law,’ speaks, if anything, more clearly of victims than of defendants. The sponsors of the fourteenth amendment unquestionably intended this language to prohibit unequal punishments for defendants of different races—indeed one of their major aims was to ‘constitutionalize’ the provisions of the Civil Rights Act of 1866, including the requirement that in every state ‘inhabitants of every race and color, without regard to any previous condition of slavery or involuntary

cannot be “cruel and unusual” and, to avoid that nomenclature, they must not be inflicted in an *unequal* manner either.<sup>244</sup> The words that adorn the U.S. Supreme Court building—“EQUAL JUSTICE UNDER LAW”—must be given effect in the context of *punishment* (just as they were, for example, in the context of *public education* in *Brown v. Board of Education*) if the Fourteenth Amendment is to be meaningful and fully implemented.<sup>245</sup>

*V. The Need for Equal Protection of the Laws: From  
Discrimination and Arbitrariness to Abolition and the Protection  
of Universal Rights*

The basic rule of equal protection is that persons “similarly situated with respect to the legitimate purpose of the law must receive like treatment.”<sup>246</sup> The purpose of the Fourteenth

servitude . . . shall be subject to like punishment, pains and penalties, and no other—but they were concerned about protecting black victims as well.

243. See 16B C.J.S. *Constitutional Law* § 301 (2016) (“[E]qual protection is violated when different punishments for offenses is grounded merely on the basis of gender.”); see also *Hobson v. Pow*, 434 F. Supp. 362, 366 (N.D. Ala. 1977) (“[T]he principle of equal protection is violated when different punishment for offenses is grounded merely on the basis of gender.”) (citations omitted).

244. The Eighth and Fourteenth Amendments are frequently cited and read together. See, e.g., *U.S. ex rel. Free v. Peters*, 778 F. Supp. 431, 439 n.7 (N.D. Ill. 1991):

[W]hile Free purports to be advancing two grounds for recovery, one based on the Eighth Amendment, the other based on the Fourteenth Amendment, it is evident that these grounds must be read together as one claim, since there is no basis for relief against the state based solely on the Eighth Amendment without the requisite incorporation through the Fourteenth Amendment.

245. BESSLER, CRUEL AND UNUSUAL, *supra* note 47, at 306.

246. E.g., *People v. Barrera*, 14 Cal. App.4th 1555, 1565 (Cal. Ct. App., 5th Dist. 1993); see also *Western & Southern Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 660 (1981) (“[T]he Fourteenth Amendment, ratified in 1868, introduced the constitutional requirement of equal protection, prohibiting the States from acting arbitrarily or treating similarly situated persons differently *even with respect to privileges formerly dispensed at the State’s discretion.*”); *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O’Connor, J., concurring) (“The Equal Protection Clause of the Fourteenth Amendment ‘is essentially a direction that all persons similarly situated should be treated alike.’”) (*quoting City of Cleburne, Texas v. Cleburne*

Amendment's Equal Protection Clause—it has been written—is “to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.”<sup>247</sup> In that regard, the Equal Protection Clause is, logically, an ideal vehicle for enforcing *universal* rights, such as the rights to be free from torture, cruelty and discrimination.<sup>248</sup> No one, not even prisoners, are to be subjected to torture or gratuitous cruelty, and similarly situated offenders should be treated alike under the law.<sup>249</sup> The death penalty, it is

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Living Center, 473 U.S. 432, 439 (1985)); *Williams v. Illinois*, 399 U.S. 235, 241–42 (1970) (“[O]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum . . .”).

247. *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. 441, 445 (1923) (*quoting* *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350, 352 (1918)). In the context of criminal statutes, *McLaughlin v. State of Florida*, 379 U.S. 184, 192 (1964), emphasized:

[W]e must be especially sensitive to the policies of the Equal Protection Clause which, as reflected in congressional enactments dating from 1870, were intended to secure “the full and equal benefit of all laws and proceedings for the security of persons and property’ and to subject all persons ‘to like punishment, pains, penalties, . . .’ taxes, licenses, and exactions of every kind, and to no other.

(citations omitted); *cf.* *United States v. Armstrong*, 517 U.S. 456, 464–65 (1996):

[T]he decision whether to prosecute may not be based on “an unjustifiable standard such as race, religion, or other arbitrary classification.” A defendant may demonstrate that the administration of a criminal law is “directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive” that the system of prosecution amounts to “a practical denial” of equal protection of the law.

(citations omitted).

248. See JEAN THOMAS, *PUBLIC RIGHTS, PRIVATE RELATIONS* 86 (2015) (“The right to be free from torture, for example, protects an interest whose importance would be difficult to make sense of if it did not protect all persons equally.”); see also G.A. Res. 217 (III) A, Universal Declaration of Human Rights, U.N. General Assembly Resolution 217 A(III) (Dec. 10, 1948), Art. 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

249. See *People v. Hamilton*, 40 Cal. App. 4th 1615, 1619 (Cal. Ct. App. 1995) (“Equal protection requires that like defendants be treated alike; a state's classification of crimes and punishments must be reasonable.”); see also *Ex parte Sizemore*, 8 S.W.2d 134, 136 (Tex. Ct. App. 1928) (“Due process of law under the Fourteenth Amendment and the equal protection of the law are

true, has been a fixture of American life since colonial days. But the legal landscape—both in the U.S. and abroad—is changing rapidly, if not at lightning speed.<sup>250</sup> While a U.N. effort seeking a global moratorium on executions is gaining momentum,<sup>251</sup> American anti-death penalty advocacy has been focused in the courts and on the state level—and with some successes, with courts declaring certain practices to be unconstitutional<sup>252</sup> and with six states abolishing the death penalty since 2000.<sup>253</sup>

While the U.S. Supreme Court has held that race and gender discrimination are unconstitutional in a series of cases,<sup>254</sup> it has yet to effectuate the Fourteenth Amendment's dictates in the

secured if the law operates on all alike and do not subject the individual to the arbitrary exercise of the powers of government.”) (citations omitted).

250. *E.g.*, John D. Bessler, *Capital Punishment Law and Practices: History, Trends, and Developments*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 19 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 3d ed. 2014); John D. Bessler, *The Death Penalty in Decline: From Colonial America to the Present*, 50 CRIM. L. BULL. 245 (2014) (tracing the law's evolution); Shehrezade C. Malik & D. Paul Holdsworth, *A Survey of the History of the Death Penalty in the United States*, 49 U. RICH. L. REV. 693, 709 (2015):

The general global trend away from the death penalty, including among America's greatest allies, makes the intrepid nature of capital punishment within the fabric of our society more glaring. Altogether, this makes for the possibility of very drastic changes in the near future as to how we approach, prosecute, and punish those whose conduct exceeds the tolerable bounds of moral depravity.

251. *See* ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 41–44 (5th ed. 2015); *see also* Sandra Babcock, *The Global Debate on the Death Penalty*, 34 HUM. RTS. 17, 17 (2007) (“The international trend toward abolition reflects a shift in the death penalty paradigm. Whereas the death penalty was once viewed as a matter of domestic penal policy, now it is seen as a human rights issue.”).

252. *E.g.*, Adam Liptak, *Electrocution Is Banned in Last State to Rely on It*, N.Y. TIMES (Feb. 9, 2008), <http://www.nytimes.com/2008/02/09/us/09penalty.html> (last visited Dec. 19, 2016) (noting that the Nebraska Supreme Court declared the electric chair to be unconstitutional) (on file with the Washington and Lee Law Review).

253. DANIEL LACHANCE, *EXECUTING FREEDOM: THE CULTURAL LIFE OF CAPITAL PUNISHMENT IN THE UNITED STATES* 248 n.11 (2016).

254. *See* *Brown v. Board of Education*, 347 U.S. 483 (1954) (overruling the “separate but equal” doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), and declaring unconstitutional state laws establishing separate public schools for black and white students); *see also* *United States v. Virginia*, 518 U.S. 515 (1996) (striking down the Virginia Military Institute's male-only admission policy).

context of America's death penalty system. Thus, in *McCleskey*, the Supreme Court held that the Baldus study, the statistical study showing discrimination in Georgia's death penalty system, was "clearly insufficient" to support an inference that any of the decisionmakers in that *particular* criminal case "acted with discriminatory purpose."<sup>255</sup> In minimizing the role of race in death penalty adjudications writ large and rejecting Warren McCleskey's Eighth Amendment and Fourteenth Amendment equal protection claims, a bare majority of the Supreme Court sidestepped the Baldus study's alarming findings by concluding: "Statistics at most may show only a likelihood that a particular factor entered into some decisions. There is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case. There are similar risks that other kinds of prejudice will influence other criminal trials." Ultimately, the Court in *McCleskey* determined that the presence of that risk of racial prejudice was not "constitutionally unacceptable."<sup>256</sup>

In reaching its decision, the Court in *McCleskey* touted the "substantial benefits" of discretion.<sup>257</sup> Although it determined that the Baldus study "indicates a discrepancy that appears to correlate with race," the Court nonetheless found that "[t]he discrepancy indicated by the Baldus study is 'a far cry from the major systemic defects identified in *Furman*.'"<sup>258</sup> The Court in *McCleskey* then made this slippery slope argument:

[I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender.<sup>259</sup>

As Justice Powell, in extending his slippery slope argument, continued:

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255. *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987).

256. *Id.* at 308–09.

257. *Id.* at 311–12.

258. *Id.* at 312–13 (*quoting* *Pulley v. Harris*, 465 U.S. 37, 54 (1984)).

259. *Id.* at 314–17.



Also, there is no logical reason that such a claim need be limited to racial or sexual bias. If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could—at least in theory—be based upon any arbitrary variable, such as the defendant’s facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decisionmaking.<sup>260</sup>

But *McCleskey* wasn’t about a defendant’s physical attractiveness; it was about a man’s life. And in the modern era, the death penalty’s legitimacy has been corroded by the punishment’s arbitrary, errant, and highly discriminatory application. Indeed, many people now see capital punishment—and increasingly and properly so—as violating basic and fundamental human rights, including the right to life and the rights to be free from torture and cruelty. The International Covenant on Civil and Political Rights, a widely ratified international treaty, itself expressly provides that “[n]o one shall be arbitrarily deprived of his life.”<sup>261</sup> The language of that treaty, put in place in 1966, thus makes clear that the arbitrary infliction of death sentences has been a violation of international law for *fifty* years now.<sup>262</sup> While the treaty’s use of the masculine—“his”—reflects its 1960s vintage and that executions have long been used mainly to kill men, the death penalty’s arbitrary and discriminatory character (which a number of U.S. Supreme Court Justices spoke of in 1972 in *Furman v. Georgia*<sup>263</sup>) has yet to be remedied.<sup>264</sup>

Not only does the arbitrary infliction of death sentences violate long-standing *international law* principles, but the death

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260. *Id.* at 317–18 (footnotes omitted).

261. International Covenant on Civil and Political Rights, General Assembly resolution 2200 A (XXI) (Dec. 16, 1966), S. Exec. Doc. No. 95–2, 999 U.N.T.S. 171 [hereinafter “ICCPR”], Art. 6.

262. See David Weissbrodt & Terri Rosen, *Principles Against Executions*, 13 *HAMLIN L. REV.* 579, 579 (1990) (“The right to be free from extra-legal, arbitrary, or summary executions is recognized in a number of international human rights instruments.”) (citing ICCPR, art. 6).

263. 408 U.S. 238 (1972).

264. In 2015, in their dissent in *Glossip v. Gross*, Justices Stephen Breyer and Ruth Bader Ginsburg also spoke of the death penalty’s arbitrary and discriminatory character. See STEPHEN BREYER, *AGAINST THE DEATH PENALTY* 76–80 (John D. Bessler ed. 2016).

penalty should be found to be a torturous punishment<sup>265</sup> and to violate existing *American* constitutional law as well.<sup>266</sup> In fact, just as the Convention Against Torture now prohibits acts of torture and cruelty,<sup>267</sup> the U.S. Constitution's Fourteenth Amendment has long forbidden arbitrary, discriminatory, and excessive punishments,<sup>268</sup> with the U.S. Supreme Court

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265. In a forthcoming book, I make that argument in extensive detail. For example, I explain how various *non-lethal* acts, including *mock* or simulated executions, are already considered to be acts of torture, and then argue that *real* executions—far more severe in nature than mock executions—should qualify as acts of torture, too. See JOHN D. BESSLER, *THE DEATH PENALTY AS TORTURE: FROM THE DARK AGES TO ABOLITION* (forthcoming 2017).

266. Not only has the Eighth Amendment long been read to bar torturous punishments, but the U.S. Constitution has been read to forbid race- and gender-based discrimination. *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879) (“[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment.”); *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (noting that laws that classify by “race, alienage, or national origin” are “subjected to strict scrutiny” because those classifications “are so seldom relevant to the achievement of any legitimate state interest” and “are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others”); *Reed v. Reed*, 404 U.S. 71, 77 (1971) (“By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause.”).

267. Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, Arts. 1 & 16, *reprinted in* WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 403 (3d ed. 2002).

268. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (“The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.”); *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998) (noting that the Equal Protection Clause prohibits “race and gender discrimination”); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (“if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty”); *Furman v. Georgia*, 408 U.S. 238, 249 (1972) (Douglas, J., concurring) (“There is increasing recognition of the fact that the basic theme of equal protection is implicit in ‘cruel and unusual’ punishments. ‘A penalty . . . should be considered ‘unusually’ imposed if it is administered arbitrarily or discriminatory.’”) (*quoting* Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970)); *Furman*, 408 U.S. at 256–57 (Douglas, J., concurring) (“[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.”); see also *Pulley v. Harris*, 465 U.S. 37, 59–60 (1984) (Brennan,

articulating the Equal Protection Clause's scope in a series of cases.<sup>269</sup> "When those who appear similarly situated are nevertheless treated differently," the U.S. Supreme Court has ruled, "the Equal Protection Clause requires at least a rational reason for the difference, to ensure that all persons subject to legislation or regulation are indeed being 'treated alike, under like circumstances and conditions.'"<sup>270</sup>

For *fundamental* rights, such as the right to be free from racial discrimination, the U.S. Supreme Court naturally imposes *heightened* protection, subjecting such laws to "strict scrutiny." Though the Supreme Court, in *McCleskey*, gave short shrift to the statistics demonstrating racial bias (something Justice Harry Blackmun pointed out in his dissent),<sup>271</sup> it is clear that the rights to be free from torture, cruelty, and discrimination are fundamental ones and must be respected and protected.<sup>272</sup> The

J., dissenting):

Almost 12 years ago, in *Furman v. Georgia*, 408 U.S. 238 (1972), the Court concluded that the death penalty, as then administered under various state and federal statutes, constituted a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. At that time, the Court was convinced that death sentences were being imposed in a manner that was so arbitrary and capricious that no individual death sentence could be constitutionally justified.

269. See, e.g., AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 185–86 (2012); WILLIAM D. ARAIZA, *ENFORCING THE EQUAL PROTECTION CLAUSE: CONGRESSIONAL POWER, JUDICIAL DOCTRINE, AND CONSTITUTIONAL LAW* 120 (2015).

270. *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 602 (2008) ("Thus, when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a 'rational basis for the difference in treatment.'" (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam))).

271. See *McCleskey v. Kemp*, 481 U.S. 279, 347–48 (1987) (Blackmun, J., dissenting):

The Court today seems to give a new meaning to our recognition that death is different. Rather than requiring "a correspondingly greater degree of scrutiny of the capital sentencing determination," the Court relies on the very fact that this is a case involving capital punishment to apply a *lesser* standard of scrutiny under the Equal Protection Clause.

(quoting *California v. Ramos*, 463 U.S. 992, 998–99 (1983)).

272. See Colleen Costello, *Challenging the Practice of Transfer to Torture in U.S. Courts: A Model Brief for Practitioners*, 1 NE. U. L.J. 157, 214 (2009) ("The right to be free from torture is a fundamental and universal right. Any classification impinging on a fundamental right is subject to strict scrutiny, and

right to equality, like the right to be free from cruelty and torture, is itself a *universal right*.<sup>273</sup> The right to equal treatment under the law used to be, as noted earlier, more *rhetoric* than *reality*, especially since Thomas Jefferson's Declaration of Independence, which speaks of the equality of *men*, was promulgated in an era of *slavery* and overt racial and gender discrimination. But Jefferson's lofty rhetoric is, increasingly, being actualized in the United States, with the U.S. Supreme Court's decision in *Obergefell v. Hodges*,<sup>274</sup> for example, guaranteeing same-sex couples the right to marry.<sup>275</sup>

It is clear—as Professor Goldfarb aptly notes—that “capital punishment has been reserved primarily for those convicted of killing white people” and is “disproportionately” imposed on men, especially those who victimize whites such as the innocents Joe Giarratano was convicted (perhaps falsely) of murdering. The first recorded execution of a woman in what is now the United States—that of Jane Champion—took place in Virginia in 1632, and in America women represent only a small percentage, 2.5 percent, of all persons executed by state and local authorities since 1608.<sup>276</sup> Justice Thurgood Marshall himself once recognized

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will only be upheld if ‘narrowly tailored to further compelling government interests.’”) (citations omitted); *Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016) (finding that the peremptory strikes of two black prospective jurors violated the petitioner's constitutional rights under *Batson v. Kentucky*, 476 U.S. 79 (1986), and ruling that “the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury . . . . Two peremptory strikes on the basis of race are two more than the Constitution allows”); *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005) (explaining that racial discrimination in jury selection offends the U.S. Constitution's Equal Protection Clause).

273. See Amy J. McMaster, *Human Rights at the Crossroads: When East Meets West*, 29 VT. L. REV. 109, 119 (2004) (noting that the Universal Declaration of Human Rights establishes equality before the law as a universal right).

274. 135 S. Ct. 2584 (2015).

275. See Terri R. Day & Danielle Weatherby, *The Case for LGBT Equality: Reviving the Political Process Doctrine and Repurposing the Dormant Commerce Clause*, 81 BROOK. L. REV. 1015, 1018 & n.14 (2016) (citing *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) and noting that “the U.S. Supreme Court has definitively recognized the right of same-sex couples to marry”); see also *Loving v. Commonwealth of Virginia*, 388 U.S. 1, 4, 11–12 (1966) (striking down a statute that prohibited marriages between whites and “coloreds” on due process and equal protection grounds).

276. O'SHEA, *supra* note 41, at 4.

the “overwhelming evidence that the death penalty is employed against men and not women.” After taking notice of that fact, Justice Marshall observed: “It is difficult to understand why women have received such favored treatment since the purposes allegedly served by capital punishment seemingly are applicable to both sexes.”<sup>277</sup>

But in her essay, Professor Goldfarb offers a compelling explanation for why women (at least those whose conduct conforms to traditional gender stereotypes) are less harshly punished, an explanation rooted in society’s history of patriarchy and the “chivalrous norms” associated with the treatment of women.<sup>278</sup> Her essay also explains why men who kill women, especially black men who kill white women, have long received the law’s harshest treatment and are sentenced to death. Men who kill women have not only failed to protect, they have murderously harmed, the members of society whom earlier generations of Anglo-Americans once called “the weaker sex.”<sup>279</sup> As Goldfarb adds after studying American executions and Giarratano’s death sentence and laying out preexisting race, gender and class stereotypes and ideologies: “Inflicting harsh punishment, including death sentences, in situations like these supports the status quo and its multiple intersecting hierarchies, allowing chivalrous impulses to be expressed primarily against poor men, men of color, and other men lacking in social and material power.”<sup>280</sup>

The gross inequalities associated with capital punishment have long been clear, though the U.S. Supreme Court has been

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277. *Furman v. Georgia*, 408 U.S. 238, 365 (1972) (Marshall, J., concurring).

278. Goldfarb, *supra* note 3, at 30–31. A Connecticut law—one put in place in 1893—only permitted “adult males” to attend executions. BESSLER, *DEATH IN THE DARK*, *supra* note 232, at 63.

279. See, e.g., SUZANNE LE-MAY SHEFFIELD, *WOMEN AND SCIENCE: SOCIAL IMPACT AND INTERACTION* 32–33 (2004) (“Women were understood to be the weaker sex long before the advent of the new science in the seventeenth century. Religion, philosophy, the legal system, and the western social hierarchy all reflected the belief that women were physically weaker than, and intellectually and morally inferior to, men.”); 1 *SEX AND SOCIETY* 254 (2010) (“[S]ociety has generally expected women to be feminine. Expressions such as ‘the weaker sex’ reinforce the idea that women are in some ways lesser than, or reliant on, their male counterparts. In that way, ideas of femininity can serve to perpetuate inequality.”).

280. Goldfarb, *supra* note 3, at 29, 36–37.

slow to recognize them. The death penalty's "original sin," law professors Carol Steiker and Jordan Steiker write, tracing executions from colonial days through today, is "the stain of racial discrimination."<sup>281</sup> As they explain of the death penalty's close and ineradicable association with slavery:

[T]he large increase in executions, especially of blacks, in the South during the eighteenth century was the direct result of the large influx of African slaves to that region. As the South's slave labor economy grew, so did the demand by slave owners for state assistance in disciplining the growing enslaved population, to promote economic productivity and to protect the increasingly outnumbered white population from much-feared slave violence or revolt.<sup>282</sup>

"The extent to which capital punishment for slaves was perceived as a public good," they write, "is demonstrated by the provision of state compensation to the owners of executed slaves, in the same way that property owners today are compensated when their land is taken by the state for a public use such as a highway."<sup>283</sup> In other words, human beings *as property*; to be disposed of—in the language of that era—as "chattels."<sup>284</sup>

For far too long, the U.S. Supreme has ignored the realities of discrimination associated with death sentences and executions. When America's death penalty came under attack in the 1960s and 1970s, it was the NAACP's Legal Defense and Educational Fund that led the campaign.<sup>285</sup> In cases that came before the Supreme Court, leading civil rights organizations—from the NAACP and the National Urban League to the Southern Christian Leadership Conference, the Mexican-American Legal Defense and Educational Fund, and the National Council of Negro Women—submitted or joined *amici* briefs. "The total

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281. STEIKER & STEIKER, *supra* note 5, at 3.

282. *Id.* at 19.

283. *Id.*

284. See, e.g., THE LAWS OF SLAVERY IN TEXAS: HISTORICAL DOCUMENTS AND ESSAYS 1 (Randolph B. Campbell ed., 2010) ("The institution of African slavery as practiced in the antebellum United States depended on the ownership of humans as chattels, pieces of movable personal property."); MILTON MEITZER, SLAVERY: A WORLD HISTORY 3 (1971) ("Often the word 'chattel' is used in connection with slavery. Chattel means property or capital. It means livestock, too, such as cattle—or a slave.")

285. STEIKER & STEIKER, *supra* note 5, at 78–79.

history of the administration of capital punishment in America, both through formal authority, and informally,” the NACCP argued in one submission, “is persuasive evidence, that racial discrimination was, and still is, an impermissible factor in the disproportionate imposition of the death penalty upon non-white American citizens.”<sup>286</sup> Yet, as the Steikers so cogently explain:

Despite ample ammunition in the *amicus* briefs, none of the justices seemed willing to offer a detailed history of the role of race in shaping capital statutes and practices for over 200 years; Justices Douglas and Marshall, the only two justices who addressed race at all, both stopped short of placing the practice in its historical, slavery-rooted context.<sup>287</sup>

This was, clearly, a missed opportunity, though the Supreme Court undoubtedly made a conscious decision at the time to play down the issue of racial discrimination in the death penalty’s administration. In their thoughtful and compelling book, *Courting Death: The Supreme Court and Capital Punishment*, Carol Steiker and Jordan Steiker offer this analysis: “The Court’s deafening silence on the subject of race in its foundational capital punishment cases is striking but, on reflection, perhaps not altogether surprising. Ample reasons of various kinds—strategic, institutional, ideological, and psychological—help explain what otherwise might appear to be a baffling obtuseness.”<sup>288</sup> “In light of the Court’s ongoing role in the school desegregation battle,” they observe, “it is no wonder that Chief Justice Warren, the architect of the Court’s unanimous opinion in *Brown*, hesitated to add capital punishment to the simmering pot of racial issues.”<sup>289</sup> “The Warren Court’s desegregation rulings and its criminal procedure revolution,” they add, “already seemed to target Southern institutions, and these decisions engendered substantial backlash in that region.”<sup>290</sup> “A race-based abolition,” they conclude, “would have amounted to an acknowledgment that the effects of institutionalized racism could not be erased by constitutional intervention—the very last message that the

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286. BESSLER, CRUEL AND UNUSUAL, *supra* note 47, at 1–3.

287. STEIKER & STEIKER, , *supra* note 5, at 90.

288. *Id.* at 98.

289. *Id.* at 99.

290. *Id.* at 100.

Supreme Court wanted to send in the era of constitutionally mandated school desegregation and criminal procedure reform.”<sup>291</sup>

But in this second decade of the twenty-first century, the U.S. Supreme Court now finds itself at a crossroads as regards the punishment of death. It can let it continue, or it can say no more—no more will the United States of America engage in state-sanctioned killing. “The most profound consequence of the Court’s failure to address the issue of race in its capital jurisprudence,” the Steikers aptly note, “is that the unjust influence of race in the capital punishment process continues unchecked.”<sup>292</sup> As they explain in their book:

More broadly, the Court’s failure to address forthrightly the death penalty’s racialized history and current practice has disserved the Court in its role as chronicler of history and social and political practices. Had the Court framed its constitutional regulation of capital punishment against the backdrop of antebellum codes, lynchings, mob-dominated trials, and disparate enforcement patterns, the Court would have done a much better job of explaining why the American death penalty deserved the sustained attention of the American judiciary. This would have been true even if the Court ultimately had framed its doctrines in nonracial terms.<sup>293</sup>

## VI. Conclusion

The death penalty’s racial and gender bias is clear.<sup>294</sup> Congressman John Conyers once took note of the “gender

291. *Id.* at 105.

292. *Id.* at 110.

293. *Id.* at 111.

294. See Amanda Oliver, *The Death Penalty Has a Gender Bias*, HUFFINGTON POST (Oct. 1, 2015, 12:40 PM), [http://www.huffingtonpost.com/amanda-oliver/are-women-getting-away-wi\\_b\\_8227690.html](http://www.huffingtonpost.com/amanda-oliver/are-women-getting-away-wi_b_8227690.html) (last visited Dec. 19, 2016) (on file with the Washington and Lee Law Review); see also Steven F. Shatz & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender, and the Death Penalty*, 27 BERKELEY J. GENDER L. & JUST. 64, 84 (2012):

Studies of gender and the death penalty have, for the most part, focused on the gender of the defendant and have consistently found that women are sentenced to death and executed at significantly



discrimination” associated with capital sentencing,<sup>295</sup> and Professor Elizabeth Rapaport—a law professor at the University of New Mexico School of Law—has written of the “chivalrous disinclination to sentence women to die.” While articulating her “chivalry” theory, she simultaneously posits an “evil woman” hypothesis to explain “the gender stereotyping that has historically dehumanized despised female murderers” and resulted in their execution when they violate “sex role expectations” (e.g., by killing their children or husbands).<sup>296</sup> The Washington, D.C.-based Death Penalty Information Center, documenting the racial prejudice in the death penalty’s administration, also cites study after study showing that killers of whites are much more likely to be sentenced to death than killers of blacks. In the modern era, the statistics for those

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lower rates than men. A study of the death penalty applied to women from 1973–2005 found that at every stage of the process female defendants appear to be diverted away from the death penalty at a greater rate than men. While 10% of people arrested for murder are women, only 2% of death sentences imposed at trial are imposed upon women, and women account for only 1.1% of persons actually executed. Men arrested for murder are six times more likely to be sentenced to death than are women arrested for murder.

295. See Rory K. Little, *The Federal Death Penalty: History and Some Thoughts about the Department of Justice’s Role*, 26 *FORDHAM URB. L.J.* 347, 378 n.170 (1999).

296. Elizabeth Rapaport, *Equality of the Damned: The Execution of Women on the Cusp of the 21st Century*, 26 *OHIO N. U. L. REV.* 581, 600 (2000); Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 *GOLDEN GATE U. L. REV.* 501, 503–504, 513 (1990); see also DAVID W. NEUBAUER & HENRY F. FRADELLA, *AMERICA’S COURTS AND THE CRIMINAL JUSTICE SYSTEM* 441 (12th ed. 2015):

The evil woman hypothesis focuses on traditional sex-role expectations. This hypothesis emphasizes that women lose the advantages normally provided by chivalry and paternalism when they are convicted of “manly” crimes such as robbery or assault. This evil woman view argues that women might actually be treated more harshly than men when they deviate from stereotypical sex-role expectations.

Andrea L. Lewis & Sara L. Sommervold, *Death, But Is It Murder? The Role of Stereotypes and Cultural Perceptions in the Wrongful Convictions of Women*, 78 *ALB. L. REV.* 1035, 1039 (2015) (“Historically, Western society has considered a woman’s role to be that of wife and mother.”); Joan W. Howarth, *Executing White Masculinities: Learning from Karla Faye Tucker*, 81 *ORE. L. REV.* 183, 185 (2002) (“Gender helps to explain why we execute, and it helps to determine who we execute.”).

executed for *interracial* homicides are particularly telling. While 20 people have been executed for interracial homicides involving a white defendant and a black victim, an exponentially higher number of people—282—have been executed where the defendant was black and the victim was white.<sup>297</sup>

Such discrimination calls for a remedy, and in the case of the death penalty, the only remedy that will suffice is the death penalty's abolition. In "Matters of Strata," Professor Goldfarb emphasizes that "when race, gender, and class play an explanatory role in decisions about who receives a death sentence, under the Supreme Court's death penalty jurisprudence those decisions constitute cruel and unusual punishment in violation of the Eighth Amendment."<sup>298</sup> And her perceptive essay, in tracing Joseph Giarratano's case and the ideologies and long history of discrimination undergirding the death penalty that "undermine" its legitimacy,<sup>299</sup> makes clear that, as a society, we need "to find other approaches."<sup>300</sup> Just as the U.S. Supreme Court, in *Shelley v. Kraemer*,<sup>301</sup> held in the 1940s that judicial enforcement of restrictive covenants attempting to bar minorities from ownership or occupancy of real property violated due process and equal protection principles, a wholly arbitrary and discriminatory death penalty regime—one still in place in the twenty-first century—should not be tolerated.<sup>302</sup> A government

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297. *Facts about the Death Penalty*, DEATH PENALTY INFO. CTR. 2 <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

298. Goldfarb, *supra* note 3, at 4.

299. *Id.* at 5.

300. *Id.* at 49.

301. 334 U.S. 1 (1948).

302. See THE OXFORD GUIDE TO UNITED STATES SUPREME COURT DECISIONS 283 (Kermit L. Hall ed., 1999) (discussing *Shelley v. Kraemer* and the "state action" doctrine). In 1991, the U.S. Supreme Court held that a private litigant may not use peremptory challenges to exclude jurors on account of their race since race-based exclusion violates the equal protection rights of the challenged jurors. As the Supreme Court ruled in that *civil* case that *post-dates* its 1987 decision in *McCleskey v. Kemp*: "Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991); see also *id.* at 619 ("Racial discrimination, though invidious in all contexts, violates the Constitution only when it may be attributed to state action.").

should not involve itself with such a cruel and torturous punishment—one that, throughout American history, has been imbued with racial discrimination, gender inequities, malice and hatred, and lottery-like arbitrariness.<sup>303</sup>

In their 2015 dissent in *Glossip v. Gross*,<sup>304</sup> Justice Stephen Breyer—joined by Justice Ruth Bader Ginsburg—called for a “full briefing” on whether capital punishment violates the Eighth Amendment and concluded that it is “highly likely” that it does.<sup>305</sup> In a subsequent speech in Chicago, Illinois, Justice Ginsburg—in talking about their dissenting opinion in *Glossip*—specifically highlighted the death penalty’s arbitrariness, telling her audience: “Factors that should not affect imposition of the death penalty, studies documented, often do, prime among those factors, race and geography.”<sup>306</sup> “Ultimately,” she said, “the considerations Justice Breyer discussed at length may bring us back to the years 1972–76, when no executions took place in the United States.”<sup>307</sup> Already, the American death penalty is actively

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303. The administration of America’s death penalty—at bottom—resembles the kind of arbitrariness and inhuman cruelty described in a famous short story published in *The New Yorker* after World War II. See Shirley Jackson, *The Lottery*, NEW YORKER, June 26, 1948, at 25 (describing a fictional small town in America in which an annual ritual, known as “the lottery,” takes place—a lottery in which, every year, a name is drawn out of a black box and the unfortunate person selected is then stoned to death). Its author, Shirley Jackson, later gave this statement to the *San Francisco Chronicle* when pressed to explain the story’s meaning: “Explaining just what I had hoped the story to say is very difficult. I suppose, I hoped, by setting a particularly brutal ancient rite in the present and in my own village to shock the story’s readers with a graphic dramatization of the pointless violence and general inhumanity in their own lives.” SHIRLEY JACKSON 33–34 (Harold Bloom ed., 2001). While people living under *Sharia* law are still stoned to death for adultery and prostitution, the modern American death penalty is, in fact, nothing more than a primitive rite—something right out of the Dark Ages. FOREIGN AFFAIRS COMM. OF THE NAT’L COUNCIL OF RESISTANCE OF IRAN, WOMEN, ISLAM & EQUALITY 22–24 (1995) (noting how women are lashed, stoned to death, or thrown off buildings for adultery or other acts under religious-based penal codes in places such as Iran); MORRIS BERMAN, DARK AGES AMERICA: THE FINAL PHASE OF EMPIRE 8 (2006) (noting that “the American legal system, at one time the world standard, is now regarded by many other nations as outmoded and provincial, or even barbaric, given our use of the death penalty”).

304. 135 S. Ct. 2726 (2015).

305. STEPHEN BREYER, AGAINST THE DEATH PENALTY 96 (John D. Bessler ed. 2016).

306. RUTH BADER GINSBURG, MY OWN WORDS 36 (2016).

307. *Id.* at 35–36. The first execution after the U.S. Supreme Court’s

used in only a small fraction of U.S. counties.<sup>308</sup> As Emily Bazelon wrote for the *New York Times Magazine* in 2016: “A new geography of capital punishment is taking shape, with just 2 percent of the nation’s counties now accounting for a majority of the people sitting on death row.”<sup>309</sup>

In *State v. Santiago*,<sup>310</sup> the Connecticut Supreme Court declared that state’s death penalty unconstitutional. In doing so, it held that “the eighth amendment is offended not only by the random or arbitrary imposition of the death penalty, but also by the greater evils of racial discrimination and other forms of pernicious bias in the selection of who will be executed.”<sup>311</sup> As that court emphasized: “Unfortunately, numerous studies have found that [e]rrors can and have been made repeatedly in the trial of death penalty cases because of poor representation, racial prejudice, prosecutorial misconduct, or simply the presentation of erroneous evidence.”<sup>312</sup> “A study of all death sentences in the United States in the two decades following *Furman*,” it pointed out, “found ‘extremely high error rates’ . . . ; with at least two thirds of capital sentences eventually overturned on appeal.”<sup>313</sup> “Statistical analyses studies,” it added, “have demonstrated to a near certainty that innocent Americans have been and will continue to be executed in the post-*Furman* era.”<sup>314</sup> As the court concluded after compiling all of the evidence: “To the extent that the ultimate punishment is imposed on an offender on the basis

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decision in *Furman v. Georgia* took place in 1977 when Gary Gilmore was executed by firing squad in Utah. See MICHAEL KRONENWETTER, CAPITAL PUNISHMENT: A REFERENCE HANDBOOK 129 (2d ed. 2001); MIKAL GILMORE, SHOT IN THE HEART 368 (1994).

308. See Matt Ford, *The Death Penalty Becomes Rare*, ATLANTIC (Apr. 21, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-death-penalty-becomes-unusual/390867/> (last visited Dec. 19, 2016) (noting that in 2012 only 59 of the 3,144 counties in America actually sentenced people to be executed) (on file with the Washington and Lee Law Review).

309. Emily Bazelon, *Where the Death Penalty Still Lives*, N.Y. TIMES MAG. (Aug. 23, 2016), <http://www.nytimes.com/2016/08/28/magazine/where-the-death-penalty-still-lives.html> (last visited Dec. 19, 2016) (on file with the Washington and Lee Law Review).

310. 122 A.3d 1 (Conn. 2015).

311. *Id.* at 19.

312. *Id.* at 65.

313. *Id.*

314. *Id.* at 65 (citations omitted).

of impermissible considerations such as his, or his victim's, race, ethnicity, or socio-economic status, rather than the severity of his crime, his execution does not restore but, rather, tarnishes the moral order."<sup>315</sup>

Hopefully, the U.S. Supreme Court will soon follow suit, looking to the jurisprudence of the Supreme Court of Connecticut and other judicial systems around the world that have already outlawed the punishment of death. Way back in 1995, South Africa's Constitutional Court—in the wake of apartheid's demise—declared the death penalty to be unconstitutional as a “cruel, inhuman or degrading” punishment.<sup>316</sup> Ironically, the President of the Court, Arthur Chaskalson, in writing for South

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315. *Id.* at 66. Death sentences are tied up with issues of poverty, race and poor legal representation as cases like those of Earl Washington and Ronald Jones make clear. Washington—a black man with an IQ of 69—falsely confessed to a rape and murder he did not commit. At his trial, his lawyer did little to convince the jury of Washington's innocence, and it took years before he was exonerated. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 10, 29–30, 145–48, 154 (2011); PETER NEUFELD & BARRY SCHECK, THE INNOCENTS 18 (2003). Jones—another black man who falsely confessed to a rape and murder in Chicago, Illinois—spent eight years on death row before being exonerated by DNA evidence. After his exoneration, Jones observed: “You're not gonna see no rich people on death row, very few of them even go to jail. I have not—to date—seen a rich man go to death row.” As Jones emphasized: “It's two types of justice: there's a poor man's justice and a rich man's justice.” *Id.* at 48. The grotesque lynchings that preceded modern-day executions were themselves frequently driven by racial animus as the protest song, “Strange Fruit,” popularized by Billie Holiday, so vividly illustrates. DAVID MARGOLICK, STRANGE FRUIT: THE BIOGRAPHY OF A SONG 3–10 (2001). The song's opening lyrics: *Southern trees bear a strange fruit / Blood on the leaves and blood at the root / Black bodies swingin' in the Southern breeze / Strange fruit hangin' from the poplar trees.* BILLIE HOLIDAY, LADY SINGS THE BLUES (PolyGram Records 1995), Vol. 4, Track 12. An anti-lynching song written by Bronx high school English teacher Abel Meeropol and his wife Ann, Billie Holiday first performed the song in Harlem in 1939 at Café Society, at the time New York City's only integrated nightclub. 2 ENCYCLOPEDIA OF AMERICAN RACE RIOTS 782 (Walter Rucker & James Nathaniel Upton, eds. 2007); 1 RACE AND RACISM IN THE UNITED STATES: AN ENCYCLOPEDIA OF THE AMERICAN MOSAIC 541 (Charles A. Gallagher & Cameron D. Lippard, eds. 2014). Abel and Ann Meeropol also gained notoriety after Ethel and Julius Rosenberg were executed for espionage in 1953. Abel and Ann Meeropol adopted the ten-year-old and six-year-old sons of Ethel and Julius Rosenberg following their deaths in New York's electric chair. ROBERT NIEMI, HISTORY IN THE MEDIA: FILM AND TELEVISION 251 (2006); L. KAY GILLESPIE, EXECUTED WOMEN OF THE 20TH AND 21ST CENTURIES 69 (2009).

316. *State v. Makwanyane and Another*, 1995 (3) SA 391 (CC) at paras. 8, 26; (S. Afr.); HANS GÖRAN FRANCK, THE BARBARIC PUNISHMENT: ABOLISHING THE DEATH PENALTY 75–78 (William Schabas ed. 2003).

Africa's highest court, looked to the reasoning of an *American* case—*Furman v. Georgia*—to support the propositions that “[a]t every stage of the process there is an element of chance” and that “poverty, race and chance play roles in the outcome of capital cases and in the final decision as to who should live and who should die.”<sup>317</sup> If the present-day U.S. Supreme Court would only return to its own roots—*Furman*'s denunciation of the death penalty as a violation of the Eighth and Fourteenth Amendments<sup>318</sup>—the American legal system could finally uproot a barbaric, discriminatory practice rooted in the Dark Ages and the institution of slavery.

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317. *State v. Makwanyane*, 1995 (3) SA 391 (CC) at paras. 43, 48, 51–52, 77, 97.

318. Before Justices Breyer and Ginsburg issued their dissent in *Glossip v. Gross*, Justices Thurgood Marshall and William Brennan had, during their tenures, called upon America's judicial system to outlaw the punishment of death. See, e.g., MICHAEL MELLO, *AGAINST THE DEATH PENALTY: THE RELENTLESS DISSENTS OF JUSTICES BRENNAN AND MARSHALL* (1996) (detailing their dissents against capital punishment in more than 2,500 cases); *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (Marshall, J. concurring) (“I continued to believe that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments.”); *id.* at 442:

I remain hopeful that even if the Court is unwilling to accept the view that the death penalty is so barbaric that it is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, it may eventually conclude that the effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether.